Leiden Journal of International Law (2023), **36**, 1117–1140
doi:10.1017/S0922156523000377

ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The dark legacy of Nuremberg: Inhumane air warfare, judicial *desuetudo* and the demise of the principle of distinction in International Humanitarian Law

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Abstract
On its seventy-fifth anniversary last year, the Nuremberg war crime trials moved again into the spotlight of public attention. To the present day, Nuremberg is mainly portrayed as the birth of international criminal law being the first tribunal that held individuals accountable for war crimes committed during the Second World War. As we argue in this article, there is an often-overseen dark legacy of Nuremberg as it represents an unused opportunity to establish accountability for inhumane military practices, especially in air warfare, being of tragic influence for the postwar development of International Humanitarian Law (IHL) as a whole. Going beyond the existing criticism already voiced on Nuremberg's shortcomings, we hold that the Tribunal's reluctance to prosecute bombing practices sowed the seeds for the decay of IHL by creating institutionalized silences, especially for massive violations of the principle of distinction. The tribunal thereby sidelined pre-war IHL and infected the development of post-war IHL by retroactively legitimating the bombing practices of the Axis powers and at least indirectly of the Allies. We argue that the failure to prosecute 'total war'-practices and reestablish former restrictive legal structures regarding aerial bombardment has fundamentally eroded the pre-war meaning of the principle of distinction leading to its downfall in the First Additional Protocol to the Geneva Convention of 1977. We describe these developments as a form of judicial desuetudo, meaning the abrogation of a rule through its subsequent non-enforcement by an international court during and after massive law violations because of perceived or real political constraints.

Keywords: air warfare; International Humanitarian Law; judicial *desuetudo*; Nuremberg War Crime Trials; principle of distinction

1. Introduction

On its seventy-fifth anniversary last year, the Trials of the Major War Criminals at the International Military Tribunal at Nuremberg (IMT)[1] moved again into the spotlight of public attention. To the present day, the Nuremberg Trials are mainly portrayed as the 'birth' of international criminal law, being the first to hold individuals accountable for war crimes committed during the Second World War. They were, and are still, seen as a significant 'step in the

[1]Hereinafter referred to as 'the Nuremberg Trials' in relation to the International Military Tribunals (IMTs). When reference is made to the US Military Tribunals at Nuremberg (NMTs) or other 'zonal' tribunals which were set up by the Allies in their respective occupation zones in post-war Germany, it is specifically indicated.

evolution of a law-governed society of nations',[2] resurrecting the rule of law from the horrors of the war.[3] As we argue in this article, there is an often-overlooked 'dark legacy' of Nuremberg, as it represents an unused opportunity to establish accountability for inhumane Second World War military practices, especially in air warfare: an omission of tragic influence for the post-war development of International Humanitarian Law (IHL). Going beyond the existing criticism already voiced on Nuremberg's shortcomings,[4] we argue that the Tribunal's reluctance to prosecute air warfare sowed the seeds for the decay of IHL by creating institutionalized silences, especially for massive violations of the principle of distinction.[5] From the non-observance of existing legal structures during the Second World War to the non-prosecution of war crimes during the Nuremberg Trials, we will demonstrate how the Tribunal side-lined pre-war humanitarian law and infected the development of post-war humanitarian law, through retroactively legitimating the bombing practices of the Axis powers and, at least indirectly, of the Allies. The failure to re-establish the former restrictive legal regime regarding aerial bombardment remained a structural feature in later major institutional developments in IHL treaty making. During the negotiations of the Geneva Conventions of 1949, which immediately followed the Nuremberg Trials, the world again missed out on the opportunity to revive the principle of distinction for bombing practices by avoiding any further discussions on its regulation. Secondly, international legal scholarship in the 1950s and 1960s did not attempt to uphold restrictive discursive structures either. Instead, most scholars legitimated the non-enforcement of the rules on aerial bombardment in Nuremberg, thus perpetuating a pattern towards the demise of the principle of distinction in IHL. Thirdly, and finally, this development culminated in the formalization of Nuremberg's dark legacy in the Additional Protocols to the Geneva Conventions of 1977 – especially through the balancing rules in Article 51 of the First Additional Protocol (AP I), as well as the undermining of unilateral declarations of several signatory states, which lead to the downfall of the principle of distinction.

We hold that these developments are the result of the path-dependencies triggered by the Second World War and judgments of the various allied post-war tribunals in Nuremberg and Tokyo, which can be described as a form of judicially induced *desuetudo*, understood here as the abrogation of a rule through its non-enforcement by an acting international court during and after a time of massive violations because of perceived or real political constraints. To be clear from the outset, we do not hold that legal norms come with a fixed or static meaning, which is independent of the context of application. Instead, we hold with a widely accepted insight from linguistic theory that the meaning of a norm (term) is constituted in its application or usage by courts as well as by general legal discourse. The phenomenon of judicial *desuetudo* described in this article builds on this insight and includes the non-application of a norm by a competent tribunal as an omission, which helps to erode a previously accepted meaning of that norm, in our case the principle of distinction.

[2]R. H. Jackson, *Report of Robert H. Jackson, United States Representatives to the International Conference on Military Trials* (1945), viii, sharing a widespread view held by many of Nuremberg's judges, for example T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1993), 226.

[3]See, for example, N. Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crime Trials Changed the Course of History* (2007); K. H. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011); more differentiated: D. Blumenthal and T. McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (2008).

[4]C. Jochnick and R. Normand, 'The Legitimation of Violence: A Critical History of the Laws of War', (1994) 35 HILJ 49; K. Sellars, *Crimes Against Peace' and International Law* (2013); with a sophisticated reading of the foundational debates in this field of international criminal law: G. J. Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law* (2007); recently on this criticism: W. A. Schabas, 'Nuremberg's Critics', (2021) 32 *Irish Studies in International Affairs* 183.

[5]Critically on intellectual traditions in the field of international humanitarian law: K. Nabulsi, *Traditions of War: Occupation, Resistance and the Law* (2005); recently on the role of the United States: S. Moyne, *Humane: How the United States Abandoned Peace and Reinvented War* (2021).

https://doi.org/10.1017/S0922156523000377 Published online by Cambridge University Press

2. The Bombing War and the Nuremberg silences

The Second World War, from a Western European and US perspective, is usually seen as a six-year long battle between the ideologies of Western liberal democracies, supported in the war effort by communist Russia and China, and the fascist and hyper-nationalist Axis powers (Germany, Japan, and Italy). At the same time, the Second World War was a complex sequence of military conflicts between various imperial powers on both sides, attempting to defend or acquire political and economic control over their old or aspired peripheries.

The ensuing man-made apocalypse termed the Second World War not only saw massive and only thinly-veiled violations of the *jus contra bellum* by the Axis powers, but also a wide disregard of what international lawyers in the early twentieth century had regarded as central norms of the laws of war (*jus in bello*). Germany and Japan applied a tactic of utmost brutality vis à vis both prisoners of war and those civilians in occupied territories, which they considered racially inferior. German troops and security forces in Eastern Europe were engaged in the unprecedented systematic and industrialized extermination of Jews, internal minorities, and civilians from the occupied territories adding an estimated number of at least ten million murdered individuals to the inapprehensible overall death toll of 50 to 56 million war casualties. During the war, all parties to the conflict applied their newest weapons technology, such as massive aerial bombardments and submarine warfare, with little or no restraint. Coventry, Dresden, Hiroshima and Nagasaki, in particular, account for hundreds of thousands killed civilians through excessive bombing practices.

After the unconditional surrender of both Germany and Japan, judges installed by the victorious Allies at the Nuremberg and Tokyo Trials faced the, perhaps impossible, task of transforming the unspeakable horrors of this war, including the Holocaust committed on occupied territories, into the language of international law and criminal procedure. Both the concept of crimes against peace and of crimes against humanity were put into practice by an international court for the first time. All this is well known and often portrayed as a foundational moment for international criminal law, the prohibition of the use of force and international human rights law.[6] The Second World War was followed by the establishment of two International Military Tribunals to hold those responsible for crimes under international law committed by the defeated Axis powers accountable: the IMT, trying the 24 main German war criminals, met in Nuremberg between 20 November 1945 and 30 September 1946; the International Military Tribunal for the Far East (IMTFE), trying 28 Japanese defendants, met in Tokyo from 3 May 1946 to 16 April 1948. Based on the Charter of the International Military Tribunal (IMT-Charter) and the Charter of the International Military Tribunal of the Far East (IMTFE-Charter), the charges included the following crimes: Crimes against Peace (specifically for waging a war of aggression), War Crimes (namely, violations of the laws and customs of war), Crimes against Humanity (including murder, extermination, enslavement, deportation), and Conspiracy to Commit these Crimes (as leaders, organizers, instigators, or accomplices).[7]

Various aspects of the IMT and IMTFE gave rise to criticism at the time. The most prominent accusation concerned 'victors' justice', because the Tribunals were staffed exclusively by representatives of the victorious powers and thus allegedly acted as 'judges in their own cause'.[8] Moreover, dissenting judges in the Tokyo Trial,[9] as well as the early reception of these Trials,

[6]As a more recent example: O. Hathaway and S. Shapiro, *The Internationalists and Their Plan to Outlaw War* (2017).

[7]1945 Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279 (1945), Art. 6; 1946 Charter of the International Military Tribunal for the Far East, 1589 TIAS 20, Art. 5.

[8]T. Taylor, *Nuremberg Trials: War Crimes and International Law* (1949), 117.

[9]See especially the famous Dissenting Opinion of Justice Pal, Member from India of 12 November 1948 (International Military Tribunal for the Far East), UNWCC Annexes 18037 (1948); see also Dissenting Opinion of Justice Röling, Member for the Netherlands (International Military Tribunal for the Far East, on the crime of aggression in Tokyo), UNWCC Annexes 18034 (1948); R. Cryer, 'Röling in Tokyo: A Dignified Dissenter', (2010) 8 *Journal of International Criminal Justice* 1109.

https://doi.org/10.1017/S0922156523000377 Published online by Cambridge University Press

pointed to the problem that Allied war crimes were not included in the Tribunal's jurisdiction and that their overall construction was therefore one-sided. Another objection related to the violation of the principle *nullum crimen sine lege*. Thus, defence lawyers in the Trials pleaded that the acts charged did not violate principles that had already existed at the time of the war.[10] Other objections concerned the guarantee of a fair trial, since multiple punishment of an act was possible and would thus constitute a violation of the principle *ne bis in idem*.[11]

As we will explain in more detail below, the complete exclusion of aerial warfare-practices during the Trials had to do with these fundamental weaknesses in the IMT's construction. Nonetheless, the Tribunal was not legally barred to prosecute German violations of the principle of distinction in aerial warfare, but ultimately refrained from doing so because the Allies had violated the same rules during the war. In a sense, the problem of Nuremberg and Tokyo therefore was not its exercise in 'victor's justice' but ultimately too little of it.[12] Before turning to this tragic non-application of pre-war legal rules to Second World War practices by the judges in Nuremberg, we need to describe the meaning ascribed to these rules protecting civilians against bombardments in international legal discourse in the interwar years and the way in which they were applied and ignored during the Second World War.

2.1 The principle of distinction and the law of air warfare

During the Second World War, aerial bombing practices on both sides of the conflict frequently disregarded the principle of distinction and culminated in area bombardments and nuclear attacks targeting densely populated cities. But what legal form had the principle of distinction for bombardments of human settlements before the Second World War?[13] In the absence of specific binding instruments under international law on aerial warfare in the interwar years, the same treaty provisions formally applied to the method of aerial bombardment at the outbreak of the Second World War as they did during the First World War. The Hague Conventions of 1899 and 1907 were considered formally applicable during the Second World War which was confirmed by contemporary literature and numerous state proclamations.[14] For the method of aerial bombardment, Articles 25 to 27 of the Hague Regulations of 1899 were of importance, the first prohibiting 'the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended'.[15]

Initially, the concept of an 'undefended' location led to lively discussions in contemporary literature and diplomatic practice. The conferring states in The Hague had established the criterion without codifying a definition of the term. The regulation first found expression in the Brussels Declaration of 1874 and had been minimally modified until the First World War.[16] In the context of a military campaign on land, only places that were either 'fortified',

[10]Cf. L. Egbert and P. Joosten (eds.), *Der Prozess gegen die Hauptkriegsverbrecher vor dem Internationalen Militärgerichtshof, Band XXII: Verhandlungsniederschriften 18. April 1946 - 2. Mai 1946* (1947), 524.

[11]J. Fuchs and F. Lattanzi, 'International Military Tribunals', in R. Wolfrum and A. Peters (eds.), *Max Planck Encyclopedia of Public International Law* (2011), at 67.

[12]J. von Bernstorff, *L'essor et la chute de droit international humanitaire: Une brève histoire de la codification de la protection des civils en temps de guerre (1899–1977)* (2023), Ch. 2.

[13]See, on the intellectual history of the immunity of civilians, R. S. Hartigan, *Civilian Victims in War: A Political History* (2010).

[14]F. Rey, 'Violations du Droit International commises par les Allemands en France dans la Guerre de 1939', in M. Sibert (ed.), *Revue Générale de Droit International Public* (1946), 1, at 8.

[15]1899 Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, Art. 25. Art. 25 succeeded Art. 15 of the Brussels Draft from 1874: 'Fortified places are only to be besieged. Open towns, agglomerations of dwellings, or villages which are not defended can neither be attacked nor bombarded', Project of an International Declaration concerning the Laws and Customs of War, in D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts* (1988), at 25.

[16]Ministère des Affaires Étrangères (ed.), *Conférence Internationale de la Paix. La Haye 18 Mai - 29 Juillet 1899, Actes et Documents, première partie* (1899), 40; cf. P. Fauchille, 'Le bombardemen árien', (1917) 24 RGDIP 56, at 59, fn. 1.

https://doi.org/10.1017/S0922156523000377 Published online by Cambridge University Press

i.e., surrounded by fortifications, or 'open' but 'defended' could be bombed. A corresponding interpretation during the Second Hague Peace Conference was brought up by the Dutch General Den Beer Poortugael:

> An armed force is marching towards a town. This town is either fortified or open. Even if it is ordinarily open the entrances might be defended by temporary fortifications, breastworks, barricades and tambours ... the assailant has a perfect right to destroy this defense with the aid of artillery in any manner which he finds most efficacious, so that he can take possession of the city.[17]

Nonetheless, the question under which conditions a place could be considered 'defended' was contested. One position – represented by, e.g., Fauchille and Spaight – held that it was sufficient that the target hosted military forces and defence facilities.[18] Others, however, considered active military resistance to be necessary.[19] In addition, the question arose whether the defence activities referred to in the norm had to be in a position to repel the type of attack under consideration. In this case, defence against air attacks would have required an antiaircraft gun on the enemy side to meet the criterion of defence.[20] From a contemporary perspective, the overarching criterion remained that the locality was fundamentally capable of offering military resistance to the attacker. If such resistance was lacking, the locality was to be qualified as 'undefended' in the context of in Article 25.[21] This was also in line with a British-German agreement drafted before the First World War, which defined a 'defended area' as a 'locality supplied with military works that can protect it effectively against enemy attack'.[22]

But if a town was considered 'defended' at the time, could it be bombed indiscriminately? According to the Hague Regulations, e.g., Article 27, which at the time already reflected the principle of distinction, 'buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected' had to be spared. The duty to warn in Article 26 of the Hague Regulations was supposed to give the enemy the opportunity to bring the civilian population to safety before starting a bombardment. Of importance, moreover, was Article 23(g) of the Hague Regulations, which prohibited the 'destruction or seizure' of enemy property, as well as Article 46 of the Hague Regulations, according to which 'the lives of persons, and private property' were to be respected. These norms expressed the general legal idea of sparing both private property and the civilian population in war, which one of the leading figures in this field Paul Fauchille also advocated: 'Les citoyens inoffensifs ainsi que les propriétés privées et les propriétés publiques ... qui ne sont pas employés à un but militaire ou n'ont pas une importance stratégique ... doivent autant que possible être épargnés.'[23] Therefore Articles 25 to 27 reflected the principle of distinction, whereby the civilian

[17]During the fourth meeting of the third committee, cited in J. Scott (ed.), *The Proceedings of The Hague Peace Conferences - The Conference of 1907* (1920), 551 et seq.

[18]J. Spaight, *Aircraft in War* (1914), 15–16, citing the British Manual on Land Warfare: 'not occupied by troops or otherwise in a position to offer armed resistance'; see Fauchille, *supra* note 16, at 62.

[19]The Institut de Droit International, for example, in its *Manuel des lois de la guerre maritime* of 1913, explicitly referred to an actual defence situation by replacing the formulation 'qui ne sont pas défendus' by 'qui ne se défendent pas', Institut de Droit International, *Manuel des lois de la guerre maritime dans les rapports entre belligérants* (1913), at Art. 25, available at www.idi-iil.org/app/uploads/2017/06/1913_oxf_02_fr.pdf.

[20]J. Garner, 'La réglementation internationale de la guerre aérienne', (1923) 30 RGDIP 372, 379: 'Défendue en matière aérienne que s'il est défendu par des canons spécialement construits pour le tir vertical et si les défendeurs en font usage.' ('Defended from the air only if it is defended by cannons specially built for vertical fire and if those are used by the defendants.')

[21]Cf. E. Spetzler, *Luftkrieg und Menschlichkeit* (1957), 35; J. Spaight, *War Rights on Land* (1911), 158.

[22]Draft Note for Signature, Nr. 29865, Confidential Print, 09.07.1914, FO 372/572, file 751, no. 14144, cited in I. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (2014), 283.

[23]'Harmless citizens as well as private and public property ... which are not used for military purposes or are not of strategic importance ... must be spared as far as possible': See Fauchille, *supra* note 16, at 73. There were nevertheless scholars like Spaight seeing it differently: J. Spaight, *Air Power and War Rights* (1924), 225.

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population was to be spared from acts of war.[24] Historically, these norms only had a limited effect on land artillery-warfare in the first two decades of the twentieth century, because shelling undefended towns by land artillery did not usually make sense from the perspective of a military commander. Sieges of towns and cities, including starving both combatants and the civilian population, a common eighteenth and nineteenth century military practice, were not outlawed by the Hague Regulations. Furthermore, bombing 'defended' settlements in general after warning local authorities remained a legalized practice. Somewhat unexpectedly, in 1907, official delegations in The Hague agreed to modify Article 25 in a way that confirmed its application to the new issue of air warfare, with an enormous potential to realize the principle of distinction in this new, and in many ways, revolutionary form of war from the skies.[25] Dropping explosives from balloons had, not without reason, also been subject of a moratorium adopted in 1899 and prolonged in 1907,[26] at a time when the great powers did not yet have a fleet of military airplanes at their disposal, which could be used for bombing the enemy.[27] Extending Article 25 to air warfare in 1907 did not therefore curb the military recourse to an already available and potentially decisive weapon.[28]

Whether or not this norm could realize its potential to protect civilians against aerial bombardments once bomber-planes were ready to be used in warfare depended, of course, on the level of norm-adherence of states in future times of conflict, and on the interpretation of the term 'undefended'. During the First World War, neither the moratorium nor Article 25 stopped Germany or the Allies instructing their newly-created airforce units to bomb military objectives in undefended and densely-populated cities of the adversary. The moratorium was held to be inapplicable because it had not been ratified by all belligerents in 1907 and contained a reciprocity clause.[29] Moreover, violations of Article 25 of the Hague Regulations were justified by both Germany and the Allies under the law of reprisals. As the other side had allegedly violated *jus in bello* rules, governments henceforth claimed that breaching the prohibition themselves was lawful as a reprisal.[30] Claiming belligerent reprisals, thus, in a somewhat cynical manner, allowed governments to officially uphold the principle that civilians should not be bombed, while openly instructing its military to unload bombs from airplanes and Zeppelins on densely populated areas.

2.1.1 Destabilizing the principle of distinction through a new and broad military objective doctrine

Later on, in the course of the First World War, lawyers argued that the term 'undefended' for air warfare had to be interpreted in line with the rules of naval war, which allowed bombing of military objectives, whether or not a settlement was defended. In more concrete terms, the 1907 Hague Convention respecting Bombardment by Naval Forces in Times of War had, in Article 1,

[24]This was also emphasized by the Belgian Delegate Beernaert during the Second Hague Conference: 'It is forbidden to harm in any way populations who take no part in the military operations; and even between combatants all unnecessary infliction of injury is forbidden. These rules were the basis of the work of the First Hague Conference, and thenceforth from a part of positive international law … The principles … are the basis of Article 25 of the treaty.': J. Scott, *The Proceedings of The Hague Peace Conferences - The Conference of 1907* (1920), 543.

[25]See Hague Rules, *supra* note 15, Art. 25, in Schindler and Toman, *supra* note 15, at 31: 'The attack or bombardment, *by whatever means*, of towns, villages, dwellings, or buildings which are undefended is prohibited' (emphasis added).

[26]"The contracting Powers agree, for a term of five years, to forbid the discharge of projectiles and explosives from balloons or by other new methods of similar nature', in Schindler and Toman, ibid., at 309.

[27]Except for dirigible and non-dirigible balloons or airships, cf. W. Royse, *Aerial Bombardment and the International Regulation of Warfare* (1928), 57.

[28]Cf. ibid., at 61.

[29]"The contracting Powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature. The present Declaration is only binding on the contracting Powers in case of war between two or more of them. It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents is joined by a non-contracting power', in J. Scott, *The Two Hague Conferences of 1899 and 1907* (1915), 21.

[30]Cf. E. Mensching, *Luftkrieg und Recht* (2022), 168.

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reproduced the prohibition in Article 25 of the Hague Regulations. In Article 2, however, it had inserted a new exception:

> Military works, military or naval establishments, depots of arms or war material, workshops or plant which could be utilized for the needs of the hostile fleet or army, and ships of war in the harbour, are not, however, included in that provision.

It was argued that, due to its comparability with the conditions of naval warfare, the regulation could also be applied to strategic air warfare by way of an analogy:[31] in the context of naval bombardment, like in air warfare, naval forces could not easily occupy the targeted localities by military action on the ground. The objective was not to overcome the enemy's resistance for the purpose of territorial control, but to destroy specific military power resources and bases; this was bombardment with the aim to destroy, not to occupy.[32] But transferring this naval 'military objective' exception to bombardments in land and air warfare was clearly at odds with the clear wording of the norm and the 1907 negotiations in the Hague on Article 25. A number of scholars therefore did uphold the literal application of Article 25 as an absolute prohibition of bombing of undefended civilian settlements.[33]

Military strategists on both sides towards the end of the war, however, had even argued that the bombing of enemy cities could also weaken the industrial workforce of the adversary. After the appearance of this new debate between military experts about 'strategic bombing' advocating the 'military objective' exception as a new legal standard for strategic air warfare in the 'hinterland', it did not take long for international lawyers to come up with a corresponding legal justification. The argument was that the 'morale' of the enemy workforce could also be considered a 'military objective' in its own right.[34] Hence, in the interwar years, a contemporary observer of aerial bombing practices during the First World War came to the following conclusion: 'In general, one principle seems to have been followed in the war: that military objectives could be bombed wherever found, regardless of their location, and, it seems regardless of the injury to non-combatants and private property.'[35]

Through new technical possibilities provided by warplanes, the zone of military operation had been dramatically extended beyond the lines held by one's military forces on the ground. It now included the whole territory of the adversary and the possibility to destroy the industrial basis of the adversary's military. That the industrial or economic bases became a legitimate target was a clear parallel to the colonial practice of economic 'attrition', which included the destruction of crops and cattle of the colonized in colonial warfare before the First World War. It is this expansion (space) and deepening (targets) of the battlefield, which motivated contemporary international lawyers to question Article 25 as a relatively clear prohibition protecting civilians against bombardment in air warfare. Instead, the doctrine of the 'military objective' provided justification for aerial bombardments outside the combat zone, to which civilians increasingly fell

[31]See Spaight, *supra* note 18, at 18; J. Kriege, 'Die völkerrechtliche Beurteilung des Luftkriegs im Weltkriege (Gutachten des Sachverständigen Wirklichen Geheimen Rates)', in J. Bell (ed.), *Völkerrecht im Weltkriege - Bd. IV* (1927), 83, at 97; more restrictive: Fauchille, *supra* note 16, at 69; J. Garner, *International Law and the World War - Vol. I* (1920), 469.

[32]A. Meyer, *Völkerrechtlicher Schutz der friedlichen Personen und Sachen gegen Luftangriffe - Das geltende Kriegsrecht* (1935), 135.

[33]J. Edmonds and L. Oppenheim, *Land Warfare. An Exposition of the Laws and Usages of War on Land for the Guidance of Officers of His Majesty's Army* (1914), 33; A. Mérignhac and E. Lémonon, *Le droit des gens et la guerre de 1914-1918* (1921), 629: 'il décide très nettement pour toutes que le bombardement de localités non défendues constitue un acte contraire à la loi de la guerre, qu'il soit réalisé par la voie terrestre ou aérienne' ('it decides clearly for all that the bombing of undefended localities constitutes an act contrary to the law of war, whether carried out by land or by air').

[34]Adumbrating excessive bombing practices in the Second World War, cf. M. Messerschmidt, 'Kriegstechnologie und Humanitäres Völkerrecht in der Zeit der Weltkriege', (1987) 1 *Militärgeschichtliche Mitteilungen* 88.

[35]See Royse, *supra* note 27, at 193.

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victim, be it unintentionally, because they were in the vicinity of military objects, or intentionally because they were factory workers employed in the targeted objects. Such civilians thus could now be regarded as indirectly participating in the belligerent force of the opposing power. This new category of combatant, first mentioned by Louis Rolland, clearly provided a decline of the protection of non-combatants.[36] It was this broad understanding of the 'military objective' doctrine, which served as a 'driving force' for this approach leading to the replacement of Article 25 and to a gradual demise, or at least destabilization, of the principle of distinction.[37]

In international legal discourse after the First World War, the argument spread that the law somehow had to accommodate or reflect new technical and strategic possibilities, not only by new codification attempts but also through an assumed evolution of customary law. This was not primarily a 'Kriegsraison' or military necessity claim, what in essence was being argued by scholars and various state officials was that whatever states (in particular great powers) did with new weapons in warfare can, even if in tension with previously accepted norms, change international law in a way that accommodates the new practice as legal.[38] As one contemporary scholar and highly recognized authority on the law of air warfare held in the interwar years with regard to the alleged demise of the principle of distinction (even though Article 25 had not been formally modified in the interwar years): '[i]nternational law must move with the times. It must accept the truth that the old clear-cut division of enemy individuals into combatants and non-combatants is no longer.'[39]

2.1.2 The Hague Rules of Air Warfare of 1923

Despite this new legal uncertainty created mainly by scholars reacting to problematic practices of the First World War, certain rules restricting (strategic) air warfare were recognized in principle.[40] Among these are those that were expressed in particular in the Hague Rules of Air Warfare of 1923, which, however, never entered into force.[41] This draft of air war rules – containing 62 Articles – was the result of negotiations by a commission of lawyers and representatives from the UK, France, Italy, Japan, USA, and the Netherlands constituting the 'Commission de juristes chargée d'étudier et de fair rapport sur la révision des lois de la guerre'. The Chair of the Commission, the American Judge John B. Moore, emphasized the principle of distinction as the primary basis of the negotiations dealing with the rules of air warfare stating that 'the principle most fundamental in character ... is the distinction between combatants and non-combatants, and the protection of non-combatants against injuries not incidental to military operations against combatants ...'.[42] The principle of distinction was, *inter alia*, expressed in Article 22 of the Draft rules which contained a clear prohibition of terror-bombings: 'Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited.' This was a critical reaction to those voices which had used the military objective doctrine to justify terror bombings at the end of

[36]L. Rolland, 'Les Pratiques de la guerre aérienne dans le conflit de 1914 et le droit des gens', (1916) 23 RGDIP, at 554; cf. Spaight, *supra* note 23, at 211; cf. Mérignhac and Lémonon, *supra* note 33, at 646–7.

[37]Critical on this development: J. Moore, *International Law and Some Current Illusions* (1924), ix, x.

[38]On this problematic legacy in the nineteenth century European international legal discourse see von Bernstorff, *supra* note 12.

[39]J. Spaight, 'Non-Combatants and Air Attack', (1938) 9 *Air Law Review* 372, at 375.

[40]'But it could not be denied that there were certain rules and principles governing air warfare and that these were valid irrespective of the willingness of belligerents', F. Kalshoven, *Belligerent Reprisals* (1971), 169; cf. H. Hanke, 'Die Bombardierung Dresdens und die Entwicklung des Kriegsvölkerrechts', in A. Schmidt-Recla (ed.), *Sachsen im Spiegel des Rechts: ius commune propriumque* (2001), 283; K. Kunzmann, *Die Fortentwicklung des Kriegsrechts auf den Gebieten des Schutzes der Verwundeten und der Beschiessung von Wohnorten* (1960), 187.

[41]H. Hanke, 'The 1923 Hague Rules of Air Warfare - A Contribution to the Development of International Law Protecting Civilians from Air Attack', (1993) 33 *International Review of the Red Cross* 292.

[42]See Moore, *supra* note 37, at 200.

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the First World War. Instead of reformulating the prohibition of the bombardment of undefended locations in Article 25 of the Hague Convention from 1907, however, the draft Hague Rules of Air Warfare also relied on the military objective doctrine as a legality criterion of aerial bombardments, albeit in a restrictive fashion: '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.'[43]

Although the doctrine of the military object thus had found its way into these rules, it was still connected to the spatial limitation of bombardments used in Article 25 of the Hague Convention of 1907. The new Hague Rules of Air Warfare also stated that 'the bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighborhood of the operations of land forces is prohibited'. The only exception recognized was stipulated as follows:

> In the immediate neighborhood 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.

These rules contained in Article 24 were another form of establishing a spatial prohibition of indiscriminate air attacks and content-wise were still very close to Article 25 of the 1907 Hague Convention. Given that Article 24 referred to the 'immediate neighbourhood of operations of land forces', such cases would have also regularly led to the assumption that the town was 'defended', within the meaning of Article 25 of the 1907 Hague Convention, and therefore allowing for bombardments.

Ultimately, the Hague Rules of Air Warfare were neither formally adopted by any state, nor was there a follow-up conference to further discuss the regulations.[44] The reasons for this non-action are highly disputed.[45] As a result, the only written rules formally applicable to air warfare remained Articles 25 to 27 of the Hague Conventions of 1899 and 1907 respectively.[46] However, the principles contained in the Hague Regulations were often referred to in international legal discourse, such as the restrictive version of the military objective doctrine,[47] the prohibition of indiscriminate air attacks and direct attacks on the civilian population, as well as the associated prohibition of so called 'terror bombings'.

In the subsequent years of the interwar period, more draft codifications from international organizations followed[48] but a multilaterally codified treaty on the regulation of air warfare did not come into being: as is still the case to this day. Nevertheless, as was evident from the drafts of the other associations, the influence of the restrictive Hague Rules of Air Warfare on international legal scholarship was undeniable.[49] One of the latest relevant initiatives before the outbreak of war,

[43]1923 Hague Rules of Air Warfare, Art. 24(1), in Schindler and Toman, *supra* note 15, at 207; French version in Commission de Juristes Chargée d'étudier et de fair rapport sur la révision des lois de la guerre, *La guerre aérienne. Révision des lois de la guerre. La Haye 1922-1923* (1930), 242.

[44]On the reasons for the non-codification see Mensching, *supra* note 30, at 258.

[45]H. Parks, 'Air War and the Law of War', (1990) 32 *Air Force Law Review*, at 35: 'The 1923 Hague Air Rules suffered an ignominious death, doomed from the outset by language that established rules for black-and-white situations in a combat environment permeated by shades of grey.'

[46]See Hanke, *supra* note 41, at 36: 'the Hague Rules of Air Warfare played a decisive part in the emergence of binding customary international law in the pre-war period'. See Kunzmann, *supra* note 40, at 187; A. Meyer, *Völkerrechtlicher Schutz der friedlichen Personen und Sachen gegen Luftangriffe - Das geltende Kriegsrecht* (1935), 8.

[47]'The rule of the military objective was accepted, expressly or by implication, as the kernel of the international law on the subject', in Spaight, *supra* note 23, at 259.

[48]For example: International Law Association, *Report of the 31st Conference held at the Palace of Justice, Buenos Aires. 24th - 30th August, 1922* (1923), at 211.

[49]See Hanke, *supra* note 41, at 36.

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the 1938 resolution of the League of Nations, recognized certain principles as a 'necessary basis for any subsequent regulations' in the field of air warfare and, following up on a speech held by the British Prime Minister Neville Chamberlain a few months earlier, stated:[50]

(1) The intentional bombing of civilian populations is illegal.
(2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable.
(3) 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.[51]

In addition, at the beginning of the war, the states of both war time alliances established certain principles in mutual appeals, directives, and military manuals restricting the use of aerial bombardment, which deserve closer attention as they show the legal views of the protagonists at the beginning of the war.

2.2 Aerial bombardments in the Second World War

That the principle of distinction as expressed in the above-mentioned Hague Rules of Air Warfare – despite scholarly laments in the Interbellum – was still a guiding legal principle in the late 1930s, which was recognized both by Axis powers and the Allies also for aerial bombardments can be demonstrated by the official declarations in the very first phase of the War. On 1 September 1939, the day of the invasion of Poland, US President Franklin D. Roosevelt made the following appeal to the governments of Germany, France, England, Italy, and Poland:

> The ruthless bombing from the air of civilians in unfortified centres of population during the course of the hostilities which have raged in various quarters of the earth during the past few years, which has resulted in the maiming and in the death of thousands of defenseless men, women and children ... and has profoundly shocked the conscience of humanity. If resort is had to this form of inhuman barbarism during the period of the tragic conflagration with which the world is now confronted, hundreds of thousands of innocent human beings ... will lose their lives. I am therefore addressing this 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 under no circumstances, undertake the bombardment from the air of civilian populations or of unfortified cities, upon the understanding that these same rules of warfare will be scrupulously observed by all their opponents ...[52]

Hitler sent a reply referring to his Reichstag speech of the same day:

> The view expressed in President Roosevelt's message, that it is an imperative of humanity to refrain from dropping bombs on non-military objects in military actions under all circumstances, corresponds entirely to my own standpoint and has always been held by me.

[50]"There are at any rate, three rules of international law or three principles of international which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking these military objectives so that by carelessness a civilian population in the neighbourhood is not bombed': Speech before the House of Commons, 21 June 1938, House of Commons Debates, Vol. 337, Col. 938, cited in Spaight, *supra* note 23, at 257.

[51]Resolution of the League of Nations Assembly, Protection of Civilian Populations Against Bombing From the Air in Case of War (1938), in Schindler and Toman, *supra* note 15, at 221.

[52]U.S. Department of State, *United States and Italy 1936-1946* (1946), 6.

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> I therefore agree unconditionally with the proposal that the governments involved in the hostilities now under way make a public declaration to that effect. For my part, I have already publicly announced in my Reichstag speech today that the German air forces have been ordered to confine their combat operations to military objects. It is a self-evident condition for the maintenance of this order that the enemy air forces adhere to the same rule.[53]

In this speech before the Reichstag, Hitler had defended the invasion of Poland as an act of self-defence and had made compliance with the rules of war law subject to reciprocity.[54] The joint British-French declaration was issued on 2 September (even before the declaration of war on the German Reich) in response to Roosevelt's appeal:

> The Governments of the United Kingdom and France solemnly and publicly affirm their intention, should a war be forced upon them, to conduct hostilities with a firm desire to spare the civilian population and to preserve in every way possible those monuments of human achievement which are treasured in all civilised countries. In this spirit they have welcomed with deep satisfaction President Roosevelt's appeal on the subject of bombing from the air. Fully sympathizing with the humanitarian sentiments by which the appeal was inspired they have replied to it in similar terms. They had indeed some time ago sent explicit instructions to the commanders of their armed forces prohibiting the bombardment, whether from the air or the sea, or by artillery on land, of any except strictly military objectives in the narrowest sense of the word. Bombardment by artillery on land will exclude objectives which have no strictly defined military importance, in particular large urban areas situated outside the battle zone ... Finally, the two Allied Governments re-affirm their intention to abide the terms of the Geneva Protocol of 1925 ... An enquiry will be addressed to the German Government as to whether they are prepared to give an assurance to the same effect. It will of course be understood that in the event of not observing any of the restrictions ... reserve the right to take all such action as they may consider appropriate.[55]

At the beginning of the war, the warring parties involved in 1939 therefore exercised diplomatic restraint with reference to the recognized legal principles for the protection of the civilian population, which were largely based on the Hague Land Warfare Regulations and the draft Hague Rules of Air Warfare. The directives of the military command staffs to the allied and German air forces also corresponded to this, as can be seen for example in the British 'Instructions Governing Naval and Air Bombardment in the Opening Stages of the War'[56] or the German instructions concerning the invasion of Poland ('Anweisung zur Führung des Luftkrieges').[57] At the same time, unofficial sources made it clear that both sides were preparing for an escalation of the conflict and would disregard the restrictions expressed at the beginning of the war in a given case; this was conveyed by the metaphor of 'taking off the gloves'[58] on the part of the British leadership or by Hitler's later internal statements vis à vis military officials.[59]

[53] In Spaight, *supra* note 23, at 260.

[54] 'This night for the first time Polish regular soldiers fired on our territory. Since 5.45 A.M. we have been returning the fire, and from now on bombs will be met by bombs. Whoever fight with poison gas will be fought with poison gas. Whoever departs from the rules of humane warfare can only expect that we shall do the same', *Address by Adolf Hitler*, 1 September 1939, available at www.fcit.usf.edu/holocaust/resource/document/HITLER1.htm.

[55] Cited in Spaight, *supra* note 23, at 259.

[56] Instructions Governing Naval and Air Bombardment in the Opening Stages of the War (1939), PRO AIR 8/283, in H. Hanke, *Luftkrieg und Zivilbevölkerung* (1991), 303.

[57] Anweisung zur Führung des Luftkrieges (1939), BA/MA RW 5/v.336, in Hanke, ibid., at 297.

[58] 'I feel sure that this instruction will not last very long, but we obviously cannot be the first to take the gloves off': PRO AIR 41/5 (1945), D-8, cited in J. Spaight, *International Law of the Air 1939-1945* (1945).

[59] In a conference in October 1939, he told his leadership that he would promise officially to stay within the framework of international regulations and would not use any banned warfare agents and weapons. In reality, however, he would not take any further precautions and also attack open cities: in H. Groscurth, *Tagebücher eines Abwehroffiziers 1938-1940* (1970), 385.

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The Axis bombing campaigns were originally organized to promote German military invasions on land. On the eastern and western fronts, tactical air warfare was initially at the forefront of Wehrmacht strategy. This was to change with the bombing of London and Coventry in 1940 (the so-called 'Blitz'), with which the strategic use of the German air force in reaction to British counterattacks came to dominate. Allied bombing campaigns, led by the UK and US, can also be divided into specific phases marked by changing strategic directives and corresponding air warfare practices. In a first phase between September 1939 and May 1940, air warfare was limited to individual bombing raids against coastal targets and port facilities on the German North Sea coast. The second phase, up to the beginning of 1942, saw the intensification of aerial bombardments of German industrial cities, a turn from day to night flights, and from precision-bombing to the first area bombings. In a third phase, these forms of area bombing now became the rule, with the first large-scale raids flown against German cities with the main objective of demoralizing the civilian population ('morale bombing'). At the end of the last phase, the unleashed air warfare practices of the *Combined Bomber Offensive* of British and American air forces culminated in the bomber offensives against Dresden and the atomic bombing of Hiroshima and Nagasaki by the US in 1945.[60]

The directives, as well as the accompanying air war practices of the Allied air forces, especially the British, had thus resulted in increasingly destructive missions, while German Luftwaffe attacks, except for retaliatory offensives and the use of the V-weapons, declined. However, this was due to the operational and technical limitations of the Luftwaffe, rather than humanitarian, legal, or moral concerns.[61] Hence, departing from the principles established by the Anglo-French Declaration in line with the American and German declarations at the outset of the war, the 'taking off the gloves' was accompanied by a conscious disregard for pre-war principles of international law on the part of the British, with the enemy civilian population increasingly becoming the focus of destructive bomber offensives. To the extent that restrictions remained in place, they lost their meaning with the 'Area Bombing Directive' at the latest.[62] The previously established principles protecting civilians in air warfare thus no longer applied to the Axis powers, since, from the British point of view, they themselves were engaged in 'unrestricted air warfare'.[63] The increasing escalation was triggered, among other things, by the mutual retaliatory strikes, whereby it was often not possible to recognize a 'purely military intention' in (intentionally or unintentionally) misdirected bombing-practices.[64] The scholarly created Interbellum uncertainties as to which targets could be subsumed under the term 'military objective' in the industrial age (workforce, civilian morale) could now be exploited by legal advisors on both sides. As it turned out, the theories and concepts of those air war scholars prevailed, which had undermined existing legal barriers by analogies to Naval warfare and extensive new interpretations of the term 'military objective'. Obvious contradictions between directives and legal principles were resolved by means of these pre-existing argumentative strategies; for example, the warring parties legitimized terror-bombings by referring to the morale of the civilian population as the 'military' goal of the offensive.[65] If law continued to play a role, it was to highlight its violation by the enemy.

2.3 Nuremberg silences

It seems striking at first sight that that the indictments in Nuremberg lacked any explicit reference to aerial warfare. Even Hermann Göring, the main person responsible for German aerial warfare,

[60]On these different stages of bombing crescendo see Mensching, *supra* note 30, at 324.

[61]S. Garrett, 'Air Power and Non-Combatant Immunity: The Road to Dresden', in I. Primoratz (ed.), *Civilian Immunity in War* (2010), 180.

[62]C. Webster and N. Frankland, *Strategic Air Offensive Against Germany 1939–1945, Vol. IV* (1961), 144.

[63]Memorandum of the Air Staff from 12.02.1943, in M. Hastings, *Bomber Command* (1999), 170.

[64]H. Boog, 'Luftwaffe und unterschiedsloser Bombenkrieg bis 1942', in H. Boog (ed.), *Luftkriegführung im Zweiten Weltkrieg: Ein Internationaler Vergleich* (1993), 460.

[65]See Jochnick and Normand, *supra* note 4, at 87.

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was indicted solely for ordering the Luftwaffe to wage a war of aggression and not for aerial warfare practices *per se*.[66] Although Article 6(b) of the IMT Charter lists 'the wanton destruction of cities, towns or villages, or devastation not justified by military necessity' as a war crime, i.e., as a crime against the laws and customs of war, the Tribunal did not consider the violation of the law of air warfare to fall under this category. One of the reasons might be that Article 6(b) had originated from a Russian draft of the Charter and had primarily referred to land warfare in the course of *occupatio bellica* and German 'scorched earth' strategies in Eastern Europe.[67] All in all, the IMT and IMTFE remained silent regarding German and Japanese aerial warfare in their sentences against major war criminals. The repercussions of this failure have been assessed differently in post-war international legal literature. While some scholars concluded from this omission that the indiscriminate bombing had thus to be considered condoned or lawful,[68] others emphasized that the Tribunal had deliberately omitted the criminal assessment of these Axis power practices because the victorious Allies themselves had committed such acts in the same or more serious ways.[69] This *tu quoque* reasoning may indeed have been the main reason for the judges' restraint. The ex-post reasoning of US Prosecutor Telford Taylor validates this assumption: '(A)erial bombardment had been used so extensively and ruthlessly on the Allies as well as on the Axis side that neither at Nuremberg nor at Tokyo was the issue made a part of the Trials.'[70] Even before the Trials, Chief Prosecutor Robert H. Jackson had expressed concerns to US President Truman: '(The Allies) have done or are doing some of the very things we are prosecuting the Germans for.'[71] The Trials avoided sanctioning air warfare practices from the very beginning at the cost of weakening or downplaying applicable pre-war legal rules, as the former Nuremberg Prosecutor Taylor in his Final Report confirmed:

> Many of the provisions of the Hague Convention regarding unlawful means of combat ... were antiquarian. Others had been observed only partially during the First World War and almost completely disregarded during the Second World War ... the ruins of German and Japanese cities were the results not of reprisal but of deliberate policy, and bore witness that aerial bombardment of cities and factories has become a recognized part of modern warfare as carried on by all nations. The indictment in the first Nuremberg trial, accordingly, contained no charges against the defendants arising out of their conduct of the war in the air.[72]

Another strategy adopted in Nuremberg was the use of an extensive interpretation of the concept of 'military necessity'. According to the terminology developed by the US High Command Military Tribunal in Nuremberg in the *Hostages* Trial, any military action was considered necessary and thus in accordance with international law 'that saves a dollar or a day in the pursuit of military victory'.[73] It found use in the Nuremberg *High Command* Trial/*The United States of America* v. *Wilhelm von Leeb et al.*, which involved the shelling of starved civilians fleeing besieged

[66]See Egbert and Joosten, *supra* note 10, at 314.

[67]Cf. Kunzmann, *supra* note 40, at 216.

[68]J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law* (1954), 609: 'significant that ... no war crimes charges were brought as to the illegal conduct of air warfare'.

[69]E. Markusen and D. Kopf, 'Was it Genocidal?', in J. Primoratz (ed.), *Terror from the Sky: The Bombing of German Cities in World War II* (2010), 167; M. Selden, 'A Forgotten Holocaust: U.S. Bombing Strategy, the Destruction of Japanese Cities, and the American Way of War from the Pacific War to Iraq', in T. Tanaka and M. Young (eds.), *Bombing Civilians: A Twentieth-Century History* (2010), 79; S. Garrett, *Ethics and Airpower in World War II: The British Bombing of German Cities* (1997), 199.

[70]T. Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970), 100.

[71]Cited in R. Conot, *Justice at Nuremberg* (1983), 68.

[72]T. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10* (1977), 65; cf. Parks, *supra* note 45, at 37.

[73]D. Luban, 'Military Necessity and the Cultures of Military Law', (2013) 26 LJIL 341; M. Walzer, *Just and Unjust Wars* (1977), 144.

https://doi.org/10.1017/S0922156523000377 Published online by Cambridge University Press

Leningrad. The US Military Tribunal judged this action to be lawful in apparent reference to Article 18 of the Lieber Code of 1864:[74]

> If the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back so as to hasten the surrender.[75]

This broad interpretation of military necessity basically followed the logic of the German nineteenth century 'Kriegsraison' doctrine, putting military advantage ahead of any protection of civilians. As Luban observerd recently: 'Hostages sells the brand-name "military necessity" at the cheapest possible price.'[76]

The *Hostages* Trial is indeed emblematic of how the post Second World War Crimes Trials, both in the IMT and in the subsequent US High Command Military Tribunals in Nuremberg, legitimized excessive military action at the expense of civilians, not only through omissions but also, at least indirectly, in rendered judgments through their reasoning. The thesis that the lack of sanctions for air warfare presented itself as a concession on the part of the Allies granted to the Axis powers to compensate for the one-sidedness of IMT legal structure and mandate can be corroborated by the case against Grand Admiral Karl Dönitz and Naval Officer Erich Raeder. The defence counsel argued that submarine warfare was conducted in the same manner by the Allies and that the relevant conventions had been interpreted in the same (permissive) manner on the Allied side. While the Tribunal ultimately found Dönitz and Raeder guilty, it did not base its verdict on violations of the provisions of submarine warfare explicitly applying the *tu quoque* principle:[77]

> In view of all of the facts proved and ... the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that nation entered the war, the sentence of Dönitz is not assessed on the ground of his breaches to International Law of submarine warfare.[78]

In sum, inhumane air warfare practices were neither subject of the indictments nor of the sentences against the principal Axis war criminals.[79] Exceptions were the investigations of individual events under the general indictment of war crimes, namely the discussions of the bombings of Warsaw, Coventry, and Rotterdam.[80] By generally excluding air warfare from the Trials, the Military Tribunals in Nuremberg (IMT and US High Command Military Tribunals) and Tokyo (IMTFE) gave retroactive legitimacy not only to the military bombing practice of the Axis powers, but also to their own conduct during the air war.[81] In this respect, these post-Second

[74]'When a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender', in Schindler and Toman, *supra* note 15, at 6.

[75]US Military Tribunal Nuremberg, *High Command Trial, The United States of America vs. Wilhelm von Leeb et. al., Judgment of 27 October 1948* (1949), 562.

[76]See Luban, *supra* note 73, at 343.

[77]'(T)he most important official treatment of tu quoque is that of the International Military Tribunal at Nuremberg in its decision on Admirals Donitz and Raeder': S. Yee, 'The Quoque-Argument as a Defence to International Crimes, Prosecution or Punishment', (2004) 3 *Chinese Journal of International Law* 88.

[78]The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany (22 August 1946 to 1 October 1946), Judgment of 1 October 1946, para. 509, available at www.legal-tools.org/doc/45f18e/pdf/.

[79]Cf. B. Röling, 'The Law of War and the National Jurisdiction since 1945', in Académie de Droit International (ed.), *Recueil des Cours* (1960), 391.

[80]In Egbert and Joosten, *supra* note 10, at 43, 200, 380.

[81]S. Lindqvist, *A History of Bombing* (2011), 240: '(P)rotected from criticism for what they had already done ... away with the legal hindrances for the future nuclear use ... no legal international right of protection for Soviets.'

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World War trials did not constitute an example of successful enforcement of the principle of distinction, but rather stand for an unused opportunity to establish accountability for inhumane warfare and to 'revive' law as a guiding norm of warfare after the disastrous experiences of the Second World War.[82] This was not without negative consequences for international legal discourse and the further development of international law relevant to air warfare.

3. Repercussions on IHL Development

3.1 The 1949 Geneva Conventions

After the Second World War, international legal policy-making focused on the renewed efforts to outlaw war, thus on the prevention of war (*jus ad bellum*), rather than on its regulation (*jus in bello*).[83] Against the backdrop of the founding of the United Nations and the codification of the prohibition of the use of force in Article 2(4) of the UN Charter, the regulation of warfare was rejected as 'immoral, if not unthinkable'.[84] Another scholarly reaction to the Second World War was to consider – often in a realistic or outright pessimistic tone – future wars and the lawlessness of their conduct as simply inevitable. The idea of a complete abandonment of the *jus in bello* was, however, not shared by all. The Austrian scholar Josef Kunz was one of the few scholars rejecting this 'fatalistic pessimism of the inevitability of lawless wars'.[85] Unsurprisingly, the International Committee of the Red Cross reacted to this perceived crisis of the *jus in bello* and promoted a fundamental reform of the laws of war through the 1949 Conventions project.

The four Geneva Conventions of 1949, as the 'basis on which rest the rules of international law for the protection of the victims of armed conflicts',[86] were the outcome of this first post-war attempt to revise the law applicable in armed conflict after the devastating experiences in the Second World War.[87] Preparations by the International Committee of the Red Cross (ICRC) started on 4 September 1945, a few days after the end of the Second World War. The Committee invited the victorious powers to a meeting of experts to discuss proposals for revising the legal rules for the protection of war victims. The invitations were met with little response. The first Conference of Government Experts for the Study of the Conventions for the Protection of War Victims in Geneva, with only 15 states participating, was not to take place until April 1947. In the preceding Preliminary Conferences of National Red Cross Societies during 1946,[88] concrete approaches to reaffirm the principle of distinction in air warfare had been put forward, but the ICRC did not incorporate them into its first drafts for the convention-project. These proposals included a general ban on aerial bombardments leading to civilian losses and a recommendation that this ban be extended to the use of chemical, bacteriological, and nuclear weapons.[89] Poland's draft resolution condemning both war and new weapons of mass-destruction was met with an

[82]See Jochnick and Normand, *supra* note 4, at 89.

[83]See also the argument of the members of the International Law Commission (ILC) rejecting a study on the laws of war in the course of its first conference in 1949: 'The Commission considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant ... The majority of the Commission declared itself opposed to the study of the problem at the present stage ... It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its actions as showing lack of confidence in the efficiency of the means at the disposal of the U.N. for maintaining peace', United Nations, *Yearbook of the International Law Commission 1949 - Summary Records and Documents of the First Session including the report of the Commission to the General Assembly* (1956), 281.

[84]See Hanke, *supra* note 40, at 283.

[85]J. Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision', (1951) 45 AJIL 37, at 43.

[86]J. Pictet, 'The New Geneva Conventions for the Protection of War Victims', (1951) 45 AJIL 462.

[87]See also the recent critical engagement regarding the process of the *travaux préparatoires* of the Geneva Conventions in general: B. Van Dijk, *Preparing for War: The Making of the 1949 Geneva Conventions* (2022).

[88]For example, ICRC, *Report on the Work of the Preliminary Conference of National Red Cross Societies for the study of the Conventions and of various Problems relative to the Red Cross (Geneva, July 26 - August 3, 1946)* (1947).

[89]Cf. G. Best, *War and Law since 1945* (1994), 103. See Van Dijk, *supra* note 87, at 197–251.

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equally poor response.[90] The results of these meetings of experts on proposals to modernize the legal protection of war victims served as the basis for the ICRC's preparation of the four draft conventions. These drafts were in turn adopted by the seventeenth International Red Cross Conference in Stockholm in August 1948 as a subject for negotiation at the Diplomatic Conference in Geneva.[91]

The aim of the Diplomatic Conference, held in Geneva from 21 April to 12 August 1949,[92] was to revise the two existing Geneva Conventions on the Protection of the Wounded and Sick of Armed Forces in the Field of 1864 and on the Treatment of Prisoners of War of 1929, to integrate the Hague Convention on the Application of the Geneva Principles to Naval Warfare of 1907, as well as to extend the so-called 'Geneva Law' to include an agreement on the protection of civilians in war.[93] The latter project would have provided an opportunity to reaffirm or clarify the pre-war protective provisions against aerial bombardment after their massive disregard during the Second World War. Eventually, however, like the Nuremberg and Tokyo military tribunals, the Geneva Conventions did not reaffirm, let alone strengthen, the principle of distinction in air warfare. Only the Soviet Union, which had previously stayed away from the meetings, submitted regulatory proposals to expand civilian protection in air warfare. Supported by other socialist states, the Soviet Union criticized the personal scope of protection of the fourth draft convention as too restrictive,[94] given that the convention in its final form referred only to persons 'who, at a given moment and in any manner whatsoever, find themselves, in a case of conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.[95]

These efforts to extend safeguards for the civilian population against the Second World War bombing practices in non-occupied territory were accompanied by an attempt to prohibit the use of nuclear weapons. In this regard, two alternative text proposals for the Fourth Geneva Convention were discussed during the preparatory works. The first proposal[96] would have extended Article 32[97] 'to consider as a serious crime, murder, torture and maltreatment causing death, including medical experiments, as also all other means of exterminating the civilian population'.[98] The second proposal would have included 'the obligation of the governments of all countries to obtain without delay the signature of a convention on the prohibition of nuclear weapons as a means of mass destruction of populations'.[99] Both proposals, however, were rejected by large majorities.[100] Instead, the Geneva

[90]See Parks, *supra* note 45, at 56.

[91]ICRC, *XVIIth International Red Cross Conference - Draft Revised or New Conventions for the Protection of War Victims established by the International Committee of the Red Cross with the Assistance of Government Experts, National Red Cross Societies and other Humanitarian Associations* (1948).

[92]The Swiss Federal Council invited the governments of 70 states, of which 63 participated, 59 with voting rights and four as observers; see Pictet, *supra* note 86, at 467.

[93]Cf. R. Yingling and R. Ginnane, 'The Geneva Conventions of 1949', (1952) 46 AJIL 393.

[94]The Romanian delegation stated: 'The Conference would fail in its task if those populations were not adequately protected. Why hesitate to modify the rules of war, when the security of the civilian populations was at stake', 'Committee III, Establishment of a Convention for the Protection of Civilian Persons in Times of War', in Federal Political Department Berne, *Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II A* (1949), at 717.

[95]1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, Art. 4; in Schindler and Toman, *supra* note 15, at 502.

[96]See Yingling and Ginnane, *supra* note 93, at 413: 'an obvious attempt to obtain the unconditional ban on the use of atomic weapons'.

[97]"The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.'

[98]See Committee III, Establishment of a Convention for the Protection of Civilian Persons in Times of War, *supra* note 94, at 764.

[99]'34th Plenary Meetings', in Federal Political Department Berne, *Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II B*, 500; see Best, *supra* note 89, at 112.

[100]See Committee III, Establishment of a Convention for the Protection of Civilian Persons in Times of War, *supra* note 94, at 719; ibid., at 508.

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Conventions relegated the protection of civilians against bombardments to an *optional* establishment of neutral protection zones, which could only be established without including military objects and had to be designated as such in advance.[101] Given the prevailing extensive definitions of the concept of 'military objectives', this form of indirect and optional protection against bombardments would turn out to become meaningless in subsequent military practice. In addition, there was the obligation to refrain from direct attacks on objects in need of special protection (hospitals, medical camps, ambulances) and persons (the sick, mothers, children), as well as the prohibition of collective punishments, measures of intimidation or terrorization, and reprisals against the protected persons.[102]

Why were international lawyers, states and the ICRC not able to restore the principle of distinction for aerial warfare against (conventional or nuclear) aerial bombardments immediately after the Second World War? Surprisingly, the integration of such regulations into the convention project simply was not in the ICRC's interest. This assumption can be plausibilized by the fact that the ICRC draft conventions did not contain provisions for protection against aerial bombardments. The idea was anyway '(not) further to complicate an already complicated task'[103] and instead to devote attention to regulations that would be more likely to meet with acceptance. This was considered to be the case regarding the rules for establishing protection zones for the civilian population, which the ICRC had already developed in the so-called Tokyo draft of 1934. Moreover, such civilian protection zones had already been tested in practice in the Japanese-Chinese War and in the Spanish Civil War.

In addition to the revision of existing conventions, only those norms which in the eyes of the ICRC were 'consensus-friendly' were considered for the new conventions. Accordingly, the invitation from the Swiss Federal Council stated:

> The Swiss Federal Council was called upon to give several of the Governments convened the assurance that the Conference would deal exclusively with the revision of the three Conventions of 1907 and 1929 and the establishment of the new Convention for the Protection of Civilians in time of War, and that the Conference would make no departure from the humanitarian field to embark upon questions of a political nature.[104]

Also, of relevance in this context seemed to be the limitation of the ICRC's competence. Questions concerning the containment of means of warfare should be left to a future revision of Hague-rules:[105] '(T)he conference called to protect war-victims, not to rewrite Hague Rules of Land warfare'.[106] In this respect, the ICRC could entrench and exploit an alleged, and somewhat artificial, boundary between 'Hague law' and 'Geneva law', the latter of which had so far ignored the limitation of the use of certain means of warfare. This exercise of boundary-drawing, however, did not preclude the ICRC from proposing a revision of the rules of occupation, which traditionally had been regulated in the Hague Conventions. Moreover, a majority of governments could argue that the competence in dealing with nuclear weapons belonged to the UN,[107] as the recently established Atomic Energy Commission (AEC) was supposed 'to deal with problems raised by the discovery of atomic energy'.[108]

[101]See Fourth Geneva Convention, *supra* note 95, Arts. 15, 28, in Schindler and Toman, *supra* note 15, at 506, 511.

[102]Ibid., at 506.

[103]See Best, *supra* note 89, at 106.

[104]See '34th Plenary Meetings', *supra* note 99, at 504.

[105]See Best, *supra* note 89, at 106.

[106]'Airgram from the US delegation to the State Department from 17.05.1949', in ibid., at 111.

[107]See Committee III, Establishment of a Convention for the Protection of Civilian Persons in Times of War, *supra* note 94, at 716.

[108]United Nations General Assembly, *Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy*, UN Doc. A/RES/1(I) (1946): it had the task 'to make specific proposals ... (c) for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction'.

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In addition, power-politics was responsible for the lack of legal containment of air warfare. As Geoffrey Best points out, the states most interested in establishing such restrictions – meaning Germany and Japan – were denied involvement from the beginning, while the victorious Allied powers had many reasons to circumvent legal restrictions on air warfare.[109] One particular reason was the 'air policing' that the British and French had continued in their colonial territories in the years after the end of the war and also during the Geneva Conferences: whether in Haiphong (Vietnam) in 1946, Aden (Yemen) in 1947, or Kenya and Madagascar in 1948.[110] Accordingly, they saw both their established war-practices vis à vis their colonial peoples, and their achievements in aeronautical technology threatened: '(T)hey tried to ensure that no new laws were passed that might hold them back'.[111] With the atomic bomb, the US had achieved a hegemonic armament status that would have been endangered by a ban on this weapon. This was compounded by the onset of the Cold War, which did not permit a renunciation of this ultimate weapon. Therefore, the former alliance powers found themselves in a dilemma as a result of the Soviet Union's requests for an extension of the protective regulations relevant to air warfare. On the one hand, the legal restriction of aerial bombardment was to be explicitly prevented, as a letter from the British War Office to the British representative in Geneva revealed: '[c]learly nothing must be included … which would restrict freedom to carry out operations, particularly bombing'.[112] On the other hand, it was important not to come across as opposing the inclusion of humanitarian protection provisions ('But flatly to stand out for civilian bombing would look so bad!'),[113] which would have given the Soviets an excuse to leave the conference early. Therefore, it was argued that the Geneva conferences were not the appropriate forum for implementing any proposals; instead, the issue would have to be addressed elsewhere.[114] Moreover, a large number of the state representatives present shared the distrust of the Soviet proposals and suspected only political motives behind the restrictive resolution proposals.[115] One aspect that revealed the differences between Britain and the United States was the proposal on the part of the United States to raise violations of the Geneva Conventions as 'war crimes'.[116] The British opposed this proposal, taking into account the Nuremberg Trials as well as the underlying *tu quoque* reasoning, as Lindqvist notes, '(T)he victorious powers could hardly forbid bombing of civilians without incriminating themselves for what they had already done and planned to continue doing.'[117] This could again be justified by the limitation of competence, which, after the establishment of the United Nations War Crimes Commission, rested with the UN and not with the ICRC. Even its 'spiritual father' Jean Pictet saw the Geneva Conventions exclusively as a contribution to the further definition of the concept of war crimes, which still lacked a uniformly recognized definition at that time.[118] In short, the ICRC, from the very beginning, shied away from taking up the issue of aerial bombardments against reticent Western military powers, which prevented efforts to restore the principle of distinction in post-war IHL. The Nuremberg silences had to be perpetuated, an indirect incrimination of Allied warfare practices, four years after the victorious

[109]See Best, *supra* note 89, at 115: 'The most conspicuous sufferers from bombing, Germany and Japan, were unable to put their case, while the bombing specialists, the USA and the UK, had every reason for preventing the case'.

[110]Cf. A. Gillespie, *A History of the Laws of War: Volume 2. The Customs and Laws of War with Regards to Civilians in Times of Conflict* (2011), at 36; see Lindqvist, *supra* note 81, at 282.

[111]See Lindqvist, ibid., at 256.

[112]See Roseway, in Best, *supra* note 89, at 111.

[113]Ibid.; cf. Gillespie, *supra* note 110, at 36.

[114]See US Representative Clattenburg, 'Committee III, Establishment of a Convention for the Protection of Civilian Persons in Times of War', *supra* note 94, at 716, who stated: 'The present Conference was neither a disarmament conference nor a conference to re-write the Hague Convention.'

[115]Cf. Best, *supra* note 89, at 115.

[116]Cf. Ibid., at 159.

[117]See Lindqvist, *supra* note 81, at 256.

[118]Cf. Pictet, *supra* note 86, at 470.

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war, against the will and strategic prerogatives of the then still-existing colonial powers, turned out to be politically impossible.

3.2 Reactions of international legal scholarship

The Geneva Conference represented a missed opportunity to restore the principle of distinction by means of a binding treaty for the protection of the civilian population, and thus to legally come to terms with the Second World War bombing practices. The mandate and outcome of the 1949 Diplomatic Conference in many aspects tragically corresponded to the judgments rendered in Nuremberg and Tokyo, including the judicial omissions. All of this did not remain without influence on international legal discourse. Josef Kunz, for example, diagnosed – as he had done 16 years earlier[119] – a 'chaotic status of the laws of war' that was supported by a 'neglect' on the part of international law scholarship, as the Geneva conferences had proven again.[120] Hersch Lauterpacht, on the other hand, described the 1949 Conventions as 'historic and in many ways almost a revolutionary piece of international legislation',[121] not without doubting the existence of basic principles of the law of war at the same time: '(T)here are probably at present no overriding, universally or generally agreed, juridical principles of the law of war'.[122] Moreover, Lauterpacht, like Georg Schwarzenberger,[123] questioned the validity of the principle of distinction in light of past air war practices. Even the bombing of civilians would in his view be within the bounds of legality if done as a side effect of an attack on legitimate military targets.[124] Lauterpacht refers to 'the prohibition of the weapon of terror not incidental to lawful operations' as the only remaining prohibition related to air warfare.[125] He was not the only scholar who accepted the Second World War air warfare practices as a new (law-changing) practice instead of condemning them as violations of law. As a result of the non-existent institutional condemnation after the war, Stone, for instance, qualified the morale bombing of the 'quasi-combatant workforce' as a legitimate practice,[126] while Phillips even more bluntly negated all legal restrictions in the field of air war law.[127] Other authors, in particular German-speaking ones, such as Alfred Verdross and Friedrich von der Heydte, rejected a law-modifying effect of the Second World War practices, but criticized the lack of application of general legal principles to air warfare.[128] Many agreed on the need for a specific regulation of air warfare, whether as a task *de lege ferenda* or as a task of concretizing the *lex lata*.[129] Nevertheless, the status of air warfare law in the discourse on international law in the early post-war period was in more disarray than the titling of the Geneva Convention as a revolutionary achievement of international legislation would suggest. The institutional scenery for

[119]J. Kunz, 'Plus de lois de la guerre?', in M. Sibert (ed.), *Revue générale de droit international public* (1934), 22.

[120]J. Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision', (1951) 45 AJIL 37, at 40, a legal answer to the rise of the phenomenon of 'total war' was still missing in his view, referring to B. H. Liddell Hart, *The Revolution in Warfare* (1947).

[121]H. Lauterpacht, 'The Problem of the Revision of the Law of War', (1952) 29 BYIL 360.

[122]Ibid., at 364.

[123]G. Schwarzenberger, 'Das Luftkriegsrecht und der Trend zum totalen Krieg', (1959) JfIR 8, 257.

[124]'(T)he bombing of the civilian population, when incidental to attack upon legitimate military objectives, however widely conceived, may still be within the borderline of legality', H. Lauterpacht, 'The Problem of the Revision of the Law of War', (1952) 29 BYIL 360, at 369.

[125]'(S)o long as the assumption is allowed to subsist that there is a law of war, the prohibition of the weapon of terror not incidental to lawful operations must be regarded as an absolute rule of law', ibid.

[126]See Stone, *supra* note 68, at 631.

[127]'Air power entered the post-war period free of all limitations save those imposed by its own technology', C. Phillips, 'Air Warfare and Law', (1953) 21 *George Washington Law Review* 311, at 334.

[128]F. von der Heydte, *Völkerrecht II* (1960), 249; A. Verdross, *Völkerrecht* (1964), 479.

[129]Cf. A. Randelzhofer, 'Flächenbombardement und Völkerrecht', in H. Kipp, F. Mayer and A. Steinkamm (eds.), *Um Recht und Freiheit: Festschrift für Friedrich August Freiherr von der Heydte zur Vollendung des 70. Lebensjahres* (1977), 471, at 481.

https://doi.org/10.1017/S0922156523000377 Published online by Cambridge University Press

the tragic demise of the principle of distinction had been set by the screaming silences in Nuremberg and the 1949 Geneva Conventions.

3.3 The Additional Protocols of 1977: Formalizing the Nuremberg silences

After the Geneva Conventions, it took another 25 years before a diplomatic conference of state representatives met to discuss and formalize the further development of the principle of distinction in the context of air warfare. The outcome of the four sessions of the Diplomatic Conference on the Reaffirmation on Development of International Humanitarian Law Applicable in Armed Conflicts between the years 1974 and 1977 were the two Additional Protocols to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International (Additional Protocol I) and Non-International Armed Conflicts (Additional Protocol II).[130] As the current *status quo* in treaty law, the 1977 Additional Protocols are at the end of any standard progress narrative on the development of international humanitarian law. In this contribution, however, the Additional Protocols stand for a legislative endorsement of the demise of the principle of distinction, formalizing a discursive development, which had started during the Second World War and the Nuremberg Trials.

The lacunae left by Nuremberg, Tokyo and the four Geneva Conventions had not gone unnoticed in ICRC circles. Less than three years after the adoption of the four Geneva Conventions, the Korean war had demonstrated that large scale area – and 'morale' – bombings and other indiscriminate attacks on civilians were here to stay. In 1957, the ICRC proposed Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War at the 19th International Red Cross Conference in 1957.[131] The draft rules submitted by the ICRC, *inter alia*, contained a toned-down version of the principle of distinction and a prohibition of area-bombing as well as other rules protecting civilians against indiscriminate military attacks. Given that these proposals had 'met with a crushing silence from the Governments', the ICRC, for the time being, did not pursue this project further.[132] It was the Vietnam War and the nearing end of the decolonization era, which, in the early 1970s, saw the ICRC make a new attempt to develop a meaningful codification of the principle of distinction possible within the framework of two new Additional Protocols to the Geneva Conventions. During the Vietnam War (1964–1975), Vietnam's civilian population had been disproportionately affected by the war, as around 70 percent of the casualties of this war were civilians, compared to an estimated 50 percent in the Second World War.[133] In various stages of the war, the US military command also ordered bombing campaigns on targets in populated areas in the North, with the aim to force North Vietnamese officials into surrender or into making concessions during final armistice negotiations, thus adopting 'morale bombing' strategies also well-known from the Second World War and the Korean War. Vietnam, together with neighbouring Laos, in this way became the most heavily-bombed countries in the history of mankind, with the US air force dropping more bombs in total on these countries than during all US Second World War bombing campaigns combined. Against this background, and after formal decolonization in many countries of the newly independent states of the Global South, the ICRC in the 1970s could count

[130]1977 Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in Non-International Armed Conflict, in A. Roberts and R. Guelff (eds.), *Documents on the Laws of War* (1982), 387, 447; M. Bothe, K. Partsch and W. Solf (eds.), *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982), 16, 604.

[131]XIXth International Conference of the Red Cross, *Final Record Concerning the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War* (1959, in Schindler and Toman, *supra* note 15, at 251.

[132]Statement by an ICRC official quoted in H. Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva conventions - Volume I* (1980), xiii.

[133]D. Schindler, 'International Humanitarian Law: Its Remarkable Development and Its Persistent Violation', (2003) 5 *Journal of the History of International Law* 165, at 171.

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on the support of a broad coalition of small and newly independent states to reaffirm the principle of distinction. This coalition opted for increased legal protections for civilians in armed conflict and also wanted to go beyond the draft provisions on the principle of distinction developed by the ICRC over the last two decades.

According to the initial ICRC draft of the principle of distinction in the First Additional Protocol, 'the civilian population as such, as well as individual civilians, shall not be made the object of attack'.[134] This provision included two more specific prohibitions, the first related to area bombings and the second related to the single most important issue in this context, namely regarding civilians being killed 'incidental' to an attack on a military objective.[135] The initial wording of this second clause on what became termed the issue of 'collateral damage' deserves a closer look:

> In particular, it is forbidden b) to launch attacks, which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.[136]

While at first sight prohibiting 'incidental losses' among the civilian population, the initial draft provision already introduced a wide exception to this prohibition. In contrast to previous codification attempts, the draft provision entitled military commanders to launch military attack even if they 'expected' the loss of civilian lives as long as these killings were not 'disproportionate to ... the military advantage anticipated'. Prior codification attempts, both successful and unsuccessful, from the first half of the twentieth century, had been more restrictively worded in sticking to bright line prohibitions of attacks on targets likely to lead to civilian loss of lives.[137]

In the Diplomatic Conference, a broad coalition of socialist and newly independent states proposed to delete paragraph b) in its entirety[138] or to eliminate the words after 'objects' herewith removing the proportionality principle.[139] The Hungarian representative had argued that the principle of proportionality 'called for comparison between things that were not comparable, and thus precluded objective judgment'.[140] The Nordic countries (Sweden, Finland, and Norway) also pointed to the problem that the proportionality principle could be abused to legitimize indiscriminate attacks and proposed to exclude all civilians which were not in immediate 'vicinity' of the attacked military objective from the application of the stipulated balancing act between military advantage and civilian losses. In other words, they tried to uphold a rudimentary bright line prohibition for attacks affecting civilians unless they were in immediate vicinity of a military object.[141]

Interestingly, the ICRC representative did not attempt to support the delegations, which had voiced their concerns regarding the codification of the principle of distinction by way of a proportionality principle. Instead, he defended the ICRC draft, stressing that since the First World War many attempts had been made at codifying the immunity of the civilian population, such as

[134]Art. 46 (1) of the ICRC Draft Additional Protocol, printed in H. Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva conventions, Vol. III* (1980), 123.

[135]Ibid., at 123, Art. 46(3): 'The employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives, are prohibited. In particular it is forbidden: (a) to attack without distinction, as on single objective, by bombardment or any other method, a zone containing several military objectives, which are situated in populated areas, and are at some distance from each other ...'.

[136]Ibid., at 123.

[137]On this arguably decisive methodological difference between bright-line rules and proportionality reasoning elsewhere see J. von Bernstorff, 'Is IHL a Sham? A Reply to Eyal Benvenisti and Doreen Lustig', (2020) 31 EJIL 709.

[138]Hungary, Czechoslovakia, Poland, and the GDR proposing deletion of paragraph b), minutes in Levie, *supra* note 132, at 128.

[139]Proposal supported by Egypt, Algeria, Ghana, Yemen, Iraq, Kuwait, Libyan Arab Republic, Mauritania, Morocco, Sudan, Syrian Arab Republic, United Arab Emirates, ibid., at 127, 129.

[140]H. Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva conventions, Vol. III* (1980), 128.

[141]See the comments of H. Blix (Sweden) and A. Eide (Norway), ibid., at 136.

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the 1923 project, which 'would have required combatants to refrain from bombing, when it might affect the civilian population'. But in his view 'a good text was useless if it went unsigned, unratified and unimplemented'.[142] As the negotiations and prior consultations had made clear, a bright line rule protecting civilians was not in the interest of the great military powers. They insisted on turning the principle of distinction into an utilitarian balancing act, according to which the killing of civilians became legalized whenever the commander on the spot considered the 'military advantage' gained by the attack to outweigh the anticipated civilian losses.[143] The finally-adopted version not only retained the proportionality principle without incorporating the limiting Nordic proposals, it also turned the already weak prohibition of *disproportionate* civilian losses into an even weaker prohibition of *excessive* civilian losses only:

> Art. 51, 5. b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[144]

It follows from this wording that even the anticipation of a high number of civilian casualties did not automatically render an attack illegal. This was only the case once the civilian losses were 'excessive' compared to the military advantage. A similarly depressive result must be noted with regard to the specific provisions on 'morale' – and 'area-bombing' in the Additional Protocols. A prohibition on 'morale-bombing' could have eventually been adopted, but only at too high a price. The great military powers had demanded the insertion of a qualifier, which legitimized 'incidental' terrorization of the civilian population and herewith the main justification for morale bombing since the Second World War. This qualification of the prohibition had been suggested in an often-cited article by Hersch Lauterpacht in the aftermath of the Second World War, attempting at the time to justify *ex post facto* the allied morale bombing campaigns during the war. It now became part of the codification of the principle of distinction, destroying the codified rule in Article 51(2) of AP I through the following wording: 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.' Turning the prohibition of 'morale-bombing' into a norm legitimizing the main justification for this contested practice was made possible through the insertion of the qualifier 'the primary purpose of which'.[145] If the attempt of the codification process had been to outlaw certain violent practices, it now had produced the opposite effect. The norm now entitled military commanders by law to pursue 'morale bombing' strategies as long as the 'primary purpose' of the terrorizing bombings remained to destroy military objects; a precondition easily fulfilled in military conflict and even more easily claimed by military commanders in bad faith.

Given that the provision on 'area bombing' in Article 51(5a) of AP I also had been redrafted by the great powers in order to insert significant 'loopholes' minimizing the restrictive effects of the prohibition, the legal effects of the codified principle of distinction were meagre to say the least.[146] The formulation that the principle had been given in the analysed provisions of the Additional Protocol turned the codification process into an exercise of hegemonic adjustment. After strong public condemnation of certain military practices in the Second World War and during the Korean and the Vietnam wars, the codification at first sight enshrined the public moral outcries

[142]ICRC-statement, ibid., at 126.

[143]See von Bernstorff, *supra* note 137, at 717.

[144]See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 130, in Schindler and Toman, *supra* note 15, at 711.

[145]See Mensching, *supra* note 30, at 466.

[146]See, on the redrafting-process, Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 623.

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regarding 'morale and area-bombings' into law. At a closer look, however, it adjusted the contested legal structures through the insertion of qualifiers and balancing acts to be able to justify the practice in the future as a legal practice. International legal scholarship had prepared this adjustment of legal discourse to contested great power practices by developing and integrating corresponding legal justifications beforehand. All of this became quickly apparent for the delegations in Geneva during the negotiations of the individual prohibitions at the Diplomatic Conference, but it obviously could not be prevented by a broad coalition of small states against the great powers threatening non-ratification.[147] The only tangible progress for the legal realization of the principle of distinction was the adoption of an explicit prohibition of reprisals justifying indiscriminate attacks on civilians in Articles 20 and 51(6) of AP I.[148]

4. Conclusion

The Nuremberg and Tokyo Tribunals do not only represent an unused opportunity to establish accountability for inhumane air warfare practices and to revive the principle of distinction as a guiding norm of warfare after the Second World War. The failure to apply these legal rules in the two Tribunals has also haunted the development of IHL to the present day, leading to the downfall of the principle of distinction as a result of the demonstrated path dependencies. Attempts to overcome the apparent erosion of the principle of distinction through indiscriminate bombing practices by codification failed again in 1977. Western great powers managed to water down the restated principle of distinction in line with the new military practices employed by them since the Second World War. Codification led to a re-adjustment of international law to hegemonic practices and prerogatives, most of the Nuremberg 'silences' were thus enshrined in written law. These successive retroactive legitimizations of unrestrained bombing practices had a lasting influence for the post-war discourse on international law. We introduced these developments as an example of judicial *desuetudo* meaning the abrogation of an existing rule through subsequent non-enforcement by an international court. The long-term repercussion of such forms judicial *desuetudo* for international go way beyond classic rule of law-concerns. As we have attempted to plausibilize in this piece, judicial *desuetudo* in war crimes trials can 'create' new legal patterns legitimizing the most excessive forms of military violence meaning that the partial or total failure to prosecute violations of this principle in rendered judgments (Nuremberg and Tokyo on the Second World War) can over time lead to the demise of the applicable legal rules, or – to be theoretically more precise – of their previously accepted meaning in legal discourse. Such judicial silences in high profile cases come with a subsequent tendency of legal discourse to preserve and perpetuate these silences in later institutional settings. In this way, not only the application of legal rules by courts and tribunals but also judicial silences (non-application of a legal norm in a given case) can trigger subsequent fundamental re-interpretations of existing legal rules in international legal discourse. As in the case of the principle of distinction in and after Nuremberg and Tokyo, in practice, this process of re-interpretation through judicial non-application can substantially weaken a foundational norm of a whole legal regime. This contribution traces such a historical process, from codification of a rule via new interpretations advanced by the great military powers; followed by judicial silences, a subsequent phase of insecurity, and re-interpretation by scholars; ultimately leading to a new legislative process endorsing the new meaning of the rule.[149] However,

[147]See, for the negotiations on Art. 51 of AP I, Levie, *supra* note 132, at 163; on the different coalitions see Bothe, Partsch and Solf, *supra* note 130, at 7; Best, *supra* note 89, at 342.

[148]See Bothe, Partsch and Solf, ibid., at 311.

[149]On discursive re-adjustments of international legal norms over time in hegemonic 're-adjustment circles' see von Bernstorff, *supra* note 12.

https://doi.org/10.1017/S0922156523000377 Published online by Cambridge University Press

the new meaning and structure of the principle of distinction in the case of aerial bombardments as formalized in the 1977 Additional Protocols, had arguably lost most – if not all – of its former pre-war protective meaning. With hindsight, total war practices in the Second World War, their discursive justifications by military powers and international lawyers, and most importantly, the failure to prosecute them in Nuremberg and Tokyo, have over time fundamentally changed the meaning of the principle of distinction in international law. As such, the Nuremberg silences are here to stay.

Cite this article: von Bernstorff J and Mensching EL (2023). The dark legacy of Nuremberg: Inhumane air warfare, judicial *desuetudo* and the demise of the principle of distinction in International Humanitarian Law. *Leiden Journal of International Law* **36**, 1117–1140. https://doi.org/10.1017/S0922156523000377