Law

Air Warfare and International Humanitarian Law

Mateusz Piątkowski

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Mateusz Piątkowski (ORCID: 0000-0002-6918-2602) – University of Lodz
Faculty of Law and Administration
Department of Public International Law and International Relations
90-232 Lodz, Kopcińskiego 8/12 St.

REVIEWER
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INITIATING EDITOR
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PUBLISHING EDITOR
Monika Poradecka

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INTRODUCTION

The person who first drafts an acceptable code of rules for use in aerial warfare will receive the thanks of the peoples of all nations and he will become the Francis Lieber of the 20th Century.[1]

Aviation in the modern era may well be the most important means of conducting armed combat. Examples of air campaigns over the last three decades indicate that this form of warfare will be a decisive factor in determining success in a future armed conflict. Since the beginning of the twentieth century, the use of the of air forces in hostilities has been considered the subject of a special norm of international humanitarian law of armed conflicts.[2] This stemmed from the special, hitherto unknown, capability of the new tool of warfare to strike the enemy at previously unattainable distances. For the first time, the geographical approach to war ceased to be limited solely to areas within the range of land or naval artillery. The firepower of military aircraft began to exceed the capability of a single soldier and, with the advent of the era of heavy four-engined strategic bombers, it became capable of exerting a greater impact on the enemy than any division or army organized according to the 19th century model. The projection of the above-mentioned force against combatants required the adoption of restrictions, especially in the deployment of combat assets causing "superfluous injuries" and "unnecessary suffering", as well as weapons uncontrolled in time and space.[3]

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1 Francis Lieber – American lawyer of German origin, author of the so-called "Instructions for the Government of the Armies of the United States in the Field" from 1863, i.e. from the period of the Civil War, considered the first modern document *ius in bello.* W.G. Downey, *Revision of the Rules of Warfare*, „American Society of International Law Proceedings" 1949, vol. 43, p. 108.

2 The term "international humanitarian law" proposed by the International Committee of the Red Cross (ICRC) in the 1950s gradually became an approved name defining a conglomerate of norms and provisions of international law applicable in armed conflicts. For the sake of linguistic consistency, it should be pointed out that the terms "law of armed conflicts" or "ius in bello" are still in use. There are only semantic differences between these phrases and the term "international humanitarian law". See: D. Schindler, *International Humanitarian Law: Its Remarkable Development and Its Persistent Violation*, "Journal of the History of International Law" 2003, vol. 5, p. 171.

3 See: M. Piątkowski, *O wartości normatywnej Deklaracji petersburskiej z 1868 roku* [*The normative value of the 1868 Saint Petersburg Declaration*], "Międzynarodowe Praw Humanitarne" 2018, vol. IX, p. 101.

The appearance of balloons, airships and then aircraft opened the third classical element as a new dimension of warfare operations. This was a breakthrough in the hitherto bipolar legal regime, which traditionally included naval and land warfare. The autonomy of aircraft was a research challenge in the context of the legal status of airspace. Significantly, while in the case of civil aviation, the conclusion of the first international agreements is almost chronologically similar to the pioneering dates of the achievements of the Wright brothers or Louis Blériot, in the context of air warfare law, the matter quickly became the subject of an extremely tedious legislative process, whose pace of development was unable to keep abreast of the technological progress of military aviation. The aircraft quickly ceased to play a purely "tactical" role, operating only near the zone of direct combat contact, and became a "strategic" tool deciding the fate of battles far away from the front line. The negative experiences of the First and Second World Wars were greatly influenced by the visions of aviation theorists, who considered bomb-carrying machines as a means capable of independent victory in the war. Significantly, this success was not to be achieved by defeating the enemy in battle, but as a result of the collapse of their economic and social abilities to conduct warfare. Such perception of the vision of using military aviation led to undermining the fundamental principles of distinguishing between combatants and civil population. It also directly influenced the fact that no state ratified the only "code" in the history of air warfare – a draft developed by a committee of jurists in 1923. As a consequence of this, to this very day, a treaty that would comprehensively regulate all issues of deploying military aviation in a future armed conflict is missing. The international community has always reacted retroactively to air warfare, often attempting to regulate the use of aircraft in war through completely inadequate solutions, including the adjustment of aviation operations by analogy to the conditions applicable in naval and land warfare. This turned out to be not only a scientifically and technically incorrect solution, but also had very serious consequences in the practice of conducting military operations. These shortcomings persisted essentially until 1977, when atrocities brought about by air bombardments became the driving force of changes in political and legal thinking by shifting from the theory of "total war" to the principle of "concentration of war effort". The reasons for this change were not purely humanitarian but were inherently related to the success of Operation "Linebacker II", where the focus of the entire military energy on exclusively military goals led the United States to political success, such as the conclusion of the Paris Agreements in 1973 and the withdrawal of this state from the war in Indochina.

Despite the breakthrough and the actual progress of *ius in bello* regulations, especially on the protection of civilians and guaranteeing the rights of combatants against the impact of certain types of weapons, the contemporary reality of the battlefield is still a challenge for many norms of air warfare law. Still, the classification of the subject of military action, namely a military objective, encounters

objective difficulties. The increase in the accuracy of firepower and reconnaissance assets will not contribute to the complete elimination of collateral damage in all circumstances. The asymmetrical nature of conflicts in the 21st century, in which the combatants often use international law as a kind of "weapon" or political and military doctrine, also affects the course of air operations. In addition to the current challenges, there are also new ones related to the gradual elimination of the human being as an operator of weapons systems. The phenomenon of autonomy in air warfare seems to be a breakthrough, not only a technical, but also philosophical and legal one, which may be difficult to reconcile with the existing network of international humanitarian law. The importance of modern air warfare is confirmed by the course of armed conflicts in Ukraine and the Gaza Strip.

It should be pointed out that air warfare does not only include air bombardment. The rules applicable to the status of military aircraft, the legal situation of crew members, as well as the rules applicable to the selection of aircraft armament are also subject to legal regulations. The development of these standards was the result of long-term practice, with origins often reaching back almost 100 years, at the dawn of military aviation. In the absence of a relevant contemporary international treaty that comprehensively regulates the above issues, a deep historical and legal analysis of the development of aviation technology and legal thought is required.

This work is the culmination of research conducted during 5 years of doctoral studies, the result of which was a doctoral dissertation entitled *Współczesna wojna powietrzna w świetle międzynarodowego prawa humanitarnego konfliktów zbrojnych* [*Contemporary air warfare in the light of international humanitarian law of armed conflicts*], defended on 22 December 2018 at the Faculty of Law of the Administration of the University of Łódź.

The publication is the result of the translation of the monography titled *Wojna powietrzna a międzynarodowe prawo humanitarne* [*Air Warfare and International Humanitarian Law*], published in Wydawnictwo Uniwersytetu Łódzkiego in 2021. The translation and publication was possible through the financial support of the state budget from the Ministry of Education and Science of Republic of Poland under grant "Doskonała Nauka II" (grant no. MONOG/SP/0055/2023/01).

Selection of the main subject of the monograph

The issue of air warfare in terms of international humanitarian law is still awaiting a comprehensive elaboration in Polish research on international law. The researchers who devoted part of their arguments to the issue of air warfare in

the form of excerpts from monographs or articles published in magazines were, primarily, two eminent employees of the Faculty of Law and Administration of the University of Łódź: Remigiusz Bierzanek[4] and Zbigniew Rotocki,[5] who jointly addressed the issue of attributing customary norms to the Hague Rules of Air Warfare. Zbigniew Rotocki, as a direct participant in the German invasion against Poland (opening World War II), also prepared an excellent analysis of the Luftwaffe's activity during this conflict.[6]

In the period preceding the First World War, the issue of air warfare in legal terms was first addressed by the French doctrine. Its leading representative was Professor Paul Fauchille, the author of the first academic papers devoted to the issue of the legal regime of airspace, as well as the rapporteur of three sessions of the Institute of International Law in 1902–1911. The professor at the University of Nancy, Louis Rolland, also spoke widely on this aspect, and the doctoral dissertation *Le Droit Futur De La Guerre Aérienne* was written by V. Le Moyne.[7] In the pre-war period, many of the important works devoted to the legal aspects of using aviation in warfare were published in the journal "Revue générale de droit aérien" published during the period of 1932–1940. Joseph Kroell devoted a separate volume of his treatise on the regime of international aviation law to air warfare.[8] The most important representative of British science was James Malory Spaight, who published three comprehensive studies in the period preceding the First World War, as well as in later years.[9] William Edward Hall and Lassa Oppenheim wrote about air warfare in their textbooks of international law.[10] In the United States, issues related to air bombing were addressed by James Wiford Garner,[11] as well as by

4 R. Bierzanek, *Commentary, 1923 Hague Rules for the Control of Radio in Time of War*, [in:] N. Ronzitti (ed.), *The Law of Naval Warfare. A Collection of Agreements and Documents with Commentaries*, The Hague 1988.

5 Z. Rotocki, *Polish Directives of 1939 concerning Aerial Bombardment in the Light of International Rules of Air Warfare*, "Polish Yearbook of International Law" 1970, vol. 3.

6 *Idem*, *Operations de l'Aviation Allemande en Pologne en 1939 a la Lumiere du Droit International*, "Polish Yearbook of International Law" 1972–1973, vol. 5.

7 V. Le Moyne, *Le Droit Futur de la Guerre Aérienne*, Nancy 1913; L. Rolland, *Les pratiques de la guerre aérienne dans la conflit de 1914 et le droit des gens*, "Revue générale de droit international public" 1916.

8 J. Kroell, *Traité de Droit international public aérien: L'Aéronautique en temps de guerre*, vol. II, Paris 1936.

9 J.M. Spaight, *Air Bombardment*, "The British Yearbook of International Law" 1923–1924, vol. 4; *idem*, *Air Power and War Rights*, London 1947; *idem*, *Air Power and War Rights*, London 1924; *idem*, *Bombing Vindicated*, London 1944; *idem*, *Aircraft in War*, London 1914.

10 W.E. Hall, *A Treatise on International Law*, Oxford 1904; L. Oppenheim, *International Law: A Treatise*, London 1920.

11 J.W. Garner, *Proposed Rules for the Regulation of Aerial Warfare*, "American Journal of International Law" 1924, vol. 18.

M.W. Royse.[12] Alex Meyer was an outstanding representative of the German doctrine.[13] It is worth mentioning the study by Professor Erik Castrén from the University of Helsinki of 1938[14] and a judge of the Permanent Court of International Justice John Basset Moore.[15] The Italian perspective on the law of air warfare was presented by Roberto Sandiford.[16]

Amongst important post-war studies, it is worth mentioning Hans Blix,[17] George Schwarzenberger,[18] David Johnson,[19] Hamilton DeSaussure,[20] as well as William Hays Parks.[21] The works of two German authors (Heinz Marcus Hanke[22] and Eberhard Spetzler[23]) deserve special recognition in this respect. Air warfare was also the subject of statements by world authorities in the field of international law – Hersch Lauterpacht[24] or Philip Caryl Jessup.[25] After 1990, air warfare and its relation to international humanitarian was addressed by two collective studies. The first one was a collection edited by Professors Natalino Ronzitti and Gabriella Venturini, while the second was a collection of conference materials led by Professor Anne-Sophie Millet-Devalle.[26] Dedicated monography concerning historical dimensions was published by Enno Mensching.[27] Chapters devoted to air warfare can be found in the works of contemporary authors: Michael Bothe, Matthew C. Waxman, Matthew Lippman, Anthony Rogers, Yoram Dinstein, Michael N. Schmitt and Marco Sassòli.

Recent years have also seen extensive development of the Polish doctrine of international humanitarian law, also in the context of research on the so-called

12 M.W. Royse, *Aerial Bombardment and the International Regulation*, New York 1928.
13 A. Meyer, *Völkerrechtlicher Schutz der friedlichen Personen und Sachen gegen Luftangriffe*, Berlin 1935.
14 E. Castrén, *Ilmasota – kansainvälisoikeudellinen tutkimus*, Helsinki 1938.
15 J.B. Moore, *International Law and Some Current Illusions and Other Essays*, Chicago 1924.
16 R. Sandiford, *Diritto Aeronautico di Guerra*, Rome 1937.
17 H. Blix, *Area Bombardment: Rules and Reasons*, "The British Yearbook of International Law" 1978, vol. XLIX.
18 G. Schwarzenberger, *The Law of Air Warfare and the Trend Towards Total War*, "University of Malaya Law Review" 1959, vol. 1; *idem*, *Das Luftkriegsrecht und der Trend zum Totalen Krieg*, "German Yearbook of International Law" 1959, vol. 8.
19 D.H.N. Johnson, *Rights in Air Space*, Manchester 1965.
20 H. DeSaussure, *The Laws of Air Warfare: Are There Any?*, "International Law Lawyer" 1971, vol. 5.
21 W.H. Parks, *Air War and the Law of War*, "Air Force Law Review" 1990, vol. 32.
22 H.M. Hanke, *Luftkrieg und Zivilbevölkerung*, Frankfurt am Main 1992.
23 E. Spetzler, *Luftkrieg und Menschlichkeit*, Göttingen 1956.
24 H. Lauterpacht, *The Problem of the Revision of The Law of War*, "The British Yearbook of International Law" 1952, vol. 29.
25 P.C. Jessup, *A Modern Law of Nations – An Introduction*, New York 1949.
26 N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006; A.-S. Millet-Devalle (ed.), *Guerre aérienne et droit international humanitaire*, Paris 2015.
27 E. Mensching, *Luftkrieg und Recht: Zur historischen Rolle des Humanitären Völkerrechts in der Einhegung der Luftkriegsführung*, Baden-Baden 2022.

law of the Hague. Many of the valuable speeches and publications in this area were created as part of a series of long-term conferences organized by the Naval Academy in Gdynia in cooperation with the University of Gdańsk. Among the authors also dealing with the above issue, it is worth mentioning works by Marcin Marcinko[28] (on the subject of the targeting), Kaja Kowalczewska (unmanned aerial vehicles),[29] Agnieszka Szpak[30] and Patrycja Grzebyk.[31]

However, during his research, the author did not come across a comprehensive study devoted exclusively to the law of air warfare, which, apart from decoding the concept itself, would present the basic assumptions of the problem. On account of the observations presented above, in the author's opinion, the science of international humanitarian law needs to be supplemented with a publication devoted entirely to the issue which, in its essence, most influenced the development of *ius in bello* in the twentieth century.

Structure of the study

The monograph is divided into ten main chapters.

The first chapter is an attempt to define air warfare as a dimension of military operations. It includes an analysis of the outline of aviation technological development, its genesis as a means of armed combat and its impact on the battlefield in the nineteenth and twentieth centuries. The structure adopted is necessary to understand the significance of the phenomenon and the reasons why this matter has become a fundamental challenge for the science of international humanitar-

28 M. Marcinko, *Prowadzenie wojny powietrznej w świetle międzynarodowego prawa humanitarnego konfliktów zbrojnych* [*Conducting aerial warfare from the perspective of international humanitarian law of armed conflict*], [in:] Z. Falkowski, M. Marcinko (eds.), *Międzynarodowe prawo humanitarne konfliktów zbrojnych* [*International humanitarian law of armed conflict*], Warszawa 2014, pp. 303–348.

29 K. Kowalczewska, J. Kowalewski (eds.), *Systemy dronów bojowych: analiza problemów i odpowiedź społeczeństwa obywatelskiego* [*Combat drones systems: problem analysis and civil society answer*], Warszawa 2015.

30 A. Szpak, *Bezpośredni udział w działaniach zbrojnych w świetle międzynarodowego prawa humanitarnego* [*Direct participation in hostilities in light of international humanitarian law*], Toruń 2013; *eadem*, *Międzynarodowe prawo humanitarne* [*International humanitarian law*], Toruń 2014.

31 P. Grzebyk, *Cele osobowe i rzeczowe w konfliktach zbrojnych w świetle prawa międzynarodowego* [*Personal and material targets in armed conflict from the perspective of international law*], Warszawa 2018. See also: P. Grzebyk, *Human and Non-Human Targets in International Armed Conflict*, Cambridge 2022.

ian law and a subject of particular concern for the international community. To this extent, the analysis also includes the presentation of changes in the doctrine, strategy and tactics of deploying air force to this day.

The second chapter is an attempt to define the concept of "law of air warfare" and place it within the framework of international humanitarian law.

The next element of the argument is the presentation of the framework and foundations of the *ius in bello* regime, which is identical and parallel to the dimension of the "law of air warfare" concept in the scope of objective, subjective, temporal and geographical application, taking into account the circumstances significantly related to the characteristics of air warfare, such as the issue of the first strike and the classification of this act related thereto, being the first element of an armed conflict (chapter three).

The fourth chapter is devoted to the historical development of the history of the law of air warfare until 1923.

The fifth chapter includes a dogmatic and comparative analysis focused on the Hague Rules of Air Warfare of 1923 and assesses their status as customary law during the period preceding World War II. This part also includes an analysis of the gradual "collapse" of the norms of international law as a result of unlimited air warfare in 1939–1945.

The sixth chapter is an overview of the relevant standards of the Additional Protocol (I) applicable to the law of air bombardment, as well as an analysis of codification limits in the law of air warfare.

The seventh chapter presents selected issues related in detail to the status of people evacuating from a damaged aircraft, issues of perfidy, wartime deception, rules governing the marking of military aircraft, as well as standards applicable to the selection of combat equipment.

The eighth chapter is an analysis of the issue of neutrality and its governing rights in the context of air operations.

Chapter nine is a collection of relevant judgments of value in the context of the law of air warfare, issued by various types of bodies: international courts, national courts or committees of inquiry.

Chapter ten is an analysis of contemporary challenges related to the capability of unmanned and autonomous operation in military aviation operations.

The author is aware that a significant part of the book is devoted to *prima facie* historical issues. It should be noted, however, that these solutions are only chronologically earlier, because their value in the legal context, doctrine and practice of various states is still relevant. First of all, it should be noted that to date, no code of air warfare law has been created that comprehensively regulates all issues of this law. Secondly, the special institution of international humanitarian law of armed conflicts is based on history understood essentially as practice pursued by states, which is one of the necessary elements for the formation of a customary norm.

Objectives and main theses of the study

The research aims to fill the gap in the science of international humanitarian law with a dissertation that will be devoted entirely to the issue which most affected the development of *ius in bello* in the 20th century. In addition to presenting the development of the concept of the "law of air warfare", it is necessary to conduct independent research, based on the need to identify fundamental problems related to the interpretation of international humanitarian law standards, defining the scope of the permissible use of aviation in armed conflict, not only as a tool (new weapon), but also as **an autonomous dimension of warfare, parallel to land, naval and cyber combat**. Due to the cross-section of the topic, taking into account the historical perspective to a large extent, it should be noted that international humanitarian law has special regulations resolving the conflict between earlier and later norms. The resolution of the above-mentioned collisions ultimately takes place by applying *lex posterior derogat legi priori* rule, contained in Article 30 para. 3 of the VCLT of 1969, which excludes the application of the earlier treaty to the extent to which it cannot be reconciled with the provisions of the later treaty. The specificity of the international humanitarian law of armed conflicts, especially in the development of the so-called law of the Hague, focuses more on the development and supplementation of earlier provisions with later regulations (*lex posterior "amplificat" legi priori*) than replacing it directly with a newer treaty or international norm.[32] This applies in particular to the provisions of the Fourth Hague Convention and its Regulations on Laws and Customs in War on Land of 1907, the provisions of which form the basis of *ius in bello*. Their validity was not in any way, explicitly or implicitly, undermined by subsequent regulations. Given the above observation, this work cannot be limited only to the most adequately contemporary norm of international humanitarian law in the form of Additional Protocol I, but should, in the author's opinion, include an overview of seemingly historical, but still valid and binding considerations on the grounds of treaties or customs. Hence, a significant part of the study will be devoted to the chronologically first *ius in bello* documents contributing to the formation of the "law of air warfare" concept. This method will be the main factor in structuring argumentation in this work, built around these fundamental, interrelated theses:

1. There is no concept of "law of air warfare" under international humanitarian law, and it is necessary to systematize it.
2. The development of legal norms for air warfare is inherently connected with technological breakthroughs in military aviation, to which international law reacts with a delay, being unable to proactively regulate the issue due to considerations of military nature.

32 R. Kolb, K. Del Mar, *Treaties for Armed Conflict*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 76.

3. The incorrectness of construing Article 25 of the Hague Regulations of 1907 on Laws and Customs of War on Land and its failure to adapt to the conditions of air warfare, assuming the absence of other customary standards governing the principles of air bombardment, meant that air operations during the years 1939–1977 (at the latest from 31 May 1942) could take place in a legal vacuum of *non liquet* situation.
4. Widespread large-scale air operations aimed at the civilian population, undertaken over the years 1939–1970, preclude unequivocal determination of whether these operations were a violation of the existing norms of customary law.
5. The shift away from operations targeting civilian population in the 1970s and 1980s was a result of both a change in the doctrine of aviation deployment in an armed conflict and the development of international humanitarian law.
6. The provisions of the Additional Protocol I are only a partial codification of the law of air warfare, with the remainder being customary norms reflecting the 1923 Hague Rules of Air Warfare.
7. No obligation exists in international law to use precision-guided munitions, but their absence may significantly limit the operational capabilities of the attacking party.
8. The currently existing network of international humanitarian law adequately addresses the challenges associated with the third and partially with the fourth phases of military aviation development.
9. The currently existing network of international humanitarian law is inadequate for "ideal autonomy" in air operations.
10. Investigating and determining violations of the law of air warfare is impeded by the general feature of international humanitarian law in the context of responsibility for violations of the so-called law of the Hague: the prohibition against evaluating the attack by its outcome and relying on a post factum perspective.

Research methodology

The complexity of the issue of air warfare in the context of international humanitarian law requires the adoption of a holistic view, which includes a broad extra-legal context, related to the history of military, aviation technology, the doctrine of the use of aviation in armed conflict and knowledge of the realities of international relations. The legal perspective includes, first of all, an analysis based on existing sources of the law of air warfare, which, due to the lack of a clear definition, need

to be distinguished as having significant value from the point of view of the scope of the monograph. The work primarily uses the historical method both legislatively (as the origin of the "legal regime of air warfare") and non-legislatively (as the source of the concept of "air warfare", the evolution of the doctrine and aviation technology), and the formal-dogmatic method (understood as a critical analysis of the norms of international humanitarian law, international jurisprudence and the positions of international institutions of substantial authority). The use of comparative legal analysis was limited due to the fact that most modern military instructions and directives for the use of force and the so-called Rules of Engagement are classified and cannot be used for academic research.

CHAPTER I

THE PHENOMENON OF AIR WARFARE FROM THE BEGINNINGS OF MILITARY AVIATION TO THE PRESENT DAY

In modern warfare, one`s air superiority is the key prerequisite to ultimately achieving victory in war. In fact since 1939 no country has won a war if it has not possessed air superiority. Also, no large offensive has been possible when the enemy has had control of the air.[1]

1. Definition of air warfare

An important component in the concept of the "law of air warfare" is the phrase "air warfare". Until the early 20th century, there was a distinction between land warfare – involving the actions of the armed forces on land – and a naval confrontation resulting from warship combat.[2] In the period immediately preceding the beginning of World War I, a new form of conducting rivalry between airspace belligerents was noted. Among the above-mentioned types of military operations, with regard to the type of dimension (classical element) in which they take place, one can distinguish operations of a mixed nature, such as air-sea battle (involving aircraft carriers or naval aviation) or land-sea battle (in the form of bombardment of coastal areas).[3]

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1 M.N. Vego, *Joint Operational Warfare: Theory and Practice*, Newport 2009, p. 67.

2 See: D. Jordan, J. Kiras, D. Lonsdale, I. Speller, C. Tuck, C.D. Walton, *Understanding Modern Warfare*, Cambridge 2016.

3 Such was the nature of the clashes during the Second World War related to the actions of aircraft carriers (e.g. the Battle of Midway). The concept of the so-called Air-Sea Battle is one of the core strategic doctrines of the United States of America (see: Department of Defense, *Air-Sea Battle: Service Collaboration to Address Anti-Access and Area Denial Challenges*, Washington 2013).

It is worth starting the analysis of the concept with the presentation of existing definitions. For J.G. Gomez, the term "air warfare" means "is a set of offensive and defensive aerial operations carried out using the air force with the intention of imposing one's will on the adversary by achieving a sufficient degree of aerial superiority".[4] The author's definition draws attention to the connection between air warfare and efforts to achieve a given degree of control of the air, that is, all aviation operations aimed at achieving tactical and strategic success allowing for effective and unimpeded hostile air activity operation of all types of armed forces.[5] The following levels of airspace control are distinguished:

1) *Air parity/disputed control of the air*: a situation in which neither party is able to achieve sufficient control over the airspace, and its own and adversary's air operations are significantly impeded;
2) *Favorable air situation*: a state in which the adversary has limited means of responding to air operations;
3) *Air superiority*: the enemy is unable to significantly affect the execution of air, land and sea operations;[6]
4) *Air supremacy/air dominance*, the adversary is not able to interfere in any way with the execution of operations in airspace.[7]

One step in achieving air superiority is to execute Counterair (CAO) missions with an offensive and defensive dimension, including:

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4 "In principle, it could be said that air warfare is a set of offensive and defensive aerial operations carried out using the air force with the intention of imposing one's will on the adversary by achieving a sufficient degree of aerial superiority. On the other hand, when the court of Montpellier had to define air warfare in September 1945, it did so indirectly, limiting itself to an enumeration of the specific hardware involved, namely, balloons, dirigibles, aeroplanes, seaplanes and helicopters" – J.G. Gomez, *The Law of Air Warfare*, "International Review of the Red Cross" 1998, no. 323.

5 "Air superiority – is a state of dominance of the air force of one side over the air force of the other side, which allows the land and naval forces of the former to conduct operations in a given place and time in the absence of effective counteraction of the air force of the latter" – J. Marszałkiewicz, *Rozwój doktryn powietrznych w okresie zimnej wojny* [*Development of Aviation Doctrines During the Cold War*], "Rocznik Bezpieczeństwa Międzynarodowego" 2011/2012, p. 181; W. Michalak, *Przewaga w powietrzu i z powietrza* [*Dominance in the air and from the air*], "Zeszyty Naukowe AON" 2013, vol. 3(92), p. 210.

6 "The degree of dominance in the air operations of one force over the other, which allows land, sea and air forces to conduct operations at a specific time and place without significant counteraction from the opponent's air force" – NATO AAP-6, NATO Glossary of Terms and Definitions.

7 United States Air Force, Air Force Doctrine Publication 3-01, Counterair Operations, 2023, p. 2; J. Csengeri, *One of the Basic Questions of Warfare: The Levels of Control of Airspace*, "AARMS" 2015, vol. 14, no. 4, pp. 331–340; Doctrine Advisory: Control of the Air July 2017, https://www.doctrine.af.mil/Portals/61/documents/doctrine_updates/du_17_01.pdf?ver=2017-09-17-113839-373 (accessed: 16.10.2020).

1) strike missions aimed primarily at eliminating the enemy's air potential, air infrastructure, air defense, or command centers;
2) SEAD/DEAD missions (Suppression of the Enemy Air Defence/Destruction of the Enemy Air Defence), which aim to neutralize enemy air defenses (mainly Surface to Air Missile sets – SAM), including the use of electronic warfare assets (the so-called EW);
3) escort fighter missions protecting one's own assets operating over the enemy-controlled territory;
4) fighter sweeps consisting in acquiring an appropriate degree of airspace control over a given theater, including by carrying out CAP (Combat Air Patrol) missions.

The *Encyclopaedia Britannica* describes air warfare as "the tactics of military operations and armed forces conducted by airplanes, helicopters, or other manned craft that are propelled aloft. Air warfare may be conducted against other aircraft, against targets on the ground, and against targets on the water or beneath it".[8] The American think-tank RAND defines air warfare as "to disable an opponent's military using strategic strikes from manned and unmanned aircraft".[9]

Chrales H. Stockton pointed out on the eve of World War I that air warfare was ultimately so normatively related to the norms of land and naval warfare that he defined air warfare as "air-land warfare or sea-land warfare".[10] A French researcher J. Kroell, the author of a study dedicated to the law of air warfare in the interwar period, described air warfare as "a set of operations carried out by a belligerent against the armed forces of another belligerent".[11] Gregor Schwarzenberger pointed out that air warfare is a different, both legally and militarily, dimension of conducting military operations, possessing autonomy to some extent, but, according to the author, "both sea and air warfare are eminently suited to weaken enemy resistance but, by themselves, they are not necessarily able to achieve the strategic objective of war" (thus, he questioned the possibility of distinguishing between

8 "Air warfare, also called aerial warfare, the tactics of military operations conducted by airplanes, helicopters, or other manned craft that are propelled aloft. Air warfare may be conducted against other aircraft, against targets on the ground, and against targets on the water or beneath it. Air warfare is almost entirely a creation of the 20th century, in which it became a primary branch of military operation" – Britannica, *Air warfare*, n.d., http://www.britannica.com/topic/air-warfare (accessed: 16.10.2020).

9 RAND, *Air Warfare*, n.d., https://www.rand.org/topics/air-warfare.html (accessed: 16.10.2020).

10 "By this term is included aerial warfare over the land and aerial warfare over the sea, or what has been termed 'aerial land and aerial maritime warfare'" – C.H. Stockton, *Outlines of International Law*, New York–Chicago–Boston 1914, p. 355.

11 "La guerre aérienne est un ensemble d'operations effectués par les forces miltaires d'unbelligerant contre celles de son adversaire" – J. Kroell, *Traité de Droit international public aérien: L'Aéronautique en temps de guerre*, vol. II, Paris 1936, p. 49.

tactical and strategic bombing).[12] The Harvard Instruction of 2009 adopted a fairly broad definition of air warfare as "air operations which are specifically related to hostilities, which in addition to combat operations include surveillance, reconnaissance, search-and-rescue and transport operations, undertaken both in offence or defence".[13]

By analyzing the definitions and concepts presented above, it can be assumed that air warfare is an element of military operations taking place in the airspace between belligerents through their air forces. Air warfare is a conglomerate of combat air operations taking place in airspace, ultimately aimed at achieving supremacy in the air by combating the opposite side's ability to conduct active air operations and its ability to affect ground-to-air combat assets to a minimum.[14] Air operations include operations in airspace, in the air-to-ground and air-to-land modes, which involve supporting land and naval forces and reducing the enemy's potential to wage war.[15] It should be noted that the common denominator of all the definitions presented is the acknowledgement that the objective of air warfare is the totality of combat operations of military aviation during an armed conflict. This term has two dimensions:

1) *sensu stricto* – involving armed interaction between enemy aircraft;
2) *sensu largo* – the totality of combat activity of a military aircraft, including land and naval operations, related to combating surface and ground targets, as well as operations of other types of aircraft in the zone of an armed conflict.[16]

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12 G. Schwarzenberger, *The Law of Air Warfare and the Trend Towards Total War*, "University of Malaya Law Review" 1959, vol. 1, p. 120.

13 "The phrase 'air and missile warfare', as used in the title of this Manual, adverts to air or missile operations that are specifically related to hostilities. In addition to air or missile combat operations (see: Rule 1(c)), air or missile operations include surveillance, weather, reconnaissance, search-and-rescue, transport and other operations that may not be directly related to ongoing hostilities. The inclusion of operations 'whether in offence or defence' is intended to highlight the fact that an operation's tactical or operational character has no bearing on the law of international armed conflict applicable to it. Thus, for instance, there is no distinction in the terminology of this Manual between an offensive attack and a defensive counter-attack" – Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge 2013, p. 9.

14 The literature indicates three degrees of control over airspace under the conditions of armed conflict: 1) a favorable air situation (when the enemy air force is unable to prevent the success of the land forces or the navy), 2) air superiority (when military operations can take place in a given time and space without much impact of the enemy air force, 3) air supremacy (when there is no real impact from the enemy). One can find the concept of the so-called air dominance, where the enemy is prevented from taking any action in controlled airspace.

15 M. Piątkowski, *A Brief History of the Law of Aerial Warfare*, Beau Bassin 2017, p. 9.

16 Y. Dinstein, *The Laws of War in the Air*, "Israel Yearbook of Human Rights" 1981, vol. 11, p. 41.

2. Air warfare from a historical perspective

2.1. The birth of military aviation and its development until 1903

Since the days of Daedalus and Icarus, one of humankind's unfulfilled dreams has been to overcome the force of gravity and invent an object capable of flying. Simultaneously, there appeared a desire to use air as a new dimension for conducting military operations. Robin Higham and Mark Parillo claim that as early as during the campaign led by Alexander III of Macedon in Bactria (located in modern Afghanistan and Pakistan) in 327 BC, the capture of the so-called Sogdian Rock was attributed to his seizure of a position overlooking the besieged defenders.[17] During the Battle of Legnica in 1241, the victory of the Mongol troops is attributed, among others, to the use of chemical concoctions carried on high banners.[18] The Mongols introduced elements of the Chinese art of warfare, where the use of kites as a kind of surveillance and reconnaissance devices was common. Kites, as the prototype of an unmanned platform, are credited with participating in the first aerial bombing. Phetracha, the king of Thailand (then Siam), who reigned from 1688 to 1703, attached gunpowder to kites, which led to reducing the resistance of one of the rebellious provinces.[19] Attempts to build first aerial structures, modeled on the anatomy of flying birds, were the subject of efforts by one of the Renaissance era geniuses – Leonardo da Vinci.[20] It was not until the end of the 18th century that tangible results were achieved, when the Montgolfier family, manufacturing paper in southern France, began the first experiments using a paper dome filled with hot air in order to float in the air. On July 4, 1783, the first balloon (unmanned) successfully got off the ground. On September 19, 1783, the invention loaded with animals flew over the residence of Louis XVI at

17 R. Higham, M. Parillo, *The Influence of Airpower Upon History: Statesmanship, Diplomacy and Foreign Policy since 1903*, Lexington 2013, p. 1.

18 "There was one of enormous size in their (Mongol) army, among other flags. […] at the top of its staff was the figure of a very ugly and monstrous head with a beard, so when the Tatars retreated by one yard and started to flee, the ensign carrying this banner began to wave the head with all his might, and immediately a dense steam, smoke and a breeze so foul that when this deadly smell spread among the troops, the Poles, fainting and barely alive, stopped fighting and became unable to fight" – J. Długosz, *Roczniki czyli Kroniki Sławnego Królestwa Polskiego* [*Annals or Chronicles of the Famous Kingdom of Poland*], Book VII, 1241, http://biblioteka.kijowski.pl/sredniowiecze/d%E5%82ugosz%20jan%20-%20roczniki%20czyli%20kroniki...%20-4%20%5Bksi%E4%99gi%20vii%20i%20viii%5D.pdf (accessed: 3.06.2025).

19 P. Wooning, *A Short History of Kites: History of Flying – The Kites Role in Aviation and the Airplane*, "History of Things Series Book III" 2015, e-book.

20 J.D. Anderson, *A History of Aerodynamics: And Its Impact on Flying Machines*, Cambridge 1997, pp. 21–25.

Versailles for 8 minutes. That same year, on October 15, J.-F. Pilâtre de Rozier and the Marquis d'Arlandes were the first passengers on board the Montgolfier brothers' balloon. Thus began the first era of aviation development; the era of balloon aviation. The invention quickly found real military utility, because on April 2, 1794, the Committee of Public Safety of revolutionary France decided to create the first aviation formation within the French armed forces, which was the First French Aerostatic Corps (*La Compagnie d'aérostiers*).[21] On June 2, 1794, a balloon called *L'Entreprenant* performed the first combat reconnaissance mission, and during the Battle of Fleurus (June 26, 1794) provided the commanding officer of the French army with information on the location of Austrian troops.[22] During the American Civil War in 1861, the armed forces of the Union ("the North") created the Union Army Balloon Corps, with hydrogen-filled balloons as their principal component. Their purpose was similar to that of the French units and during the so-called Battle of Seven Pines between May 31 and June 1, 1861, it is assumed that the intelligence provided by the crews of "Constitution", "Intrepid" and "Washington" saved the troops of the North from being surrounded by Confederate forces.[23] During the siege of Paris in 1870–1871, French balloons provided a supply of materials, information and mail for the surrounded French troops, transporting the most important people in the state (including the head of the French government, Léon Gambette) on their way back.[24]

The first mention of an attempted aerial bombing (interestingly, in an unmanned form) was recorded in 1849, when the Austrian army prepared 200 hot-air balloons, armed with bombs with timers, to bomb Venice, but a headwind prevented it.[25] There also exists information on combat deployment of balloons in the form of bombers during the French intervention in Indochina (during the Battle of Dien Bien Phu in 1884) and the Russo-Japanese War in 1905.[26] What is interesting, in 1812 Russian troops planned to fill a balloon with explosives in order to attack the place where the French emperor was making a stopover.[27]

2.2. Airships and first strategic bombings

The advent of airships marked a new era in the history of ballooning. They were filled with hydrogen and had engines installed, along with spacious and closed nacelles, making airships largely dependent on weather conditions, giving them

21 F. Stansbury Haydon, *Military Ballooning During the Early Civil War*, Baltimore 2000, p. 8.
22 F. Lyall, B. Larsen, *Space Law. A Treatise*, New York 2009, p. 156.
23 H. Driver, *The Birth of Military Aviation, Britain 1903–1914*, Suffolk 1997, p. 131.
24 E. Castrén, *Ilmasota – kansainvälisoikeudellinen tutkimus*, Helsinki 1938, p. 25.
25 J. MacKenzie Bacon, *The Dominion of the Air: The Story of Aerial Navigation*, London 1902, p. 141.
26 R.N. Macomber, *Honor Bound*, Sarasota 1911, p. 264.
27 J. Lefebvre, *Le droit des gens moderne dans la guerre continentale*, Paris 1886, p. 68.

unprecedented operational autonomy at that time. The design was particularly refined by the German constructor Ferdinand Graf von Zeppelin. The increased payload capacity of the new type of aerostats enabled airships to be equipped with the first primitive aerial bombs and even defensive weapons. Before the outbreak of World War I, the German armed forces had 11 Zeppelin-type airships. Concerns about the operation of airships raised concerns in British military circles, including the then First Lord of the Admiralty Winston Churchill, who ordered the Royal Air Force to prepare pre-emptive attacks on Zeppelin bases, as well as to outline the first plans for an organized air defense of London.[28] November 21, 1914, saw the first Allied air attacks on the German airship base in Friedrichshafen. The German command, in turn, believed that air strikes targeting city centers would create a state of panic among the British civilian population, lowering the support of the British public for the involvement of British Commonwealth forces on the continent. Despite having the assets to launch a direct attack against the British Isles, Emperor William II personally opposed the airship attack against the capital of the United Kingdom, fearing casualties among the Royal Family. On January 9, 1915, Admiral Paul Behncke, heading the Admiralty Staff, convinced Chancellor Bethmann Hollweg and Emperor William II to attack London, believing that it could lead to sizable psychological effects.[29] On May 5, 1915, attacking targets located west of the Tower of London was forbidden (this was the result of an earlier air attack on Norfolk, where some of the bombs almost hit the royal residence).[30] It was not until May 31, 1915 that the German zeppelins made their first bombing raid on London. During their campaign, they dropped approx. 6,000 bombs on the British Isles, killing 556 and injuring 1,357 people.[31] The operations of airships were also observed on other fronts of World War I, including in 1914, when the SL-2 unit bombed Warsaw, and zeppelins also operated in the Balkans.[32]

Initially, zeppelins were elusive to British military aviation, and their top ceiling was beyond the reach of anti-aircraft artillery. The era of military aviation based on balloons and airships ended with the invention of incendiary munitions for anti-aircraft artillery. Conventional ammunition of fighter aircraft and gunships either fell short in terms of range or, despite the penetration of the coating of aerostats, did not cause much damage to airships. Only incendiary rounds caused an explosion of hydrogen, which immediately translated

28 T.D. Biddle, *Rhetoric and Reality in Air Warfare: The Evolution of British and American Ideas about Strategic Bombing, 1914–1945*, Princeton 2002, pp. 19–21.

29 S.H. Ross, *Strategic Bombing by the United States in World War II: The Myths and the Facts*, Jefferson 2003, pp. 21–22; E. Spetzler, *Luftkrieg und Menschlichkeit*, Göttingen 1956, pp. 142–143.

30 A. Hyde, *The First Blitz*, Barnsley 2012, pp. 65–66.

31 A. Finlan, *Contemporary Military Culture and Strategic Studies: US and UK Armed Forces in the 21st Century*, New York 2013, p. 109.

32 W. Behrends, *The Great Airships of Count Zeppelin*, 2015, e-book, p. 31.

into such high casualties that zeppelin air raids over the British Isles came to a definitive end.[33] After 1916, all German airships were assigned only to patrols in maritime zones. As a result, in the later period, balloons had only observational nature or were a means of air defense against enemy aviation. During the Battle of Britain, during the phase of bombing English airports, barrier balloons posed a serious obstacle for the low-flying Luftwaffe bomber aviation. During World War II, in an attempt to reverse the fate of the war, the Japanese command approved a plan to send thousands of balloons filled with incendiary charges against the western territories of the United States and Canada (Operation "Fu-Go").[34]

2.3. Development of military aviation on the eve of World War I

A truly breakthrough event of the period preceding the outbreak of World War I was the successful flight by Louis Blériot in 1909 when an airframe of his design crossed the English Channel. Immediately, this technical success resulted in the launch of various types of corporations and flight schools in many states. In October 1910, the first independent air force unit (*Aéronautique Militaire*) was established in France. During the same period, similar formations were formed in Germany (*Fliegertruppen des deutsches Kaiserreich*), Great Britain (*Royal Flying Corps*), Italy (*Regia Aeronautica*), Austria-Hungary, and Russia. On November 1, 1911, Italian Air Force Lieutenant Giulio Gavotti, piloting a Blériot airframe, dropped hand grenades on a position held by Turkish forces – this is considered to have been the first air bombardment in history.[35] The first attempt to bomb a city dates back to the First Balkan War (1912–1913) when a Bulgarian military aircraft bombed Turkish Edirne. In July 1913, during the Mexican Civil War, an airship attacked a warship.[36] The first official aerial victory is credited to Sgt. Joseph Frantz of the French Air Force, who shot down a German biplane near Reims with a machine gun on October 5, 1914.[37] A technical problem related to air combat was the issue of on-board armament installation, in which the lack of coupling between the armament and the circular motion of the propeller led to its damage, the invention of the so-called interrupter gear turned out to be a revolution, in this case.

33 D. Sloggett, *Drone Warfare: The Development of Unmanned Aerial Conflict*, Barnsley 2014, p. 20.
34 R. Mikesh, *Japan's World War II Balloon Bomb Attacks on North America*, Washington 1973, p. 38.
35 A. Tiwary, *Attrition in Air Warfare: Relationship with Doctrine, Strategy and Technology*, New Delhi 2000, p. 55.
36 C.H. Stockton, *Outlines*…, p. 356.
37 J. Black, *The World at War, 1914–1945*, London 2019, p. 82.

2.4. The course of the hostilities during World War I (1914–1918)

The role of the aircraft was initially underestimated and even ignored. At the beginning of the conflict, Gen. Douglas Haig, commander of the Royal Armed Forces in France, claimed that the planes were incapable of replacing conventional cavalry in reconnaissance operations.[38] A similar position was expressed by the future Marshal of France and the author of the final victory during World War I, Ferdinand Foch.[39] These opinions were quickly re-considered. Already in September 1914, the then commander of the British Forces, Gen. John French thanked the Royal Air Corps in a telegram to London for their commitment, courage, and accuracy in collecting data on enemy movements.[40]

During World War I, the principal part of air operations was limited to local support of one's own ground troops and attempts to obtain supremacy within a defined airspace zone. Missions with a greater scope of objectives were hindered by considerations of a technical nature. However, the air operations conducted clearly indicated possible directions for the development of deep strategic bombing – especially the above-mentioned air campaign against the British Isles. It is worth mentioning here the long-distance flights performed by Zeppelin airships and four-engined Gotha airplanes over Great Britain over the years 1915–1918 and attacks on larger urban centers. Some of the successful sorties were achieved by attacking British railway infrastructure – even single, isolated strikes had an impact on interruptions in railway traffic. A key target for the raids against London was the City district and the piers servicing shipping on the River Thames.[41] German Gotha bombers approached the target in formations ranging from a few to a dozen or so aircraft, attacking with bombs weighing up to 500 kg from an altitude of approx. 20,000 feet (above the effective ceiling of British fighters), also at night.[42] The bombings resulted in significant human casualties – in the air raids of June 13, 1917 and July 7, 1917, almost 750 people were killed and wounded in London (the ratio of shipping losses was approx. 121 wounded and killed per one ton of bombs), despite the

38 "I hope none of you gentlemen is so foolish as to think that aeroplanes will be usefully employed for reconnaissance purposes in war. There is only one way for commanders to get information by reconnaissance and that is by the cavalry", quoted after E. Ash, *Sir Fredrick Sykes and the Air Revolution 1912–1918*, London 1999, p. 29.

39 "Aviation is a good sport, but for the army is useless", quoted after S. Tucker, *The Great War, 1914–1918*, London 1998, p. 15.

40 "I wish to bring your Lordships' notice to the admirable work done by the Royal Flying Corps. They have furnished me with the most complete and accurate information, which has been of incalculable value" – J. French, *Complete Despatches of Lord French 1914–1916*, London 2012, p. 12.

41 See: I. Castle, *London 1917–18: The Bomber Blitz*, Oxford 2010.

42 J. Sutherland, D. Canwell, *Battle of Britain 1917: The First Heavy Bomber Raids on England*, Barnsley 2006, pp. 50–63.

installation of one of the first bombsights produced by the Goerz company in the new aircraft.[43] A single attack by Gotha aircraft caused greater casualties and material losses than all previous airship attacks put together.[44] In response to the German attacks, a representative of the House of Commons (Joynson-Hicks) stated that: "Everytime the Germans raid London then British airmen must blot out a German town".[45]

At the last stage of the war, both sides decided to significantly strengthen the potential of long-range air strikes. The German Air Force, using the invention of a new, incendiary bomb called the "Elektron", prepared Operation "Fire Plan" (*Feurplan*), envisaging the use of the entire air force as part of terrorist air raids against Paris and London.[46] Their goal was to drop a large number of incendiary bombs on Allied urban centers and cause devastation powerful enough to trigger mass demonstrations of the civilian population. Then, as part of the Royal Air Force a special unit was created in 1918 under the name *Independent Force*, which, being equipped with new types of bombers, was intended to carry out long-range air strikes against the logistics chain far from the frontline. This was an essential part of the plan to wage war against the German side in the case of its prolongation into 1919.[47] As part of the above, it was intended to cover with strategic bombardments an area with almost 250 targets located throughout Germany.[48]

The practice of the Allies with regard to air bombardment was not consistent. In 1915, the French High Command prohibited bombing military facilities located too close to civilian population in Alsace and Lorraine, extending this prohibition to other areas occupied by German troops.[49] French Army commander Marshal Joseph Joffre ordered the Air Force to target "only military and industrial facilities clearly distinguished from residential areas which should

43 P. Laurie, *Beneath the City Streets: A Private Enquiry Into Government Preparations for National Emergency*, London 1992, p. 16; M. Veuthey, *Histoire du droit international humanitaire dans la guerre aérienne*, [in:] A.-S. Millet-Devalle (ed.), *Guerre aérienne et droit international humanitaire*, Paris 2015, p. 40.

44 J.D. Murphy, *Military Aircraft, Origins to 1918: An Illustrated History of Their Impact*, Santa Barbara 2005, p. 66.

45 A.J. Smithers, *Cambrai: The First Great Tank Battle*, Barnsley 1992, p. 32.

46 D. Preston, *A Higher Form of Killing: Six Weeks in World War I That Forever Changed the Nature of Warfare*, London 2015, pp. 254–255.

47 The introduction of this plan was associated with the emergence of a new aircraft (the four-engined British Handley Page V/1500) capable of reaching the capital of the German Empire.

48 R. Blank, *Strategischer Luftkrieg gegen Deutschland 1914–1918*, n.d., https://www.erster-weltkrieg.clio-online.de/_Rainbow/documents/einzelne/Luftkrieg14_181.pdf (accessed: 3.06.2025).

49 A. Barros, *Strategic Bombing and Restraint in 'Total War', 1915–1918*, "The Historical Journal" 2009, vol. 52, p. 419.

never be hit by bombs".[50] In the case of executing airstrikes against Germany itself, the French Air Force carried out such strikes only as reprisals against the violation of the status of French open cities.[51] The sites of retaliatory attacks were Trier, Essen, and Koblenz.[52] As soon as the armed conflict began, the French military authorities declared some of their cities as open areas. One of the most famous events was the case of the city of Lille in northern France, which, due to the initial rapid progress of German troops, was to be evacuated in order to protect its infrastructure and civilian population. A similar status was announced regarding the town of Nancy. Both urban areas were particularly affected by air strikes. In the case of the latter, it is characteristic that the list of the soldiers fallen in combat written in 1917 included largely the personnel of French infantry.[53] The capital of France, Paris, was also the target of several air strikes, during which the casualties, both dead and injured numbered approx. 850 people.[54] Allied air strikes delivered by the combined Anglo-French and Italian air forces resulted in the deaths of 746 people and injuries to 1,843 people.[55] David Francois pointed out that the production costs of airships and aircraft lost by the German side during combat operations over England were disproportionate to the scale of the damage that had been caused. The total British losses resulting from zeppelin attacks were estimated at approx. 2,000 killed and wounded, and material losses amounted to USD 30,000,000 (at the cost of building one airship of USD 500,000 – out of 140 zeppelins, almost 2/3 were shot down or destroyed as a result of various incidents). However, a different result was obtained – the raids against London forced the British command to increase the presence of the air force and accompanying personnel around the capital of the United Kingdom at the expense of reducing involvement on other fronts.[56]

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50 *Ibidem*.

51 *Ibidem*, p. 420.

52 F.W. Halsey, *The Literal Digest History of the World War: Complied from Original And Contemporary Sources: American, British, French, German and Others, The United States Enters the War Western Front December 1916 – March 1918*, New York 1920, p. 286.

53 E. Badel, *Les Bombardements de Nancy. Ville Ouverte 1914–1918. Églises & monuments meurtris, les victimes, les dégâts*, Nancy 1919.

54 "Les bombardements d'artillerie à longue distance et les premières attaques aériennes tendent également à altérer les distinctions spatiales entre espace de combat et espace civil. Les canons lourds qui bombardent Paris du 23 mars au 9 août 1918 font 256 victimes et 625 blessés, alors que les bombardements, par zeppelin dès 1914, puis par avion, font 267 morts et 602 blessés" – A. Dumenil, *La guerre de 1914-1918 : le sort des civils*, 2018, https://web.archive.org/web/20201026132638/https://www.vie-publique.fr/eclairage/19336-premiere-guerre-mondiale-1914-1918-le-sort-des-civils (accessed: 3.06.2025).

55 A.D. Harvey, *Collision of Empires: Britain in Three World War, 1793–1945*, London 1992, p. 403.

56 D. François, *La première bataille d'Angleterre et la naissance du bombardement strateggique*, n.d., http://lautrecotedelacolline.blogspot.com/2014/07/la-premiere-bataille-dangleterre-et-la.html (accessed: 3.06.2025).

Consequently, it should be concluded that there are two opposing views on the impact of the strategic campaign of Zeppelin airships and Gotha bombers over the years 1915–1918. The first one indicates that despite the lack of measurable material damage, the raids created an atmosphere of general anxiety in the British society, fulfilling the premise of effective bombardment of a terrorist nature, achieving a moral goal. In turn, T.D. Biddle, analyzing the German air campaign against the British Isles, pointed out that, against the predictions of the German command, British public opinion did not succumb to the terror of attacks. Instead, the desire for retaliation against the German side increased significantly.[57] Voices criticizing the impact of strategic bombing on the morale of the civilian population were marginalized by the influence of the theory of the mass use of aviation in a future armed conflict, which was based on false premises.[58] The Ministry of Aviation stated that the negative influence of air bombings in World War I on the morale of the civilian population could be deepened by the destruction of crucial urban infrastructure and sites providing services to the population – against the opposition of the Ministry of War, which claimed the above data to be inaccurate.[59] In particular, the raids of Gotha bombers turned out to be extremely effective and devastating (in relation to the forces and assets employed).[60] Hypothetically, one should consider what further bombing operations would have looked like in the case of a prolongation of the war into 1919, in which both sides could have implemented massive numbers of new bombers (the Allies) or new ordnance (Central Powers) – perhaps the scale of devastation would have significantly exceeded the permissible threshold of social resistance to air bombardment, especially taking into account the developmental and unknown nature of air warfare.[61]

However, the effect of the first *Blitz* over the British Isles, omitted in the analyses of the post-war period, was a purely military effect, which involved the necessity to weaken the presence of the Royal Air Force in other theaters of war, especially in France and the Middle East.[62]

57 T.D. Biddle, *Rhetoric and Reality*…, pp. 22–24. "In the popular view, moral effect and material destruction seemed equal. The experience of London under the Gothas legitimized the demand for retaliation in kind" – G.K. Williams, *Biplanes arid Bombsights British Bombing in World War I*, Maxwell 1999, p. 42.

58 M.N. Vego, *Joint Operational Warfare*…, pp. 75–76.

59 J. Terraine, *The Right of the Line: The Role of the RAF in the World War Two*, Barnsley 2010, pp. 11–12.

60 J. Abbatiello, *Anti-Submarine Warfare in World War I: British Naval Aviation and the Defeat of U-Boats*, Oxon 2006, p. 69.

61 A. Levine, *The Strategic Bombing of Germany, 1940–1945*, Westport 1992, p. 5.

62 D.S. Highman, *One Hundred Years of Air Power and Aviation*, New York 2003, p. 53.

Table 1. Number strategic bombing casualties during World War I in Great Britain and Germany

Bombing technique	Wounded people	Fatalities	Including military personnel	Total weight of bombs (t)	Casualties to bomb weight ratio
Zeppelin airships	1,358	557	58 killed[a]	196[b]	~2,8
Gotha bombers	1900–2000	857	354 killed, 642 wounded	No data	
Total for England	Approx. 3,300	Approx. 1,400	345 killed, 642 wounded	300[c]	~15[d]
Allied air raids	1,843	746	No data	543[e]	~4
Total human losses	Approx. 5,000	Approx. 2,200			

[a] A. Cellier, *Bombing in the World War*, "Popular Aviation" 1934, vol. 14, p. 80.
[b] A. Simpson, *Air Raids on South-West Essex in the Great War: Looking for Zeppelins at Leyton*, Barnsley 2015, p. 158.
[c] D.T. Zabecki, *Germany at War 400 Years of Military History*, Santa Barbara 2014, p. 778.
[d] P. Laurie, *Beneath the City Streets: A Private Enquiry Into Government Preparations for National Emergency*, London 1992, pp. 16–17.
[e] M. Clodfelter, *Warfare and Armed Conflicts: A Statistical Encyclopedia of Casualty and Other Figures, 1492–2015*, Jefferson 2017, p. 429.

Source: A. Wiest, *The Western Front 1917–1918: The History of World War I: From Vimy Ridge to Amiens and the Armistice*, London 2011, p. 29.

Based on the above statistics, the British Ministry of War indicated that as a result of the future air war, the enemy might drop approx. 3,500 tons of bombs on the Isles on the first day and 600 tons on each subsequent day, which would result in 600,000 killed and 1.2 million wounded, assuming a conversion rate of 50 wounded and killed per each ton of bombs dropped.[63] About half a million households would be abandoned and uninhabitable.[64] All these estimates were the result of the analysis of two individual operations carried out in June 1917 by four-engined Gotha bombers.

2.5. The use of aviation in World War I – conclusions

It should be noted that the data presented indicates that approx. almost 70–80% of the casualties of air strikes were civilians. This was due to a combination of a few factors. Certainly, the dominant factor was the archaic quality of the

63 J. Sutherland, D. Canwell, *Battle of Britain 1917*…, p. 145.
64 R.H. Fredette, *The Sky on Fire: The First Battle of Britain, 1917–1918*, Alabama 2007, p. 233.

bombardment technique (which, however, also underwent a significant evolution beginning from attacks without any devices to telescopes calculating wind direction, speed, and the airplane's ceiling), which translated into a serious inaccuracy of attacks.[65] However, what is more alarming, the information about casualties among the civilian population did not cause a change in the way air strikes were carried out or their cessation, but even intensified operations against non-combatants. This leads to the conclusion that the legitimacy of bombing the civilian population was solely based on pragmatic aspects (based on faulty data). That whole discussion took place (apart from the instructions of Emperor William II from 1915), in total detachment from any questions related to the then-applicable law of armed conflicts. Captured in December 1917, the pilots of a downed Gotha bomber testified that their goal was to attack the buildings of the British military leadership while adding that they would not suffer any consequences if the attacks were not carried out accurately because the aim of the air war over England was to break the morale of the civilian population.[66]

3. The doctrine of air warfare in the inter-war period

3.1. Giulio Douhet's concept

There will be no distinction any longer between soldiers and civilians.[67]

Aerial bombardment can certainly never hope to attain the accuracy of artillery fire; but this is an unimportant point because such accuracy is unnecessary.[68]

As indicated earlier, only two cases of bombings from July 1917 largely determined the shape of the concept envisaging the use of air force in a future armed conflict and had an impact on the development of international law. The development of the concept presented first, had its origins in Italy which, in the wartime

65 S.H. Ross, *Strategic Bombing by the United States*…, p. 127.
66 See: A. Gillespie, *A History of the Laws of War: The Customs and Laws of War with Regards to Civilians in Times of Conflict*, Oxford 2011.
67 G. Douhet, *The Command of the Air*, Washington 1988, p. 9.
68 *Ibidem*, p. 17.

and post-war period, became an actual research laboratory and a center of developing ideas for the future air warfare.

Giulio Douhet, who was the author of one of the most recognizable works on the use of aviation in armed conflicts, began his research work, based directly on the experience gained during the war between Italy and the Ottoman Empire in Libya. In his report on the course of the aerial campaign, he highlighted that aircraft could be used to drop bombs on ground targets from a high altitude.[69] Having assumed the command of one of Italian air force units, Douhet fell into general disfavor among military circles even before the outbreak of World War I because he had commissioned the construction of bombers from the Caproni company disregarding the official procedure, and his views were seen as too radical. Eventually, he spent the initial period of World War I as Chief of Staff of an infantry division near the Austrian border. The Caproni works built a long-range strategic bomber – the Caproni Ca.1 biplane – in accordance with Douhet's vision. The biplane was accepted for operational service in the air force already in 1915. At the beginning of World War I, an Italian general proclaimed in his memoranda that the Italian air force needed to build 500 bombers capable of dropping 125 tons of bombs on the most important targets located on the territory of the Central Powers.[70] He claimed that the war effort of Austria-Hungary and Germany could be paralyzed by striking military centers, industrial centers, arsenals and ports, which would raise, among others, the necessity of a mass air strike on the area of Istanbul in order to open the connection between the Mediterranean Sea and the Black Sea.[71] Douhet's criticism of the actions taken by the Italian high command eventually led to his arrest and imprisonment in a military prison, from which he was released in 1917.[72] While serving his imprisonment sentence, the Italian colonel prepared another memorandum, in which he postulated, in turn, a concentric strike against the air forces of the Central Powers, focused on airports and factories, and then an attack against the enemy's civilian population, suggesting preparation of an armada of 20,000 aircraft tasked with delivering 1,000 tons of bombs on targets in Germany and Austria in one raid.[73] After his release from prison, he returned to service in the air force for a short time, only to start his writing career after the war. The work of Giulio Douhet's life was the book *The Command of the Air*, in which he outlined his views on the use of air force in an armed conflict.[74]

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69 T. Hippler, *Bombing the People: Giulio Douhet and the Foundations of Air-Power Strategy, 1884–1939*, Cambridge 2013, pp. 67–68.

70 R.S. Dudney, *Douhet*, "Air Force Magazine" 2011, no. 4, p. 65.

71 J.H. Morrow, *The Great War in the Air Military Aviation from 1909 to 1921*, Tusacaloosa 1993, p. 129.

72 H.D. Sokolski, *Getting MAD: Nuclear Mutual Assured Destruction: It's Origins And Practice*, Carlisle 2004, p. 23.

73 A. Gat, *A History of Military Thought from the Enlightenment to the Cold War*, Oxford 2001, p. 579.

74 G. Douhet, *The Command of the Air*, Washington 1988.

For this Italian theorist, the emergence of an aircraft opened up completely new and unknown opportunities for conducting military operations in areas which previously had been not directly linked to an armed conflict zone. The aircraft redefined the goal of war as such. According to Douhet, it was no longer necessary to overcome the resistance of land forces, as the will to surrender might emerge not only as the result of losing sea or land battles, but also as the result of losing the will to fight.[75] The dimensions of a future conflict would be limited only by the borders of states involved in the war, while the civilian population would become combatants and would be exposed to the consequences of the enemy's aerial offensive.[76] The means to a future victory was the offensive, which was also the best defense against the enemy. The use of independent bomber aviation which cannot be stopped by anti-aircraft defense would be a direct tool in this respect. Douhet based this argument on his (erroneous) analysis of experiences from the period of World War I.[77] The Italian author went so far as to state that anti-aircraft artillery was so inefficient that any investment in its potential would be a waste of state resources.[78] In order to conduct an effective air offensive and, therefore, achieve the eponymous command in the air, the elimination of hostile strategic aviation was required in the first place.[79] The final step would be to break the will to fight among the civilian population through mass air strikes via incendiary and demolition bombs.[80] The remaining part of the work is devoted mainly to recommendations as regards the organization of aviation, the organization of tactical units and advice on the technical development of bomber aviation.

Assessing Giulio Douhet's work from the perspective of international humanitarian law, it should be concluded that the author definitely did not believe in

75 "But that situation is a thing of the past; for now it is possible to go far behind the fortified lines of defense without first breaking through them. It is air power which makes this possible" – *ibidem*, p. 9.

76 "On the contrary, the battlefield will be limited only by the boundaries of the nations at war, and all of their citizens will become combatants, since all of them will be exposed to the aerial offensives of the enemy. There will be no distinction any longer between soldiers and civilians. The defenses on land and sea will no longer serve to protect the state behind them; nor can victory on land or sea protect the people from enemy aerial attacks unless that victory insures the destruction, by actual occupation of the enemy's territory, of all that gives life to his aerial forces" – *ibidem*.

77 *Ibidem*, p. 17.

78 *Ibidem*, p. 18.

79 *Ibidem*.

80 "A complete breakdown of the social structure cannot but take place in a state subjected to this kind of merciless pounding from the air. The time would soon come when, to put an end to horror and suffering, the people themselves, driven by the instinct of self-preservation, would rise up and demand an end to the war – this before their army and navy had time to mobilize at all!" – *ibidem*, p. 58.

any role of *ius in bello* norms with regard to shaping the rights and obligations of belligerents.[81] However, this did not result from experiences of World War I, nor was it a bitter reflection on the condition of international law, which was characteristic of many experts from that period. According to the author, the conclusions from the 1914–1918 conflict did not serve as the basis for suggesting a need to regulate unrestricted air warfare to the international community through the view of the consequences brought about by air bombardment.[82] For the Italian pilot, unrestricted aerial warfare was the guiding principle of any future armed conflict, a *sine qua non* of success. The emergence of the capability to attack civilians located further back behind frontlines was the first achievement of military aviation in terms of its military utility.[83] Nevertheless, in order to achieve this goal, it was first necessary to defeat the enemy's aviation, gain a full command of the air, destroy the enemy's military potential and break the civilian population's will to fight. Douhet emphasized that for bomber aviation there was no principle of distinguishing combatants from non-combatants. Strong industrialized societies worked as a whole to meet military needs and hence bombing concentrated on the civilian population would bring tangible strategic benefits.[84] As a result, bomber crews would not have to carry out their attacks with excessive accuracy. Additionally, while bombarding cities, the crew could use all available air bombs, including incendiary and gaseous substances, to maximize the scope of damage and hinder firefighting operations.[85] Douhet believed in the effectiveness of terrorist bombing, assuming that mass air strikes would ultimately lead to social disintegration, which would force the opposing state's government to surrender.[86] The Italian pilot did not perceive any threat from anti-aircraft weapons, considering them ineffective. The conquest of a given airspace was supposed to be conducted only by the aviation forces which consisted of pursuit and bomber planes.

81 "It is useless to delude ourselves. All the restrictions, all the international agreements made during peacetime are fated to be swept away like dried leaves on the winds of war […]. The limitations applied to the so-called inhumane and atrocious means of war are nothing but international demagogic hypocrisies" – *ibidem*, p. 181. "We dare not wait for the enemy to begin using so-called inhuman weapons banned by treaties before we feel justified in doing the same" – *ibidem*, p. 189.

82 D. Turns, *Targets*, [in:] N.D. White, C. Henderson (eds.), *Research Handbook on International Conflict and Security Law*, Northampton 2013, p. 350.

83 "Behind those lines, or beyond certain distances determined by the maximum range of surface weapons, the civilian populations of the warring nations did not directly feel the war […]. But that situation is a thing of the past. It is airpower which makes this possible" – G. Douhet, *The Command*…, p. 9.

84 A.C. Grayling, *War: An Enquiry*, London 2017, pp. 94–95.

85 "Aerial bombardment can certainly never hope to attain the accuracy of artillery fire; but this is an unimportant point because such accuracy is unnecessary" – G. Douhet, *The Command*…, pp. 19–20.

86 *Ibidem*, pp. 57–58, 126.

The main measure of effectiveness of a given air operation was its plan and appropriate selection of targets, taking into account the priorities of modern aerial warfare, and the maximum projection of firepower. Douhet also drew attention to the aviation's ability to perform the first overpowering strike which could be carried independently of the operations of land and naval forces. To this end, he recommended using aviation even before the official declaration of war.[87]

3.2. Amadeus Mecozzi's concept

Amadeo Mecozzi, a World War I flying ace from Italy, was Giulio Douhet's antagonist in the theoretical field. Mecozzi criticized Douhet for overestimating the value of aviation as a strategic factor. Instead, he suggested focusing on building tactical aviation which would mainly support the progress of one's own ground troops.[88] He considered the theses outlined in the work entitled *The Command of the Air* unacceptable. In addition, he criticized the possibility of directing aerial warfare against civilians.[89] Mecozzi also postulated the development of fighter aircraft and anti-aircraft artillery. It was his projects, not Douhet's ideas, which served as the basis for making binding decisions on the development of the Italian air force in the mid-1930s as tactical aviation, which were essentially defensive in nature.[90]

3.3. "Winged Defense" by William "Billy" Mitchell. American strategic bombing theory

The Battle of Saint-Mihiel, which was fought according to the William "Billy" Mitchell's theory, lasted four days (from September 12 to 16, 1918) and was the largest air battle of World War I. The combined Allied force, consisting of approx. 1,500 planes, faced the approximately 500 German airplanes. The crucial aim of the operation was primarily to destroy enemy aircraft resources in order to achieve air superiority over a given area. Subsequently, reconnaissance aircraft were supposed to provide essential information concerning the location of land units and coordinate artillery fire. The direct support of the American Expeditionary Force via bombing and strafing German troops was the final stage. The operation ended in complete success, and its effects indicated the increasing importance of the air superiority doctrine as a prerequisite for achieving success in

87 *Ibidem*, p. 196.
88 T. Hippler, *Bombing the People*…, pp. 234–235.
89 J.S. Corum, *Airpower Thought in Continental Europe*, [in:] P.S. Meilinger (ed.), *The Paths of Heaven. The Evolution of Airpower Theory*, Maxwell 1997, pp. 160–161.
90 W.J. Boyne, *The Influence of Air Power upon History*, Barnsley 2005, p. 140.

a given military campaign. After the war, Mitchell devoted himself to writing his experiences and recommendations on the deployment of aviation as part of the United States Air Force.

In the preface to his 1921 paper (entitled *Our Air Force. The Keystone of National Defence*), William Mitchell highlighted that the American society as a whole is part of the military personnel which does not have the right to bear arms but has an impact on the general state's military effort.[91] He predicted that the use of combat gas in a future war would lead to the emergence of a great threat of bombardment with bombs filled with chemical weapons. Mitchell believed that the crucial factor in achieving success in air warfare was concentration and offensive action, postulating creation of large air divisions.[92] Contrary to Giulio Douhet, the American theorist accepted the bombardment of inhabited areas only if they were occupied for the needs of the enemy's armed forces. He also suggested the expansion of fighter aviation. Nevertheless, he envisaged that proposals in favor of the so-called unlimited combatant theory would be adopted in the future.[93] Among the targets of bomber aviation were arms production facilities as well as the workers working in them, but such attacks should be carried out with precision. Mitchell seems to have indirectly opposed the German concept of the disappearing principle of distinction, and his work did not explicitly express the conviction whereby bombing civilian population directly was necessary. The American pilot's work had a huge impact on the development of the American vision of strategic bombing as the so-called Industrial Web Theory, which assumed concentric and precise air strikes against economic resources.[94] This doctrine was significantly improved and developed later on as part of the Air Corps Tactical School (ACTS), which in the interwar period was engaged in educating the cadres of the American aviation's future command structures[95] (The Bomber Mafia).

In 1925, William Mitchell published his theoretical work *Winged Defence*. In this book, he drew attention to the air force's capacity for operational freedom and its ability of unhindered strikes against various objects behind the front line to an extent previously unattainable. This was a striking remark as regards the American continent which so far had been considered to be completely beyond the reach of the effective impact of any conflict (except ones in geographical proximity). Mitchell emphasized the growing significance of naval aviation, also within the context of the possibility to significantly reduce the operational capacity of a conventional naval fleet, including the shipment of substantial numbers of troops across the oceans. The author regretted the lack of a clear concept – in

91 W. Mitchell, *Our Air Forces. The Base of National Defence*, Washington 1921, p. xxii.
92 *Ibidem*, p. 37.
93 *Ibidem*, p. 65.
94 J. Brauer, H. van Tuyll, *Castles, Battles and Bombs: How Economics Explains Military History*, Chicago 2009, p. 207.
95 B. Grosscup, *Strategic Terror: The Politics and Ethics of Aerial Bombardment*, Cumbria 2006.

his opinion – for using military aviation in the United States, which hindered construction, organizational and training work.[96] In his view, the U.S. Air Force should be able to repel the enemy's first air strike, shield the mobilization and concentration of its own war potential, and then carry out a strategic strike into the enemy's hinterland.[97]

Even though there was no reference to the need of bombing civilian population as clear as in the case of the Italian analyst's ideas, concepts of targeting bombing operations directly at city centers were not completely unique in American circles. Mitchell, analyzing the course of The Great Kanto Earthquake of 1923, pointed out that the wooden construction of Japanese cities causes them to be an easy target for mass bombardment with incendiary weapons.[98] The regulations adopted by ASTS (Air Service Tactical School – predecessor of the ACTS) in 1926 concerning the use of aviation assumed an bombardment against urban centers as being contradictory to the laws of war.[99] The instructions on how to select a target stated that targeting ought to be guided by the expected effect in the form of material destruction or blow to morale. At the beginning of the conflict, aerial bombardment is a useful means of hindering the enemy's ability to concentrate a military force and its production capability. Attacking residential centers weakens also the enemy's will to fight. The instructions separated the so-called political and strategic goals. It was assumed that bombing political centers is prohibited by the laws of war.[100] Exemption from the above principle was granted if an attack was carried out in the form of reprisals, especially if an area in question was used for manufacturing weapons. The regulations pointed out that it could not be determined unambiguously whether attacks on political centers might actually destroy the enemy's morale. In the case of an air attack on this type of facility, the bombing mission should be carried out similarly to attacks on industrial targets, taking into account additional targets such as public buildings, water intakes, railway lines or power plants. Avoiding inhabited areas was recommended. Using gas bombs was forbidden, as they were prohibited by international treaties.[101]

Gradually, The Industrial Web Theory, already presented by William Mitchell, began to be analyzed at the ACTS school as a way to break the supply chain (vital links) and, consequently, to destroy the industrialized economic system. In the

96 W. Mitchell, *Our Air Forces*…, pp. 19–20.

97 J.S. Underwood, *The Wings of Democracy: The Influence of Air Power on the Roosevelt Administration 1933–1941*, Austin 1991, p. 186.

98 L. Eden, *Whole World of Fire: Organization, Knowledge and Nuclear Weapons Devastation*, New York 2004, p. 81.

99 D. Jones, *Art of War Papers, Perception of Airpower and Implications of the Leavenworth Schools: Interwar Student Papers*, Fort Leavenworth 2014, p. 36.

100 Air Service Tactical School, *Bombardment*, Washington 1926, p. 63. Air Service Tactical School was transformed into the Air Command and Tactical School in 1926.

101 *Ibidem*, p. 64.

mid-1930s it was concluded that the best approach to achieving definite success in this respect was high-altitude daylight precision bombing. As pointed out by Pape, the concept of attacks directed against civilian population was never completely abandoned.[102] In 1939, exercises which simulated attacks on urban centers were organized. Beau Grosscup reported that they resulted in a report postulating a massive attack on the civilian population of Berlin.[103] It should be noted that in 1940, Gen. Henry H. "Hap" Arnold (later Commander of the European Theatre of Operations) stated that "utilizing incendiary ammunition against cities is contrary to our national policy of attacking military objectives".[104]

Interesting information on the accuracy of aerial bombing in the late 1930s was presented by F.E. Quindry. He argued that during the 1927 exercises simulating an attack on a bridge from a height of 6,000 feet, only 27% of the bombs hit the target.[105]

3.4. Hugh Trenchard. The British concept of conducting aerial warfare

Hugh Trenchard, the first Chief of the Air Staff, served as the Marshal of the Royal Flying Corps during World War I from 1915 to 1918. In the summer of 1918, he assumed the command of the Independent Air Force. Later that year, he assumed the newly created position of Chief of the Air Staff, and later took over the leadership of the newly established Royal Air Force (RAF). Memoranda and official announcements addressed to various departments of the government of the United Kingdom are the main record of Trenchard's views on the use of air forces, in which he included observations which constituted an analysis of his own frontline experiences. In January 1919, he presented his report on the operations of the Independent Air Force, describing the course of the aerial bombardment of industrial targets (poison gas factories, refineries, factories producing aircraft and engines) in the Ruhr area. Trenchard indicated that the influence on the morale exceeded the actual material losses in a ratio of 20:1.[106] After the war, committees

102 R.T. Finney, *History of the Air Corps Tactical School 1920–1940*, Washington 1992, p. 68; R.A. Pape, *Bombing to Win: Air Power and Coercion in War*, New York 1996, p. 66.

103 B. Grosscup, *Strategic Terror*…

104 M. Hastings, *Retribution: The Battle for Japan*, *1944–45*, New York 2007, p. 283.

105 F.E. Quindry, *Aerial Bombardment of Civilian and Military Objectives*, "Journal of Air Law and Commerce" 1931, vol. 2, p. 501.

106 "By attacking as many centers as could be reached, the moral effect was first of all very much greater, as no town felt safe, and it necessitated continued and thorough defensive measures on the part of the enemy to protect the many different localities over which my force was operating. At present the moral effect of bombing stands undoubtedly to the material effect in a proportion of 20 to 1, and therefore it was necessary to create the greatest moral effect possible" – *Bombing Germany: General Trenchard's Report of Operations of British Airmen Against German Cities*, "Current History" 1919, vol. 10, p. 152.

of inquiry were set up to investigate the effects of the bombings. Being unable to establish clear damage to equipment and infrastructure, they focused on highlighting the impact of the psychological effect of the bomb raids.[107] In 1919, Trenchard presented the concept of a permanent organization of the Royal Air Force to the then Secretary of State for Air Winston Churchill. Trenchard considered offensive bombing strikes as an essential element of a future victory in the conflict, but he did not regard aviation as a means capable of winning a war alone.[108] The evaluation of Trenchard's vision regarding the bombing of urban areas is not a clear-cut one. This British commander indicated that infrastructure operating for armament production should be the target. According to P. Meilinger, Trenchard did not approve of terrorist bombings aimed directly at civilian population.[109] Interestingly, in 1928, in one of his memoranda, he emphasized the existence of the outlines of the law of air warfare, declaring it illegal to attack an urban area solely for terrorist purposes, allowing collateral damage to occur in connection with an attack on legitimate military objectives (see chapter below).[110] On the other hand, evaluating Trenchard's statements from 1923, A.C. Grayling, suggested that the British commander in certain circumstances approved an attack delivered directly at civilians.[111] This raises the issue of the so-called morale bombing, where psychological effects would be achieved during bomb raids directed against factories producing equipment for the armed forces, and the effects of which would be felt by those working in these factories as a side effect.[112] For the British marshal, the bomber air force was supposed to become the main arsenal of an independent air force, capable of launching strikes against key elements of the armament industry, causing an impact on the psychology of the society of the adversary to achieve several goals at once.[113] The first one of those was to cause a decrease in the productivity of the workforce and in armament production potential. The second was to achieve a particular psychological effect impacting the society, intended to induce a collapse of morale and a rebellion against the government. The third was to

107 J. Buckley, *Air Power in the Age of Total War*, London 1999, p. 78.

108 T.D. Biddle, *Rhetoric and Reality*…, pp. 94–95.

109 P.S. Meilinger, *Airwar: Theory and Practice*, Oxon 2003, p. 50. Similarly, N. Jones, *The Beginnings of Strategic Air Power: A History of the British Bomber Force 1923–1939*, Oxon 2003, p. 44.

110 H. Trenchard's statement quoted from: P.J. Goda, *The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War*, "Military Law Review" 1993, vol. 33, p. 99.

111 A.C. Grayling, *Among the Dead Cities: Is the Targeting of Civilians in War Ever Justified*, London 2006, p. 113. Trenchard's comments concerned the vision of a possible conflict with France (which was considered possible after World War I). According to British theorists, France would not be able to withstand massive air strikes due to the significant weakening of the state's position due to the immense human losses during World War I.

112 P.S. Meilinger, *Airwar*…, p. 42.

113 W.J. Boyne, *The Influence*…, p. 130.

impede the adversary's ability to achieve the target production levels, as well as the ability to move and mobilize ground troops – as a conglomerate of economic and moral factors.[114] The ultimate goal of an air campaign was to enable their troops to prevail on land and at sea.[115]

Trenchard was also the first one to identify a list of necessary targets in the future strategic campaign, such as mines, smelters, chemical and munitions plants, the armaments industry, factories producing components for aviation and submarines, and shipyards.[116] For the British marshal, a great air operation was to be preceded by a decisive air battle, and the strike against airfields was to be of only secondary importance (this was related to his experiences from World War I when attacks on enemy air bases were not sufficiently effective).[117] In his reflections, the British theorist defined the purpose of air warfare as "forcing the enemy government to capitulate by pressure from the population, in exactly the same way as in the case of famine or blockading the state".[118] In a similar context, he also pointed to how the concept of a military objective was understood, i.e. "objectives which will contribute effectively towards the destruction of the enemy's means of resistance and the lowering of his determination to fight".[119] The above conclusions were concluded as part of the official doctrine for the deployment of the Royal Air Force of 1928, the so-called Royal Air Force Manual AP 1300.[120] The concept outlined in this document indicated that bombing should generally be limited to a specific purpose, assuming also the creation of a knock-on effect on morale.[121] The document emphasized the strategic paradigm, through which the use of offensive measures is the best form of protection against a hostile air attack.[122]

Despite the fairly straightforward definition of goals and means for achieving a future victory in an armed conflict, the introduction of Trenchard's idea in its entirety required an appropriate transition from the concept to the means. Just like all of Europe, in the 1920s and 1930s. the United Kingdom was also shaken by a major financial crisis, which significantly reduced expenditure on the needs of various armed forces, especially offensive armaments. Thanks to the efforts of its

114 N. Jones, *The Beginnings of Strategic Air Power*…, p. 44.
115 C.A. Synder, *Contemporary Security and Strategy*, New York 1999, p. 42.
116 M.W. Kirby, *Operational Research in War and Peace: The British Experience from the 1930s to 1970*, London 2003, p. 134.
117 C.K.S. Chum, *Aerospace Power in the Twenty-First Century: A Basic Primer*, Alabama 2001, p. 51.
118 T. Hippler, *Bombing the People*…, p. 251.
119 W.H. Parks, *The Rolling Thunder and the Law of War*, "Air University Review" 1982, vol. 33, no. 2, p. 16.
120 D. Jordan, *Air and Space Warfare*, [in:] D. Jordan, J. Kiras, D. Lonsdale, I. Speller, C. Tuck, C.D. Walton, *Understanding Modern Warfare*, Cambridge 2016, p. 265.
121 R.T. Walkeman, *The Science of Bombing: Operational Research in RAF Bomber Command*, Toronto 2009.
122 P. Gray, *The Leadership, Direction and Legitimacy of the RAF Bomber Offensive from Inception to 1945*, Birmingham 2012, p. 63.

commander, the Royal Air Force retained its funding. The air force also proved to be an effective and inexpensive tool for maintaining British rule in the colonies as part of the so-called air policing.[123] On the other hand, strategic potential development progressed at an extremely slow pace, as the priorities related to the focus on the defense of the British Isles and the lack of a real threat to international security did not stimulate development either organizationally or technically. The situation changed only by actual steps taken by the Third Reich, which in the mid-1930s began to openly violate the provisions of the Treaty of Versailles of 1919, through the remilitarization and reconstruction of its own air force. During this period, a decision to rebuild the RAF's potential was implemented by, among others, constructing new Vickers Wellington bombers. Simultaneously, in almost all states of the world possessing extensive air fleets, successful work was conducted on the development of a single-person, heavily armed low-wing fighter with capabilities to freely intercept bombing raids. However, this did not affect the revision of the British belief in the possibility of exerting influence on the Third Reich in the future war mainly through air operations. As a result, the British vision of air warfare was based more on suggestions than on solid data provided by RAF exercises in the second half of the 1930s when the presence of Hurricane and Spitfire fighter aircraft revealed a serious threat to bombing operations.[124]

Analyzing Trenchard's doctrine from an international legal perspective, one ought to stress that the British concept of aviation did not include the civilian population itself being made the object of attack, based on certain foundations of *ius in bello*[125] norms in this regard. However, psychological impact was accepted as an inevitable side effect. This raises important questions because the boundary between "economic/moral" bombing and deliberately attacking civilians seems extremely vague.

3.5. The doctrine of air necessity by James M. Spaight

One of the more interesting texts by J.M. Spaight from 1925 referring to doctrinal and legal issues is worthy of note. In it, the British author used the so-called theory of air necessity, understood as the right to legally destroy certain private property,

123 In 1925, three times as many air forces were stationed in the British colonies as in Great Britain itself. See: M. Kolinsky, *Law, Order and Riots in Mandatory Palestine, 1928–1935*, London 1993, p. 23.

124 It is worth pointing out, by way of a reverse example, that the Polish Air Force exercises organized in 1938–1939, involving a modern bomber of the "Łoś" type, showed that PZL-11 fighter aircraft could not match the speed of modern designs.

125 "Trenchard's targeting scheme against morale was vague, but he insisted on following international law, limiting collateral damage, selecting targets in urban areas for their military significance, and attacking vital centers in the infrastructure and production systems" – D.R. Mets, *The Air Campaign. John Warder and the Classical Airpower Theorists*, Alabama 1999, p. 23.

if it were justified by military necessity and the justified interest of the combatant.[126] This could take the form of justified destruction being an inherent component of warfare, or it could be mindless and unrestricted annihilation, unrelated to the achievement of a specific operational goal. Spaight believed that the right to so-called legal destruction was unquestionable in relation to warfare on land and at sea and, adhering to the same principle, should be granted to the crews of military aircraft. The British researcher of air warfare believed that the goals and effects of an air force would not be limited only to the destruction of objects of military importance but would achieve a political and psychological goal that would affect all levels of the functioning of a modern, industrialized state.[127]

3.6. Polish perception of the concept of aviation deployment in the interwar period

> *Just counting on humanitarianism in a future war would be a tragic mistake. For peoples of good will, it would mean being at the mercy and disfavor of those adversaries who, regardless of international prohibitions, are preparing to use all possible means of destruction in the event of war.*[128]

Aviation theory and doctrine were extensively addressed by publications in "Przegląd Lotniczy", a monthly published by the Air Force Command (Dowództwo Lotnictwa). A lot of research was devoted to reflections on the issue of effective operation of aviation in wartime conditions. Here, the strong expertise, accuracy and relevance of observations are worthy of note. Major Olgierd Tuskiewicz pointed out that the main focus of Douhet's considerations, including the vision of victory in an armed conflict by breaking the will to fight in civilian population through mass bombing of residential areas, is not supported by existing data and takes into account too many uncertain premises.[129] The author noted that achieving accuracy and actual elimination of a given target requires a significant amount of resources and time, often disproportionate to the possibility of

126 J.M. Spaight, *The Doctrine of Air-Force Necessity*, "British Yearbook of International Law" 1925, vol. 1, p. 2.

127 *Ibidem*, p. 4.

128 W. Sikorski, *Przyszła wojna* [*Modern Warfare*], Kraków 2010, p. 40.

129 "Douhet, on the other hand, claims that by economically devastating the enemy state from the air, as this is the essential meaning of depleting resource sources by bombing, one can cause the moral collapse of the enemy. Possibly. But there is neither certainty nor evidence about this. One cannot bet too much on the card of the enemy's spiritual weakness" – O. Tuskiewicz, *Rozważania nad doktryną Douheta* [*Considerations on the Douhet doctrine*], "Przegląd Lotniczy" 1938, no. 1, p. 5.

involving ground troops. The views of Major Tuskiewicz also indicated the possibility of an effective impact of defensive aviation, which, by avoiding a decisive, final air battle, might significantly impede the ability of a numerically superior air force fielded by the enemy to achieve air superiority.

General Ludomił Rayski, who in the mid-1930s assumed the responsibility for the development of Polish military air force, ought to be mentioned here.[130] Rayski was influenced by Douhet's idea and, as a consequence, decided to allocate modest funds and resources to the production of bombers (PZL-37 "Łoś") or heavy escort fighters (PZL-38 "Wilk"), endowing the air force with offensive capability.[131] The failure of the latter design resulted in the waste of valuable time and resources that could have been used to modernize outdated fighter planes. Thus, Douhet's concept was applied under economic and strategic circumstances not conducive to its full implementation, and in addition led to a delay in the key modernization program intended for Polish fighter aircraft. As for the established bomber air force units, such as the Bomber Brigade, there were no clear concepts for their use, which resulted in wasting the offensive potential of PZL-37 "Łoś" aircraft and the destruction of Bomber Brigade squadrons in tactical operations. During the period of the Second Polish Republic, too much time and scarce, yet precious financial resources were channeled into the design and production of aircraft possessing questionable suitability for the only defensive aviation model reasonable in Polish geopolitical conditions, based primarily on interceptor aviation.[132]

Lieutenant Colonel Stanisław Jasiński is considered to be a precursor of the air warfare concept in the Polish doctrine of using aviation.[133] The author noticed the interplay of the aircraft's technical combat capabilities along with the need to embed it as part of the strategic and tactical use of aviation.[134] The Polish author

130 A. Stachula, *Obrona powietrzna Polski 1918–1939* [*The air defence of Poland 1918–1939*], Jelenia Góra 2009.

131 J.B. Cynk, *Siły lotnicze Polski i Niemiec: Wrzesień 1939* [*Air Forces of Poland and Germany: September 1939*], Warszawa 1989, s. 65–70.

132 "The utopian idea of Douhet, assuming the rapid destruction of the enemy's entire aviation, through sudden and massive airstrikes on its airports, proved to be inaccurate. This was demonstrated, among others, by the civil war in Spain. It was also noticed by Polish specialists. Some of them had already realized this much earlier, when officially the world was still 'intoxicated' by the Douhet theory in its original version. Despite many well-considered and correct opinions, throughout the inter-war period aviation was dependent on the ground forces; and these persistently promoted views which, in the light of the French variant of Douhet theory, promoted mainly bombing and observation (accompanying) aviation" – W. Michalak, *Wpływ teorii Douheta na rolę lotnictwa w walce zbrojnej* [*The impact of Douhet's theory on the role of the air force in an armed struggle*], "Zeszyty Naukowe Akademii Sztuki Wojennej" 2014, no. 97, p. 136.

133 T. Kmieciak, *Węzłowe problemy wykorzystania lotnictwa w przyszłej wojnie w polskiej myśli lotniczej lat 1919–1939* [*Core Problems of the Use of Aviation in the Future War in Polish Aviation Thought in the years 1919–1939*], "Słupskie Studia Historyczne" 2003, no. 10, pp. 134–135.

134 S. Jasiński, *Wojna powietrzna* [*Air War*], "Przegląd Lotniczy" 1929, no. 3, p. 179.

argued that aviation should not only support ground forces but make the enemy nation "unable to continue the war".[135] Jasiński recognized the need to create an independent air fleet, since its characteristics and principles of operation are so different from the traditional understanding of naval and land warfare that it is impossible to find any analogy. From the point of view of the subject of the work, the author also makes an interesting analysis of the contemporary aviation press in the context of assessing the effectiveness of the protective umbrella provided by international law. In this regard, Jasiński did not express a clear position, noting that there was an objective difficulty in predicting the course of the war, and thus the need to use aviation in the context of close support of the troops or strategic attacks in support areas beyond the frontline. At the same time, the author argued that the next great air war will affect the population of the enemy state, as an essential force maintaining and working as part of the armament effort of the state.[136]

In the mid-1930s, General Władysław Sikorski, who held many top command positions during the interwar period, wrote a paper entitled *Przyszła wojna* [*Future War*], in which he analyzed in detail the causes, course and means likely to be used in a future conflict. An entire chapter of the discussion was devoted to military aviation, which, as the future Commander-in-Chief noted, underwent huge technical transformations compared to the World War I period. In his vision, Sikorski believed that bombing attacks would first target the locations of enemy troops concentration and transport infrastructure, before attacking industrial bases and other strategic targets. He emphasized that fighter aviation was already so advanced in design that it could fend off bombing sorties to a sufficient degree and protect one's own key targets and facilities, which necessitates the presence of escort aircraft accompanying one's own offensive aircraft.[137] The comment of the long-serving minister of military affairs is extremely accurate in this respect and at the same time completely contrary to a belief popular in Western military circles whereby "the bomber will always get through".[138]

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135 *Ibidem*, p. 180.

136 "The air war made it possible to attack the spirit of the fighting masses at its source – by attacking the spirit of the homeland, both in the foundations of their technical supply and in the war industry. So whether the air warfare will be directed against masses of troops concentrated at the front, or against the population of the enemy state as a source of forces, against the war industry – it will always be directed solely and directly against the factors sustaining the resistance of the nation against which we are fighting and what in today's concept, much more widespread than it used to be, we will define by "the armed forces"" – *ibidem*, p. 184.

137 "In these conditions the mastery of the air could very well constitute at the beginning of a war the same kind of chimera as the mastery of the seas. And this is a prerequisite for the Douhet theory to prove itself in a future war" – W. Sikorski, *Przyszła*…, p. 216.

138 This is an excerpt from British Prime Minister Stanley Baldwin's famous statement of 10th November 1932, commenting on the proceedings at the 1932–1934 Conference on Disarmament in Geneva. G. Thorburn, *Bomber Command 1939–1940: The War before the War*, Barnsley 2013, p. 1.

4. Aviation in the interwar period

4.1. Air policing

The air policing doctrine adopted as a concept of military-political rule in the colonial areas of the British Empire was the result of mainly economic considerations. After the end of the war in 1918, a decision was made to radically reduce expenditure on maintaining all types of British armed forces. Budget cuts also affected garrisons outside the British Isles. The 1919 uprising in Somalia exposed the problem of the weakness of British rule in more remote parts of the Empire, which required great expenditure and permanent military presence. Meanwhile, the British air force which had just become an independent branch – the Royal Air Forces – was experiencing a developmental crisis. In order to maintain the independence of the aviation component, the then RAF commander Hugh Trenchard proposed that instead of expensive transport and maintaining a land contingent, the task of suppressing the rebellion should be assigned to the air force. Unknown to the indigenous peoples, the new combat assets performed their job, effectively destroying the resistance points of the insurgents and supporting their own ground troops. The success of the first campaign convinced British political circles that aviation in colonial territories was a kind of so-called air police, whose task was primarily to perform policing and suppressive tasks in colonial territories.[139] The air force repeated its success during operations carried out in Afghanistan – where air strikes were reported to have caused damage among non-combatants along the Afghan-Indian border, which was met with accusations made by the Afghan side and rebutted by the British.[140] The RAF took over the main operational role in the actions carried out in the Middle East, Iraq, Palestine and the so-called Transjordan, which were territories administered under the League of Nations mandate.[141] In the 1920s, British aviation, owing to its bombing and transport operations, repeatedly intervened with success against various types of rebellions and insurgencies. This reaffirmed the military circles about the need to maintain an air force, as well as in the erroneous belief that an armed conflict could be resolved through air operations

139 D.E. Omissi, *Air Power and Colonial Control: The Royal Air Force 1919–1939*, Manchester 1990, pp. 35–38.

140 "During British operations against Afghans on the northwest frontier of India, the General Officer commanding reported on May 17, 1919, that nearly 12 cwt. of explosives had been dropped on Basawal, on the ridge to the west of Dakka, and on Jalalabad; and the Afghan Commander-in-Chief declared that these British air bombs inflicted heavy losses on the civil population and army of Afghanistan" – E. Colby, *Aerial Law and War Targets*, "American Journal of International Law" 1925, vol. 19, p. 711.

141 P. Towle, *The RAF and Air Control between the Wars*, "Proceedings of the Royal Air Force Historical Society" 1990, issue 8, September, pp. 7–25.

alone. Similar activities were carried out by the French air force – for example, the bombing of Damascus in 1925.[142] In the later doctrine of the so-called counterinsurgency operations the British-French experience related to conducting air operations as part of the so-called air policing is often referenced.

4.2. Air warfare during the interwar period

In the 1930s, before the outbreak of World War II, extensive use of aviation occurred in the Sino-Japanese conflict and during the Italian invasion of Ethiopia. Given their nature, these conflicts were typically asymmetric. It is worth mentioning that the first example of carpet (surface) bombing directed against civilians was the attack on the residential districts of Shanghai-Chapei in 1932, where planes taking off from two Japanese aircraft carriers killed many non-combatants and caused significant damage to civilian property.[143] Both of these conflicts, as well as the Spanish Civil War, were the object of widespread interest and discussion within the League of Nations and will be discussed in the relevant chapter, due to their impact on the development of the law of air warfare.

5. An overview of the operations of air forces during World War

5.1. Initial period

Trenchard's concept of assuming the dominance of bomber forces over any other type of air force, as well as indirectly the concepts of Douhet and Mitchell, despite their publicity and popularity, were not devoid of flaws, which were

142 M. Provence, *French Mandate Counterinsurgency and the Repression of the Great Syrian Revolt*, [in:] C. Schayegh, A. Arsan (eds.), *The Routledge Handbook of the History of the Middle East Mandates*, New York 2015, p. 140.

143 "I watched last Friday the aerial bombardment, without warning, of an open and defenseless city, and saw how Japanese spectators on the same roof with me capered in joy, shouting, 'Banzai' (hurrah) and embracing each other as explosions spread fire and death in Chinese territory. It was a terrible sight, this dropping of bombs on a crowded territory far down below, death and mangling were the fate of many Chinese, caught without a chance" – W. Brown, *Japanese bombard civilians in Shaghai's Chapei*, 1932, https://web.archive.org/web/20210211132239/https://www.upi.com/Archives/1932/02/02/Japanese-bombard-civilians-in-Shanghais-Chapei/1703141119892/ (accessed: 3.06.2025); D.A. Jordan, *China's Trial by Fire: The Shanghai War of 1932*, Ann Arbor 2001, p. 47.

emphasized already during the interwar period. In addition, against all appearances, few states decided to rely on the concept of building an air force in accordance with the model proposed by air war theorists, for reasons ranging from utilitarian to economic ones. From the beginning of its existence until the last day of the war, the Luftwaffe remained a purely tactical air force.[144] This was linked to adopting Gen. Heinz Guderian's view as the leading strategic one. This stance was expressed in his book entitled *Achtung Panzer!*, which was the "foundation" of the art of blitzkrieg, in which aviation was to play the role of air artillery and thus support the offensive of ground troops.[145] That is why the Luftwaffe ordered primarily tactical bombers, which were intended to operate near the front, excluding long-range strategic strikes from its concept.[146] A new development was the introduction of a new type of weaponry in the form of the Junkers Ju 87 dive bomber (the so-called Stuka), in which the advantages of delivering precise strikes at tactical targets were noticed.[147] However, it was only at the end of the 1930s that the American side decided to build a heavy strategic bomber (Boeing B-17 Flying Fortress). At the design stage of this aircraft, they considered the possibility of implementing a strategy of precise air strikes.[148]

From a military viewpoint, both the first Commander of the Royal Air Force and Giulio Douhet underestimated the capabilities of a well-organized anti-aircraft defense, based on the cooperation of artillery, observation points, and fighters. The potential of independent bombing raids, which were not accompanied by fighter cover, was overestimated. The first examples of the imperfection of Trenchard and Douhet's concepts in this matter were made visible by the clashes during World War II in its initial period. From the perspective of the Polish September Campaign in 1939, it is worth adding that the Luftwaffe's achievement of complete air superiority did not guarantee a significant reduction in losses suffered by the German air force.[149] The

144 D. Uziel, *Arming the Luftwaffe The German Aviation Industry in World War II*, Jefferson 2012, pp. 51–52.

145 J.S. Corum, *A Comprehensive Approach to Change: Reform in the German Army in the Interwar Period*, [in:] H. Winton, D. Mets (eds.), *The Challenge of Change Military Institutions and New Realities, 1918–1941*, Lincoln 2000, pp. 53–54.

146 Personally, Adolf Hitler was influenced by the "terrorist" aspects of air bombing, which became apparent during the creation of the Protectorate of Bohemia and Moravia and in his threat, addressed to the President of Czechoslovakia, of the appearance of bombers over Prague in March 1939. P.S. Meilinger, *Airwar*…, p. 29.

147 R. Hargreaves, *Blitzkrieg Unleashed: The German Invasion of Poland, 1939*, Mechanicsburg 2008, p. 50.

148 A. Levine, *The Strategic Bombing*…, pp. 13–15.

149 The final total of Luftwaffe losses in 1939 is still the subject of controversy among historians. Some of the aircraft classified as damaged were later refurbished and returned to service. Careful estimates suggest the number of approx. 200–300 aircraft damaged or shot down by Polish fighter aircraft or anti-aircraft artillery, which amounted to approx. 10–20% of the initial level. C. Bowyer, *Air War Over Europe: 1939–1945*, Barnsley 1981, p. 20.

possibility of destroying the enemy's air force with a first and incapacitating strike were overestimated (e.g., as a result of evacuating the Polish Air Force to pre-prepared field runways). Despite limited resources, the well-organized air defense of Warsaw was able to successfully stave off attacks on the city until September 7, 1939.[150] Tactical operations aimed at attacking troop concentration areas, marching routes, or supporting their own troops turned out to be much more successful. It is worth mentioning that the air strikes of September 17, 1939 aimed at the "Poznań" and "Pomorze" Armies led to the dispersion of Polish troops and the final loss of their combat capability. On the other hand, sorties undertaken by bombers of the "Łoś" and "Karaś" types aimed at stopping armored columns resulted in great losses.[151] On December 18, 1939, the Vickers Wellington bombers sent in the first strategic mission of the Bomber Command were tasked with attacking the German fleet in the Heligoland Bight. As a result of the expedition, 50% of the aircraft were lost.[152] On May 14, 1940, an expedition of Blenheim type bombers (intended to stop the German breakthrough in the Ardennes) suffered heavy losses as a result of anti-aircraft artillery and Luftwaffe (41 out of 70 aircraft were destroyed).[153] Consequently, the Royal Air Force ceased to conduct airstrikes by day. However, the idea of strategic air strikes was not completely abandoned, and its rebirth was associated with the emergence of a suitable weapon of war, which was a heavy four-engined strategic bomber.

5.2. The development of the concept of "morale" bombing

The Battle of Britain was an important lesson for air warfare theorists. The clashes over the British Isles proved that a small, but well-organized and equipped anti-aircraft defense (based on a system already developed and proven during World War I) is able to effectively prevent a belligerent with a significant numerical superiority from achieving supremacy in the air.[154] The Luftwaffe – like, for example, the French or Polish air force – was still conceptually only a tactical air force.

150 See: J. Pawlak, *Brygada pościgowa – Alarm!* [*Pursuit brigade – Alert!*], Warszawa 1977.

151 "Of the aircraft used in 1939, Poles lost approx. 120 planes of "Karaś" type, or approx. 86% of baseline. It was the highest loss rate among all types of combat aircraft of our air force. The reason for this is that the "Karaś" planes were treated as multi-purpose aircraft and were given extremely difficult and numerous tasks, which the machines were not designed to perform. This is because the "Karaś" was designed to perform reconnaissance tasks and light bombardment from level flight at medium altitude. Meanwhile, in 1939, it had to fulfil the function of a dive bomber and at the same time an attack aircraft, attacking point targets – armoured vehicles" – T. Kopański, *PZL.23 Karaś*, "Polskie Skrzydła" 2013, no. 17.

152 T.D. Biddle, *Rhetoric and Reality*…, p. 183.

153 C. More, *The Road to Dunkirk: The British Expeditionary Force and the Battle of the Ypres-Comines Canal, 1940*, Barnsley 2013, p. 11.

154 A. Classen, *Dogfight: The Battle of Britain*, Auckland 2012, p. 16.

German bombers could not play the role of independent strategic bombers, and their fighter planes were not able to effectively protect bombing sorties due to their range (Messerschmitt Me 109 fighters were able to stay in the operational area over Great Britain for only approx. 10–20 minutes).[155] In addition, a significant part of the Luftwaffe's arsenal could not operate in the conditions of deficient airspace control (such as the diving bombers Stuka, which had to be withdrawn from the front line due to high losses).[156] The shortcomings of the Luftwaffe became even more evident during the invasion of the Soviet Union in 1941, as the Luftwaffe did not field a bomber capable of effectively affecting the Soviet armaments industry located deep in the hinterland.[157]

In the case of the Allies, Britain – after the end of the Battle of Britain – faced the need to determine the nature of conducting warfare in the future. The threat of invasion was quelled, but an offensive campaign was necessary to defeat the Third Reich. The British land forces did not have sufficient resources to invade the Old Continent on their own, and the Royal Navy was involved in the Atlantic and Mediterranean theater. Air operations were the only way to weaken the German war machine. At the same time, the military-political leadership of Britain changed its approach to the issue of aerial bombing. The above-mentioned change was influenced by numerous factors. Having entered into the office of Prime Minister, Winston Churchill revised the previous British policy regarding air operations, which stipulated the avoidance of airstrikes against areas inhabited by civilian population. That way, the Prime Minister of HM government departed from the stance expressed in July 1938 by his predecessor, Neville Chamberlain (see more in the chapter devoted to the law of air warfare). The British Prime Minister based his actions on two beliefs: firstly, the scale of damage inflicted by the German air force on the civilian population in Poland, Norway, Belgium, the Netherlands, France, and the United Kingdom itself entitled Britain to make an adequate response – through the concept of reprisals (the issue discussed in the chapter below). Secondly, Churchill was guided by ax-

155 See more: M.P. Barley, *Contributing to its Own Defeat: The Luftwaffe and the Battle of Britain*, "Defence Studies" 2006, vol. 4, pp. 387–411.

156 J.T. Correll, *How the Luftwaffe Lost the Battle of Britain*, "Air Force Magazine" 2008, vol. 91, no. 8, pp. 62–66.

157 Germany's plan to build a so-called Ural bomber proved to be a fiasco, and Germany's only strategic bomber, the Heinkel He-177 Greif, was a failed design. In the later stages of the war, as the air war over Europe progressed, the Luftwaffe significantly increased its emphasis on the production of fighter aircraft – this program was, however, hampered by Hitler himself, who, for example, demanded that the modern Me-262 type jet fighter be equipped with bomb-carrying capability, which delayed its entry into service. It was not until the second half of 1944 that the German armaments industry began to implement the *Jagdnotfall-program* project, which gave priority to the construction of fighter and interceptor aircraft. The only bomber produced in limited quantities was the jet-powered Arado Ar-234. Following the introduction of an emergency fighter machine building program, existing types of tactical bombers were converted into night fighters.

iological considerations, suggesting a deep conviction of the necessity to brutally wage war in order to save the free world and secure victory, recognizing bombing as a necessary means to this end and as a kind of retaliation. Martin Gilbert's analysis of Winston Churchill is interesting in this matter. The former Lord of the Admiralty was very impressed by the effects of German air raids during World War I and intended to bring about retaliatory strikes against Germany.[158] However, he did not see the fact that the British civilian population did not succumb to the pressure of bombing but, on the contrary, demanded attacks against the German civilian population in retaliation. It is characteristic that almost simultaneously with the assumption of office by the head of HM government in May 1940, Churchill sought to build a powerful fleet of strategic bombers as Britain's only way to impact the Third Reich. For the British prime minister, the air strikes initially aimed at industrial facilities and then at industrial cities, which finally led to attacks on working-class residential areas, were supposed to be a visible contribution of Great Britain to the final victory over the Third Reich.[159]

The first offensive campaigns of the Royal Air Force Bomber Command perfectly confirm the first of Winston Churchill's decision-making premises. On August 24, 1940, in response to the Luftwaffe's bombing of London (which was actually more of an error than deliberate action), the first British aircraft bombed the capital of the Third Reich.[160] Another raid (on December 10, 1940), aimed directly at the central districts of the city of Mannheim, was made in retaliation for the attack on Coventry.[161] The consequences of these attacks were not strategically satisfying for the British command also on account of the technical imperfections of the British aircraft from that era. Daylight airstrikes conducted against selected targets of a purely military nature resulted in significant losses and did not affect the operation of the German arms industry due to poor accuracy. During 1941, British bombers attacking at night began to suffer significant losses as a result of

158 "In August 1942 Churchill flew to Moscow for his first meeting with Stalin. Bombing policy was much on the agenda. Churchill told Stalin that Britain looked upon German morale 'as a military target'. Churchill added: 'We sought no mercy and would show no mercy. We hoped to shatter twenty German cities as we had shattered Cologne, Lübeck, Düsseldorf and so on… If need be, as the war went on, we hoped to shatter almost every dwelling in almost every German city'" – M. Gilbert, *Churchill and Bombing Policy*, Washington 2005.

159 This did not, however, in the British leader's view, replace the need to invade the continent. A.F. Witt, *War from the Top: German and British Decision-Making during World War II*, Indiana 1990, p. 228.

160 This raid directly led to a breakthrough in the Battle of Britain. Hitler, as a result of the British air raid, ordered the Luftwaffe to retaliate by launching a bombing campaign against the capital of Great Britain. This order came at a time when the previous efforts of the German air force, aimed at eliminating British fighter aircraft, began to bring tangible results. Shifting the emphasis of the air offensive to bombing London allowed the RAF to reorganise and replenish its losses, resulting in the defeat of the Luftwaffe.

161 See: R. Hansen, *Fire and Fury: The Allied Bombing of Germany*, London 2008.

the German air force receiving a night version of the Messerschmitt Bf 110 aircraft equipped with the FuG 202 Lichtenstein radar, as well as the creation of the so-called Kammhuber Line – an anti-aircraft defense system providing the capability to track individual British aircraft from land-based observation points.[162]

Due to the above factors, the Royal Air Force decided to change the concept of strategic operations. In the literature, the frequently encountered phrases defining the new method of conducting warfare include "area bombing", "bombing against the morale of civilian population" (morale bombing) or "demolition of houses" (dehousing). These concepts, originating directly from Hugh Trenchard's theory from the interwar period, were revised in a special memorandum by Lord Frederick Lindemann, advisor of Prime Minister Winston Churchill.[163] In February and March 1942, the British scientist presented to HM government a report on the current course of the air campaign against the Third Reich. The report pointed to relatively small benefits of selective bombing, indicating the lack of measurable military effect with significant proprietary casualties. Reports from photographic reconnaissance highlighted that only 10–30% of bombers were able to drop bombs within a 5-mile radius of the target. Having considered such data, German cities with a large percentage of the population working in factories and plants contributing to armament production were to be the target of Bomber Command. The attacks were supposed to cover a sizable area and, in addition to destroying industrial infrastructure, they were intended to cripple the morale of the German working class through dehousing – i.e., the destruction of households.[164] Precision in this matter was of secondary importance. The concept coincided with the introduction of a large number of heavy four-engined Avro Lancaster, Stirling, and Handley Page Halifax bombers into RAF service. These bombers were endowed with a greater range and bomb payload, as well as stronger armor and defensive weaponry. The attacks were to be executed on a mass scale, and for this purpose, Lindemann proposed the construction of a several-thousand strong (approx. 4,000–6,000 aircraft) fleet of bombers to inflict destruction in

162 R. Forczyk, *Bf 110 vs Lancaster: 1942–1945*, Oxford 2013, p. 8.

163 M.W. Kirby, *Operational Research*…, p. 74.

164 "Investigation seems to show that having one's house demolished is most damaging to morale. People seem to mind it more than having their friends or even relatives killed. At Hull, signs of strain were evident, though only one-tenth of the houses were demolished. On the above figures we should be able to do ten times as much harm to each of the fifty-eight principal German towns. There seems little doubt that this would break the spirit of the people. Our calculation assumes, of course, that we really get one-half of our bombs into built-up areas. On the other hand, no account is taken of the large promised American production (6,000 heavy bombers in the period in question). Nor has regard been paid to the inevitable damage to factories, communications, etc., in these towns and the damage by fire, probably accentuated by breakdown of public services" – M. Hastings, *Bomber Command: The Myths and Realities of the Strategic Bombing Offensive, 1939–1945*, New York 1977, pp. 127–128; A. Levine, *The Strategic Bombing*…, pp. 31–32.

such a way.[165] The approval of the plan was also supported by the conviction of the necessity for Great Britain to actively participate as the war progressed, especially in a situation where the actual chances of landing in France were limited, and the USSR had taken over the main burden of the struggle against the Third Reich.

5.3. The beginning of carpet bombing. Arrival of US forces in Europe

On February 23, 1942, another breakthrough occurred, as Arthur "Bomber" Harris, a proponent of Lindeman's plan, was appointed commander of Bomber Command. For the British commander, the experience in posts associated with bombing operations during the colonial period was of vital importance, especially the one during the uprisings against British rule in Iraq in the interwar period. For the Empire weakened by World War I, the new combat asset, which the air force was, turned out to be useful as part of the so-called air policing doctrine – the use of the destructive power of air force to maintain order in a given area and eliminate possible manifestations of rebellion. The British victory over the rebellion in Iraq was mainly attributed to the psychological effects of air strikes. Arthur Harris, who was the commander of one of the squadrons of the Royal Air Force at that time, shaped his views on the potential of aviation during that period.[166] According to the future commander of Bomber Command, a properly organized and equipped bombing air force could lead to victory on its own – both as a result of the weakening the Third Reich production capacity and undermining of the morale of German society.[167] The scope of operations conducted was to cover all built-up areas of industrial importance, and the scale of attacks was intended to be massive.[168] As a result of the target selection process (carried out by the Ministry of Economic Warfare), the number of towns and cities contributing to the production effort of the German arms industry was approx. 400, to later increase to 518 towns and cities, often no larger than 1,000 inhabitants.[169] The concept of

165 T. Joel, *The Dresden Firebombing: Memory and the Politics of Commemorating Destruction*, New York 2013, pp. 51–52.

166 C. Coulter, *Sir Arthur Harris: Different Perspectives*, [in:] G. Sheffield, G. Till (eds.), *The Challenges of High Command: The British Experience*, Hampshire 2003, p. 127.

167 A. Harris, *Bomber Offensive*, Barnsley 2005, pp. 54–56.

168 M. Connelly, *Reaching For the Stars: A New History of Bomber Command in the World War II*, London 2001, pp. 63–64.

169 "The MEW issued the Bomber's Baedeker: an extensive collection of German towns of more than 15,000 inhabitants, evaluated according to the war-economic significance of their industries, infrastructure and traffic. In the 1944 second edition of the Bomber's Baedeker, the number of towns had risen considerably from 392 to 518. Even municipalities with fewer than 1,000 inhabitants had been included, provided that they housed industries of war-economic significance" – U. Hohn, *The Bomber's Baedeker Target Book for Strategic Bombing in the Economic Warfare against German Towns 1943–45*, "Geo-Journal" 1994, vol. 34, pp. 213–230.

area bombing boiled down to determining the rank of a given built-up area on account of the industry located within it. Priority was given to urban centers which hosted factories of particular importance for the arms production effort of the Third Reich (more about the list of targets in the chapter devoted to military objectives), as well as those with a large population and significant economic impact. In this way, the intention was to achieve several goals at once. By simultaneously destroying German industrial infrastructure and depriving the working class of housing, such operations were intended to cause the collapse of both the armament of the Third Reich and society's morale. The first act of a new opening in air operations over the Third Reich was the raid against Lübeck on March 28, 1942, which destroyed the historic part of the city. On May 30, 1942, the new strategy was first implemented during Operation "Millennium" – the first 1,000-bomber raid targeting Cologne.[170] During this action, the bomber stream tactic was also successfully used, which, unlike previous attempts of uncoordinated single attacks, allowed a significant number of bombers to strike *en masse* in a short time. Electronic warfare equipment was also expanded – for example, in order to disrupt German radars, aluminum strips were dropped from RAF aircraft, which generated an artificial radio-locating reflection.[171]

During 1942, the first units of the 8th Air Force began arriving in the United Kingdom. The B-17 The Flying Fortress bombers, being the standard equipment, carrying Norden bombsights began the first limited daylight operations. The coordination of tasks between the American Air Force and Royal Air Force was sealed at a conference in Casablanca in January 1943 under the code name "Combined Bomber Offensive".[172] Despite the initial hesitations of the British, it was finally decided that the United States Strategic Air Forces would launch an operation against the Third Reich industry by day, and the British would continue the practice of area bombing at night – as part of executing the so-called "Pointblank" directive.[173] The first "field" cooperation between the Bomber Command of RAF and the 8th Army of the USAAF was Operation "Gomorrah", which at the

170 M. Bowman, *Bomber Command: Reflection of War*, Barnsley 2011, pp. 235–236.

171 H. Boog, *The Strategic Air War in Europe and Air Defense of the Reich, 1943–1944*, [in:] H. Boog, G. Krebs, D. Vogel (eds.), *Germany and the Second World War: The Strategic Air War in Europe and the War in the West and East Asia 1943–1944/5*, Oxford 2006, p. 203.

172 "Primarily the progressive destruction and dislocation of the German military, industrial and economic system, and the undermining of the morale of the German people to a point where their capacity for armed resistance is fatally weakened... Subject to weather and tactical considerations targets to be attacked were: (a) Submarine construction yards. (b) The aircraft industry. (c) Transport. (d) Oil plants. (e) Other targets in war industry" – *Memorandum by the Combined Chiefs of Staff, Casablanca January 21, 1943*, [in:] *Foreign Relations of the United States, The Conferences at Washington, 1941–1942, and Casablanca 1943*, Washington 1956.

173 H.S. Wolk, *Decision at Casablanca*, "Air Force Magazine" 2003, vol. 86, pp. 78–82; L. Douglas Keeney, *The Pointblank Directive: Three Generals and the Untold Story of the Daring Plan That Saved D-Day*, Oxford 2012, p. 57.

turn of July and August 1943 led to the firestorm in Hamburg and caused tremendous destruction to the city.[174] American commanders (Carl Spaatz, Ira Eaker, and Henry "Hap" Arnold) were confident that precise air strikes could effectively lead to the economic depression of a developed state, and accuracy was an essential tool in this regard.[175] It was also believed that the potential of American bomber formations would effectively fend off German fighters.[176] This trust was put to the test in October 1943, when during the raid against the bearing factory in Schweinfurt, approx. 10–20% of the machines participating in the attack were lost.[177] The RAF Bomber Command also suffered losses – during the Nuremberg Raid on the night of March 30 to 31, 1944, out of 700 machines attacking the city, approx. 100 bombers were shot down and 545 aircrew members were killed – more than during the entire Battle of Britain.[178] The percentage of aircraft lost declined significantly when the P-51 Mustang and P-47 Thunderbolt escort fighters were introduced, as they effectively protected the bomber stream.

As a side note, it is worth mentioning that the Luftwaffe combat missions launched as part of Operation "Steinbock" between January and May 1944 (called Baby Blitz by the Allies) served a purely "terrorist" purpose. The German aircraft

174 The bombing of July 27, 1943 was particularly intense, where almost 800 British bombers led to the formation of fiery blasts that reached a speed of approx. 200 km/h leading to self-ignition of asphalt on roads. The number of deaths is estimated at approx. 40,000 inhabitants of Hamburg. See: R. Grant, *Operation Gomorrah*, "Air Force Magazine" 2007, vol. 90, no. 3, pp. 66–70.

175 "The disruption of the enemy's industrial network is the real target, because such a disruption might produce a collapse in morale sufficient to induce surrender" – C. Arbush, *Bombing the European Axis Powers: A Historical Digest of the Combined Bomber Offensive 1939–1945*, Maxwell 2006, p. 34; R. Schaffer, *Wings of Judgment: American Bombing in World War II*, Oxford 1985, p. 38.

176 The solution was to adopt the so-called box formation, in which each of the aircraft covered an Allied machine. The formation was introduced by the then commander of one of the bombing groups, later commander of the US Strategic Forces Curtis LeMay. J.L. Hutchinson (ed.), *B-17 Memories From Memphis Belle to Victory*, Bloomington 2014, pp. 31–32.

177 Losses that exceeded the level of 10% of the total machines involved in the bombing expedition were deemed "very high" – S.H. Ross, *Strategic Bombing by the United States*…, p. 68. The percentage of losses among the 8th Army of the USAAF was higher "than the Marine Corps and Navy combined". In total approx. 30,000 crew members were killed or missing, and another 30,000 were taken prisoner. For example, the 91st Bomb Group lost 82% out of the 36 machines in its initial state – M. Smith, *Bearing Silent Witness: A Grandfather's Secret Attestation to German War Crimes in Occupied France*, "Florida Journal of International Law" 2013, vol. 25, p. 35. Performing the full combat tour – 25 combat missions – was one of the most difficult challenges of World War II (the first heavy bomber to achieve it was the famous "Memphis Belle").

178 R.T. Walkeman, *The Science of Bombing*…; J. Furner, *100 Group – "Confound And…"*, "Royal Air Force Historical Society Journal" 2003, vol. 28, p. 27. The RAF's losses were caused by exceptionally favourable weather conditions for the operations of German night fighters and anti-aircraft artillery.

were equipped with recently developed navigation and radar equipment (German radar FuG Neptun). They adapted the bomber stream tactic. However, several months of attacks brought only negligible results while their own losses, which resulted from the concerted effort of British fighter aviation, technical defects and navigation errors, were significant. On the night of February 18–19, 1944, approx. 180 German planes appeared over London. Even though they caused some damage in the city and its surroundings, no "blow to morale" was achieved at the expense of the loss of almost 330 planes and crews during the entire campaign.[179] The failure of Operation "Steinbock" caused the German military leadership to focus its efforts on "terrorist" bombardment with the use of V-1 and V-2 missiles.

5.4. Controversial effects of the Combined Bomber Offensive

Meanwhile, bombing factories and installations closely linked to the German war effort turned out to be the most militarily successful, which is paradoxical with regard to the defeat of the Third Reich. The campaign conducted over the years 1944–1945 against synthetic fuel refineries, petrol stations and chemical plants proved to be a particular success, as it caused actual difficulties in the supply of propellants and fuel to land troops. The second element of the offensive was the struggle for the ultimate obliteration of the operational capabilities of the Luftwaffe. The fight was focused on factories, airports and the supply chain of the aviation industry. Later (from autumn 1944) its main focus was placed on the manufacturers of jet-engined aircraft and components for them, since jet aircraft were considered to be a serious threat.[180] As a result, in September 1944, aviation fuel production decreased to a level of only 52,000 tons (given the initial production amount of 170,000 tons).[181] Thus, in spite of a record-high increase in the number of vehicles and aircraft produced by the German arms industry in 1944, fuel shortages effectively prevented the use of new machines. At this point, it is worth including the example of the modern Messerschmitt Me-262 fighters. Given the conditions prevailing in the Third Reich, the number of produced jet airplanes was impressive (approx. 1,400 units). Nevertheless, the lack of fuel resulted in most of the machines never entering service. The decline of fuel production also caused the collapse of the chemical industry.[182]

179 A. Saunders, *Arrival of Eagles: Luftwaffe Landings in Britain 1939–1945*, London 2014, p. 67.

180 "With the invasion date coming ever closer and the CBO yet to achieve the intermediate objective, on 13 February 1944, the CCS modified the CBO objective to focus air attacks on the attainment of air superiority" – W. Parramore, *The Combined Bomber Offensive Destruction of Germany's Refined-Fuels Industry*, "Air Space and Power Journal" 2012, no. 4/5, p. 75.

181 F.A. Vajda, P. Dancey, *German Aircraft Industry and Production, 1933–1945*, Yorkshire 1998, p. 90.

182 T. Redding, *Bombing Germany: The Final Phase. The Destruction of Pforzheim and the Closing Months of Bomber Command's War*, Barnsley 2015, p. 324.

The last phase of the Combined Bomber Offensive included strikes directed at German cities in the last months of the war. This stage reached its climax during the attack on Dresden from February 13–14, 1945. The air campaign against German cities was vital in view of the Red Army's offensive on the Eastern Front. In addition, according to intelligence information, Dresden's significant transport potential could have supported the key directions for German defense.[183] The Allied air forces exploited to the full the tactical and quantitative advantages in the form of H2X radars and the presence of pathfinders which guided bomber streams in order to effectively simulate actual attack directions. The effects of the attack were very severe, especially regarding civilian casualties as a result of the extensive use of the so-called firestorm phenomenon by the Allied aviation (for more information concerning this topic, see the chapter on the principles of aircraft armament). The rationale behind destroying the city remains the subject of numerous controversies to this day. Some experts consider the bombing raid against Dresden to be a pure example of a war crime. Yet, another group of experts believes that the bombardment of the city was justified on the grounds of strategy and tactics.[184]

From a doctrinal point of view, the course of the Combined Bomber Offensive was, to some extent, a contradiction of the arcane details of aerial warfare strategy. The decision to shift the main burden of military operations to achieving air supremacy was made only in the middle of 1944 in conjunction with the preparations for Operation "Overlord" in Normandy. German society did not exhibit any signs of declining morale, and the area bombing of industrial areas did not produce any lasting effects, as most of the factories or installations returned to almost 80% efficiency after three months.[185] Furthermore, thanks to the efforts of Albert Speer, Reich Minister of Armaments and War Production of the Third Reich, many of the most crucial factories were relocated (also through the construction of underground installations) so as to reach the peak of the production effort. In

183 "And contrary to popular belief, Dresden in 1945 was far more than just a beautiful baroque center of cultural significance. It was also an armed camp and was home, most importantly, to a vital communications and transportation hub as well as a control node for the resupply and sustainment of Eastern Front operations. In addition, it hosted scores of embedded factories that produced goods vital to the German war effort, including the massive Zeiss-Ikon complex. Furthermore, it had been a long time since Zeiss-Ikon had produced anything as innocent as a holiday snapshot camera. Dresden, in short, was a highly legitimate military target" – D. Bashow, *In Praise of Bomber Harris and Area Bombing*, "The Royal Canadian Air Force Journal" 2014, vol. 3, pp. 41–42.

184 P. Battersby, J.M. Siracusa, S. Ripiloski, *Crime Wars: The Global Intersection of Crime, Political Violence, and International Law*, Santa Barbara 2011, pp. 24–25.

185 Another air campaign with untapped potential was the ability to systematically destroy German power grid. The possibility of affecting the civilian population would thus be achieved in a completely different way than the directly bombing them. See: T.E. Griffith, *Strategic Attack of National Electrical Systems*, Maxwell 1994, pp. 17–22.

this light, the Allies gained the greatest military advantage through precise attacks on the fuel industry, as they eliminated the profits generated by increased industrial production. Raids carried out as part of area bombing in the last phase of the war seem even pointless. At this point, it is worth mentioning the voices endorsing the legitimacy of the actions taken as part of the Combined Bombe Offensive. They indicated that the global effects of bombardments had a significant impact on the overall economy of the Third Reich, forcing its industry to allocate a significant amount of its resources to the reconstruction of ruined factories, houses, installations or infrastructure – resources which could have been used strictly for arms production.[186] On the other hand, the German offensive in the Ardennes at the turn of 1944 and 1945 and their last offensive launched in Hungary in March 1945 testified to the constantly bombed Third Reich's ability to transport, equip, and provide reserves for offensive operations by their ground forces.

5.5. Conclusions regarding the air warfare strategy during 1939–1945 in the European theater of World War II

There was only partial reference to Douhet's concept in the Combined Bomber Offensive. In view of the objectives of this work, it is crucial to state that the belief in the impact of area bombing on civilian morale as the only cause of the defeat of Germany was utterly inaccurate. The failure of the Third Reich was the result of the German land forces' defeat, and not social disintegration (which was in a sense an exact opposite to the situation in November 1918, when the imperial government was sufficiently influenced by growing social outrage to start capitulation talks). The Italian theorist's concept found partial application in the context of gaining air supremacy. Bombing missions involved a significant number of German fighter aircraft in the defense of the Third Reich. As a consequence of the air battles, the Luftwaffe's defensive potential was subject to significant attrition. Additionally, other frontline areas were denuded of their fighter units. For example, during the Normandy Invasion, the Luftwaffe was able to deploy only approx. 140 aircraft for the protection of land forces (during the D-Day, the Allied Aviation flew almost 15,000 sorties, while the German air force only deployed about 300).[187] Thus, struggling with more experienced and better armed (especially in armored vehicles) troops of the Third Reich, the Allied land army obtained the necessary support from tactical aviation, effectively reducing the German technological and qualitative advantage. As a result, only those operations which

186 K. Hartley, *The Strategic Bombing of Germany in the Second World War: An Economic Perspective*, [in:] D.L. Braddon, K. Hartley (eds.), *Handbook on the Economics of Conflict*, Cheltenham 2011, pp. 466–467.

187 O. Wieviorka, *Normandy: The Landings to the Liberation of Paris*, London 2008, p. 207.

were either confined to purely military purposes, such as ammunition factories, oil and chemical industries, or were consistent with the basic principles of operational art (aimed at the destruction of enemy aircraft) turned out to be the most effective method of conducting aerial combat.

According to the final report on the scale of American strategic bombing resulting from the air campaign, the number of civilian casualties killed and wounded by air attacks totaled approx. 1 million, and another 7.5 million people were deprived of accommodation because 20% of residential buildings were destroyed. During the Combined Bomber Offensive, a total of 2.7 million tons of bombs were dropped. About 160,000 Allied airmen were killed and 40,000 aircraft were destroyed. The document indicated that despite significant losses and the decline in morale, the German population was still eager to support the production effort as long as the state had the technical means to do so.[188]

5.6. The Pacific theater of war 1939–1945

The first aerial operations of the Japanese air force confirmed the tactical benefits resulting from an unannounced manner of air strikes against military objectives, which serve as a tool for achieving air superiority. The Pacific War began on December 7, 1941, with an unexpected air strike against the US Pacific Fleet base at Pearl Harbor by Japanese carrier-borne aircraft, destroying a battleship squadron. The Japanese aircraft took off from the decks of six aircraft carriers, which belonged to Admiral Nagumo's carrier battle group.[189] On the same day Japanese aviation and landing units launched an invasion of British Malaya and the Philippines. US defense plans included the use of B-17 heavy strategic bombers

188 "The mental reaction of the German people to air attack is significant. Under ruthless Nazi control they showed surprising resistance to the terror and hardships of repeated air attack, to the destruction of their homes and belongings, and to the conditions under which they were reduced to live. Their morale, their belief in ultimate victory or satisfactory compromise, and their confidence in their leaders declined, but they continued to work efficiently as long as the physical means of production remained. The power of a police state over its people cannot be underestimated" – *The United States Strategic Bombing Survey. Summary Report (European War), September 30 1945*, 1987, https://www.airuniversity.af.edu/Portals/10/AUPress/Books/B_0020_SPANGRUD_STRATEGIC_BOMBING_SURVEYS.pdf (accessed: 3.06.2025).

189 The attack itself was considered a strategic success, but not a decisive one. First of all, it should be pointed out that at the time of the raid, none of the US aircraft carriers were at the base in Hawaii (USS "Hornet", USS "Lexington", USS "Enterprise", USS "Yorktown", USS "Saratoga" had been deployed to other sea areas or were in California ports). Nor were the significant oil stocks destroyed, nor the infrastructure of the naval base. Admiral Nagumo was criticized for failing to conduct a third attack from aircraft carriers. E. Kosiarz, *Bitwy morskie* [*Sea battles*], Warszawa 1998, pp. 512–515.

stationed in the Philippines to carry out a pre-emptive strike against the airport in Formosa, Japan (now Taiwan).[190] However, on December 8, 1941, as a result of a surprise attack by Japanese bombers, most of the defense potential of the Far East Air Force was destroyed and Japan gained air superiority.[191] Simultaneously, British and Australian airborne units stationed in Malaya lost approx. 60 aircraft during the first day of fighting. On December 10, 1941, Japanese torpedo bombers and bomber aircraft sank the battleship HMS Prince of Wales and battlecruiser HMS Repulse. In the history of naval and aerial warfare, this moment is thought to have spelt the end for the era in which the command of the sea was held by heavy naval vessels operating without air cover.[192] In the initial phase, further Pacific Theatre air campaigns had mainly a tactical dimension. The turning point was the air-sea Battle of Midway in June 1942 during which aviation demonstrated its decisive role in naval warfare.[193]

On April 18, 1942, Allied aviation appeared for the first time over the Japanese archipelago as a consequence of the Doolittle Raid conducted by B-25 Mitchell bombers launched from the flight deck of the USS Hornet (most of the crews participating in the raid were captured and tried by the Japanese, see the following chapter). The full-scale air offensive began only after the seizure of the Mariana Islands. Once captured, Guam and Saipan airstrips were extensively used by the United States military, which could deploy B-29 bombers. The first attacks in December 1944 were directed against the Japanese arms industry (mainly against the two primary manufacturers – Mitsubishi and Kawasaki) in Nagoya and Tokyo. The mili-

190 Y. Miwa, *Japan's Economic Planning and Mobilization in Wartime, 1930s–1940s*, Cambridge 2015, p. 402.

191 It is acknowledged that the US air force in the Philippines, despite its considerable combat potential, was unprepared for a Japanese attack and was mostly destroyed on the ground. A particular mistake was to assemble most of the available machines at Clark Air Base near Manila, where almost half of the Far East Air Force fighter and bombers were destroyed within an hour as a result of decision-making chaos. This decision directly burdens the Commander-in-Chief of the US forces in the Philippines, Gen. Douglas MacArthur.

192 HMS "Prince of Wales" was a ship famous for the pursuit of "Bismarck", in which, together with HMS "Hood", it made its first combat contact (HMS "Hood" was sunk as a result of an explosion and HMS "Prince of Wales" was severely damaged). HMS "Repulse" was regarded in Royal Navy as the ship with best-trained crew. For Winston Churchill, the news of the loss of ships was "one of the greatest blows of the entire war" – M. Stille, *Malaya and Singapore 1941–42: The Fall of Britain's Empire in the East*, Oxford 2016, pp. 50–52.

193 Of the 10 Japanese aircraft carriers, the 6 largest were the core of the Imperial Navy Strike Force. As a result of the battle in the Coral Sea, resulting in the loss of the USS Lexington, the latest Japanese units: "Shōkaku" and "Zuikaku" were excluded from combat due to damage. The loss of a further 4 at Midway ("Akagi", "Hiryū", "Sōryū", "Kaga") was impossible for Japanese side to recover from. Characteristically, during 1942, the American fleet lost exactly the same number of carriers as the Japanese fleet. In addition to the USS Lexington, the USS Yorktown, the USS Hornet and the USS Wasp were sunk. A. Czubiński, *Historia drugiej wojny światowej* [*History of the Second World War*], Warszawa 2004, p. 253.

tary operations were guided by the strategic pattern of precision strikes which took place in Europe and also due to the presence of H. Hansell, the originator of daylight precision bombing and participated in the Combined Bomber Offensive against the Third Reich. However, the effects of the attacks were not satisfactory in relation to the outlays committed (mainly due to the dispersal of industrial production). Therefore, in March 1945, the command was taken over by General Curtis LeMay.[194] The new strategy included the adoption of incendiary bombardment – American planners were aware that the Japanese housing construction method was characterized by vulnerability to fire. Additionally, due to the distribution of industrial facilities within cities, directing airstrikes at urban buildings was necessary. B-29s were supposed to attack at night (as Japan did not have any night fighter program). They conducted low-level raids with the use of kerosene bombs and napalm. Consequently, the bombing of Tokyo took place on the night of March 9 to 10, 1945, and proved to be the most extensive aerial bombardment during World War II. As its result, up to 100,000 Japanese civilians were killed during the firestorm (more than were killed in the atomic bombings of Hiroshima and Nagasaki). The campaign was expanded to larger and smaller urban centers, causing much more extensive damage than during air raids against the Third Reich. It was only in the last phase of the campaign (July 1945) that aerial warfare was directed against the oil industry.[195] The outcomes of the attacks seem controversial – LeMay believed that firebombing would be a sufficient tool to make the Empire of Japan surrender. Carpet attacks significantly contributed to the decline in industrial production but their impact on civilian morale remains debatable. It seems that the psychological consequences were not serious enough for the Imperial Japanese Government to consider ceasing resistance as part of the expected invasion of the Japanese archipelago. Therefore, facing an estimated loss of approx. 1 million soldiers and civilians (the number is based on estimations stemming from the assessment of the Battle of Okinawa), it was decided on August 1945 to launch atomic bomb attacks, which ultimately led Emperor Hirohito to accept the terms of unconditional surrender.[196]

194 G.P. Gentile, *How Effective is Strategic Bombing? Lessons Learned from World War II to Kosovo*, New York 2001, p. 86.

195 As a result, one of the last Japanese ship of the line, the super battleship "Yamato", when setting out for the Battle of Okinawa in April 1945, did not have sufficient fuel supplies to allow the ship to return to its home base.

196 The plan of the American attack on the Japanese Islands was called Downfall. On the part of the Allies, it was intended to use approx. 2 million people and almost 40 divisions of various types. As part of the defense plan, the Japanese side was determined to exploit all military potential, including the so-called Volunteer Corps (*Kokumin Giyūtai* – the equivalent of the German Volkssturm), intending to call to arms up to 17 million women and men so far unmbolized – W. Murray, A.R. Millet, *A War To Be Won: Fighting the Second World War*, Harvard 2009, pp. 520–521. The discussion of the potentially catastrophic consequences of a land attack on Japan is to this day an important part of the question of the legitimacy of the use of atomic weapons in August 1945.

An analysis of the official report on the course of the air campaign provides some interesting information about the state of the Japanese economy at the time of launching the air offensive. Japanese represented a resource-dependent economy, which was based on maritime transport from the conquered areas of southwest Asia. The destruction of the Japanese merchant fleet led to a complete collapse of fuel supplies, which caused a reduction in both crew training and the ability of the Japanese army to conduct combat air missions in the second half of 1944[197]. However, unlike the situation in the Third Reich, geographically isolated Japan did not engage in open military operations on its home islands. Only the use of weapons of mass destruction made the Japanese military leaders realize their inability to effectively counteract the US air attacks. Those air raids led to the destruction of approx. 30% of urban buildings across the state.

6. Post-war use of air force

6.1. Korea – a forgotten war

On June 25, 1950, North Korean troops crossed the 38th parallel and launched a massed invasion heading south, using military aircraft of Soviet production. In response, on June 30, 1950, the first American B-29 bombers appeared over Pyongyang and attacked the local airport hub. In the initial period of the war, the American air forces focused on tactical objectives, striving to slow down the communist invasion in order to protect the necessary regrouping of the army in the south around the Port of Busan. The American units mostly bombed the lines of communication and supply points, which met with the protest of aviation theorists who wanted the B-29 to be used for its essential purpose – as

197 "In addition to steel, other basic elements of the economy were involved. Oil, although not as important as steel in its broad impact on the remainder of the economy, was of critical importance to Japan's military machine and to her merchant marine. Oil imports from the south began declining in August 1943, and had been eliminated by April 1945. Crude oil stocks were virtually exhausted; refinery operations had to be curtailed; and stocks of aviation gasoline fell to less than 1,500,000 barrels, a point so low as to require a drastic cut in the pilot-training program and even in combat air missions. Bauxite imports declined from 136,000 tons in the second quarter of 1944, to 30,000 tons in the third quarter, and stockpiles were only 3,000 tons. Stockpiles and the time delay between the various stages of production cushioned for a time the inevitable effects of the blockade on finished munitions production, but by November 1944, the over-all level of Japanese war production had begun to turn down, including even the highest priority items, such as aircraft engines" – *United States Strategic Bombing Survey Summary Report (Pacific Report)*, Washington 1946, p. 17.

a bomber designed for long-distance raids on the enemy's support infrastructure. In the summer of 1950, concentrated B-29 attacks led to the eradication of almost all strategic industrial objectives. However, due to political reasons, the attacks on cities and urban areas with the use of strategic bombers (which would directly support the battlefield) were not conducted.198 The efforts of the Allied aircraft blocked the North Korean army's advance on August 5, 1950. Then, Allied states significantly supported United Nations troops' counteroffensive launched at Incheon on September 15, 1950. The counterattack almost completely drove back the communist forces from South Korea, occupying large areas of North Korea.

As regards conducting air operations, on July 29, 1950, the President of the United States Harry Truman told his advisers that it was his wish that the air war in Korea would not be conducted "indiscriminately" – consequently, the accurate guidelines suggested the necessity to attack "only military targets".[199] Similar directives were issued by Gen. MacArthur, pointing to the need for "reasonable caution" when attacking targets located in urbanized areas.[200] On August 8, 1950, during UNSC session 484, the North Korean government's complaint about the conduct of the war effort by the United States, especially the mass deployment of planes, was examined. In a telegram addressed to the United Nations, the Pyongyang government reported on "barbarous attacks on defended Korean towns and industrial centers where there never were and are not now any military objectives". It condemned "planes firing on peasants working in the fields, passenger trains and steamers".[201] In the course of discussions on the content of the protest, the USSR representative proposed that the UN Security Council adopt a resolution (S/1679) referring to the "inhumane and barbarous bombing by the American Air Force". The draft document pointed to the necessity "of recognizing that the bombing of Korean towns and villages by the American Armed Forces, involving the destruction and mass annihilation of the peaceful civilian population is *a gross violation of the universally accepted rules of international law*".[202] In response to the above allegations, in September 1950, Secretary of State Dean Acheson pointed out that "the attacks of the UN air force are directed exclusively against military objectives

198 H. Deane, *The Korean War 1945–1953*, San Francisco 1999, p. 151.

199 R.F. Futrell, *The United States Air Force in Korea 1950–1953*, Washington 1983, pp. 41–42.

200 S. Conway-Lanz, *Collateral Damage, Americans, Noncombatant Immunity and Atrocity after World War II*, Oxon 2006; S.K. Hwang, *Korea's Grievous War*, Philadelphia 2016, p. 144.

201 United Nations, Draft resolution concerning the complaint of aggression upon the Republic of Korea, submitted at the 484th meeting of the Security Council, 8 August 1950, Union of Soviet Socialist Republics, pp. 2–4, https://digitallibrary.un.org/record/476242/?v=pdf (accessed: 3.06.2025).

202 United Nations Security Council, Proposal concerning the inhuman, barbarous bombing by the American Air Force of the peaceful population, towns and populated areas in Korea, S/1619, 8 August 1950 – *ibidem*, p. 20.

including areas of enemy concentration, supply depots, armament factories, and lines of communication", pointing to the fact that the Communist army is using the civilian population to deliberately cover the movements of its troops.[203]

The Chinese intervention in November 1950 completely changed the course of the conflict, as well as the manner of deploying strategic forces. A new chapter in the operations of UN aviation began with the preparation of the Air Pressure Campaign. The prepared list of targets included 17 items, which included among others: 1) aircraft and airports, 2) power plants, 3) radars and radio installations, 4) command centers, 5) factories and repair workshops, 6) locomotives and railway infrastructure, 7) fuel depots, 8) military personnel of the enemy, 9) bridges, roads, overpasses and tunnels.[204] On November 8, 1950, 80 B-29 bombers began carpet bombing targeting towns and cities located near the Chinese border, using incendiary bombs to "devastating effect" so as to delay the advance of Chinese troops.[205] Due to the retreat of UN forces, the decision was made to launch an attack on the capital of North Korea in January 1951. The middle of 1952 saw the largest bombing raids using conventional bombs and napalm.[206] On June 11 and August 29, 1952, the USAF aircraft made approx. 1,500 flights a day over Pyongyang.[207] Before the airstrike, the UN command dropped leaflets over the city warning civilians of the possibility of bombing and urging them to leave the city (Oper-

203 See: S. Conway-Lanz, *The Struggle to Fight a Humane War: The United States, the Korean War and the 1949 Geneva Conventions*, [in:] M. Evangelista, N. Tannenwald (eds.), *Do the Geneva Conventions Matter?*, Oxford 2017.

204 M. Clodfelter, *The Limits of Air Power: The American Bombing of North Vietnam*, Lincoln 2000, p. 144.

205 "On November 8, 79 B-29s struck Sinuiju, nine trying unsuccessfully to drop the bridges and the other 70 saturating the city with more than 500 tons of incendiary bombs, released in clusters. 'General O'Donnell indicates,' Stratemeyer recorded in his diary, 'that the town was gone.' Aerial reconnaissance found that about 60 percent of the city had been destroyed" – W. Thompson, B. Nalty, *Within Limits The U.S. Air Force and the Korean War*, Washington 1996, p. 23; J. Endicott, *The USAF in Korea Campaigns, Units and Stations 1950–1953*, Washington 2011, pp. 15–16.

206 C. Malkasian, *A History of Modern Wars of Attrition*, Westport 2002, p. 171.

207 "When attacking in 1952, Air Force bombers did not drop incendiary clusters, judged less accurate than high explosives and more likely to cause widespread collateral damage. The Truman administration wanted accuracy against Pyongyang, mainly to protect American prisoners of war believed held there. Other towns harboring large concentrations of enemy troops or stocks of supplies were attacked with incendiary clusters or napalm, along with high explosives. On July 11, 1952, United Nations fighter-bombers flew 1,200 sorties and B-29s flew 54 against the North Korean capital. Radio Pyongyang attributed 7,000 casualties and the destruction of 1,500 buildings to this raid, and reports from intelligence agents indicated that a direct hit had destroyed the headquarters of the North Korean Ministry of Industry. Despite the effects of this attack, Generals Weyland and Clark decided to send 1,400 sorties by Air Force and Navy fighter-bombers against surviving warehouses, barracks, and public buildings in Pyongyang" – B.C. Nalty, *Winged Shield, Winged Sword 1950–1997: A History of the United States Air Forces*, Honolulu 1997, p. 46.

ation "Blast").[208] There are doubts as to the scope of the bombing – some authors indicate that the attacks had an carpet character, aimed at weakening the morale of civilians, while the opposite side indicates that carefully selected military objectives, located near built-up areas were targeted.[209] The attacks against dams with the aim of stopping electricity production and indirectly destroying North Korea's infrastructure and agricultural facilities, also caused controversy.[210] In total, during the conflict in Korea, the US Air Force dropped approx. 635,000 tons of bombs – a figure greater than the total tonnage used during World War II in the Pacific (of which 32,357 tons were napalm-filled bombs).[211]

The US air force (including strategic B-29 bombers) was used as part of the Korean War to operate in a state with a relatively low level of industrialization, with scarcity of concentrated industry and communication lines capable of effectively sustaining the war effort of the enemy. Due to North Korea's economic persistence through the mass delivery of weapons and supplies directly from China and the USSR, strategic objectives were replaced by tactical ones. While in the first phase of the campaign the issue of losses amongst civilians was prioritized by the Allied command, such considerations were abandoned as a result of the Chinese offensive in November 1950. It was decided to at least partly return to Douhet's concept by bombing built-up areas. This was also necessitated by the tactics used by the Communist troops, as well as the difficult strategic situation of the UN troops related to the scale of the Chinese intervention.

The status of the captured prisoners of war belonging to the UN armed forces was controversial. While the Chinese side made a declaration under which it pledged to apply the 1949 Geneva Conventions (with a caveat – of similar content to that of the USSR – as to the content of Article 85 of the Third Geneva Convention of 1949), North Korea was not a party to or otherwise bound by the above-mentioned international agreements. As a consequence, the camps in which the UN armed forces personnel were located were not marked with the signs required by the convention, which meant that they became targets of aerial bombardment.[212]

208 C. Crane, *Searching for Lucrative Targets in North Korea: The Shift from Interdiction to Air Pressure*, [in:] J. Neufeld, G. Watson (eds.), *Coalition Air Warfare in the Korean War 1950–1953*, Andrews 2002, p. 163.

209 P.M. Edwards, *Combat Operations of the Korean War: Ground, Air, Sea, Special and Covert*, Jefferson 2010, p. 93; R.A. Pape, *Bombing to Win*…, p. 161; C.A. MacDonald, *Korea: The War Before Vietnam*, London 1999, p. 241; M.N. Vego, *Joint Operational Warfare*…, p. 77.

210 B. Cumings, *The Korean War: A History*, New York 2010, pp. 155–157; M. Burleigh, *Small Wars, Far Away Places: The Genesis of the Modern World 1945–1965*, London 2013, p. 160; H. Ammi, *Big Ocean Navy in a Little Ocean War*, "Air University Quarterly Review" 1953, vol. 4, p. 46.

211 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:] Y. Tanaka, M.B. Young (eds.), *Bombing Civilians: A Twentieth-Century History*, London 2009, p. 93.

212 S. Carvin, *Caught in the Cold: International Humanitarian Law and Prisoners of War During the Cold War*, "Journal of Conflict and Security Law" 2006, vol. 11, p. 80.

6.2. The Six-Day War and aerial clashes during the Yom Kippur conflict

The rapids success of the Israeli offensive on the Sinai Peninsula is largely due to the perfectly coordinated action of the Israeli air force, which in the morning hours of June 5, 1967, destroyed 90% of the Egyptian air force and most of the radar stations through Operation "Focus".[213] The success of the mission was ensured by appropriate planning and taking the enemy by surprise – flying at a low altitude and in complete radio silence, the Israeli aviation headed first into the Mediterranean Sea and attacked Egyptian air bases from the north – a direction which surprised radar stations. Concrete piercing bombs were widely used during the attack, causing damage to runways that required long-term repair.

The practice of starting an armed conflict by carrying out an unannounced airstrike became an established "custom" of Middle Eastern conflicts and also took place in the case of the Yom Kippur War in 1973. The Egyptian Operation "Badr", aimed at regaining control over the Sinai Peninsula and forcing the withdrawal of Israeli forces from the Suez Canal, began on October 6, 1973, with a massive air attack. About 200 Egyptian planes opened fire on Israeli air bases, command centers and Hawk anti-aircraft missile emplacements. A similar operation was launched by the Syrian Air Force, which attacked Israeli positions in the Golan Heights. Israeli aircraft counterattacks against Syrian and Egyptian air bases were intercepted by Arab fighter aircraft, leading to battles involving several hundred aircraft, such as the air battle at Al-Mansura on October 14, 1972.[214] As a result of defensive fighting, the Israeli Air Force lost approx. 100 aircraft, but their inventory did not drop due to American supplies (mainly F-4 Phantom fighters).[215] Despite the lessons learned by the Arab states throughout the hostilities in 1967, investments in improving road infrastructure and the deployment of anti-aircraft defense, the experience of the Yom Kippur War indicates that achieving air superiority was not dependent on the destruction of enemy aviation on the ground, but on the effectiveness of fighter aviation (almost half of Arab aircraft were destroyed during air-to-air combat).[216]

The focus on ground-to-air defenses by Arab states made the Israeli Air Force decide between 1973 and 1980 to increase the "survivability" of its combat aircraft operating in an environment with a significant concentration of anti-aircraft missile assets. During the Lebanese Civil War fought between 1979 and 1982,

213 J.B. McNabb, *A Military History of the Modern Middle East*, Santa Barbara 2017, pp. 160–161.

214 P.P. Barua, *The Military Effectiveness of Post-Colonial States*, Leiden 2013, pp. 74–76.

215 The aviation losses of the Arab states were approx. 4–5 times higher. This was largely due to better training of Israeli pilots and more effective air-to-air weapons, such as AIM-9 Sidewinder missiles.

216 R. Sivron, *Air Power and Yom Kippur*, [in:] E. Feuchtwanger, R.A. Mason (eds.), *Air Power in the Next Generation*, London 1979, pp. 89–90.

Israel responded to Syria's deployment of SAM missiles in the Beqaa Valley with a concentrated strike on June 9, 1982. During the attack, unmanned aerial vehicles were widely used, providing constantly updated data on the distribution of surface-to-air missiles, as well as creating an artificial radar image for Syrian radar stations, enabling the use of F-4 Phantoms to destroy the positions detected. The latest American deliveries provided Israeli pilots with modern F-15s and F-16s and a new generation of air-to-air weapons which were far superior technologically to the Syrian MiG-21 and MiG-23. During the two-hour air battle, with zero own casualties, around 80 Syrian aircraft were shot down and all enemy missile launchers were destroyed.[217]

One of the Israeli pilots, Avraham Lanir, was shot down during a reconnaissance mission over Syria on October 13, 1973, and died in Syrian captivity as a consequence of torture. A total of 28 Israeli pilots were captured in Syria. In six cases, pilots evacuating from downed aircraft were killed in mid-air by small arms fire. In a letter dated December 8, 1973, addressed to the UNGA and the ICRC, the Israeli government treated the above acts as a violation of Article 13 of the Third Geneva Convention of 1949.[218]

7. Armed conflict in Vietnam – a new perspective on the use of air force

7.1. Operation "Rolling Thunder"

In addition to the issues existing in the context of air warfare itself, the fact that the legal classification of the armed conflict in Vietnam raised political doubts is worth mentioning. The White House administration was concerned about the image associated with the existence of a state of open warfare between the DRV (Democratic Republic of Vietnam) and the United States, firstly pointing to the fact of an internal conflict between the forces of the Republic of Vietnam (South Vietnam) and the Viet Cong communist guerrilla, with the United States armed forces being the "intervening" party on the side of the government in Saigon.[219] From the perspective of ICRC's doctrine and position expressed at the beginning

217 J. Brungess, *Setting the Context: Suppression of Enemy Air Defenses and Joint War Fighting in an Uncertain World*, Maxwell 1994, pp. 21–22.

218 Letter dated 8 December 1973 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General, United Nations General Assembly A/9429.

219 D.G. Partan, *Legal Aspects of the Vietnam Conflict*, "Boston University Law Review" 1966, vol. 46, pp. 281–289.

of the conflict after the landing of US troops on the beach in Da Nang in 1965, there was no doubt that this conflict was international in nature, due to: 1) the guerrilla movement in South Vietnam remaining under the direct control of the DRV, 2) US air attacks on targets in North Vietnam, 3) direct armed clashes between US forces and DRV troops in South Vietnam – the Battle of La Drang Valley from November 14 to 18, 1965.[220]

Interestingly, similarly to the bombing of London during the key moment of the Battle of Britain in September 1940, the US air strikes on North Vietnam (DRV) also began as reprisals, related to the attack of the Viet Cong communist guerrilla (Operation "Flaming Dart") on US bases in South Vietnam in February 1965. The attacks were then organized into a new Operation "Rolling Thunder", which overall lasted intermittently until 1972. Political considerations were a fundamental variable influencing the manner in which the air campaign in Vietnam was conducted – both US Secretary of State Robert McNamara and US President Lyndon Johnson feared an excessive escalation of the conflict, considering that the US Air Force would be authorized to perform air strikes in the DRV only in the event of prior military operations directed against South Vietnam ("tit-for-tat" tactic).[221] This position was in open opposition to the views of American generals, including Gen. Curtis LeMay, who called for quick coverage of the entire DRV area with the range of concentrated strategic strikes in order to crush the military structure of the state ("bomb them back to the Stone Age").[222] The American general postulated targeting the state's economic system with air strikes, primarily fuel resources, which would cause difficulties in transportation and the supply of electricity, but also mining the port in Haiphong and destroying cargo handling infrastructure. At this point, LeMay expressed a view urging to "apply whatever force is necessary to employ, to stop things quickly. The main thing is stop it. The quicker you stop it, the more lives you save".[223] However, he stipulated that such actions may not include attacks on civilians but should be aimed at the destruction of POL facilities (petroleum, oil, lubricants), transport and economy. These measures were aimed at destroying the ability of DRV to attack South Vietnam, but they did not

220 "As professor Howard Levie notes in his study of Maltreatment of Prisoners of War in Vietnam, "the items so specified clearly indicate that the I.C.R.C. considered the armed conflict in Vietnam to be of an international character. Indeed, the tenor of the letter leaves no doubt on this score" – T. Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of 'International Armed Conflict'*, "Columbia Law Review" 1971, vol. 71, p. 58.

221 See: W.H. Parks, *The Rolling Thunder*…

222 "My solution to the problem would be to tell them frankly that they've got to draw in their horns and stop their aggression, or we're going to bomb them back into the Stone Age. And we would shove them back into the Stone Age with Air power or Naval power – not with ground forces" – W.C. Gibbons, *The U.S. Government and the Vietnam War: Executive and Legislative Roles and Relationships, Part II 1961–1964*, Princeton 1986, p. 210.

223 K.H. Williams, *Le May on Vietnam*, Washington 2017, pp. 22–23.

condone "mass slaughter".[224] LeMay stepped down as commander-in-chief of the Air Force on the eve of Operation "Rolling Thunder" and later commented extensively on the mistakes made by the US command in target selection. He pointed out that between 1967 and 1968 the USAF had the capability to selectively destroy objects without endangering the lives of civilians and postulated returning to the dogma of strategic attacks against 1) major factories, 2) power plants, 3) dams, 4) ports and 5) merchant ships. The American commander claimed that giving prior warning is sufficient protection of civilians and that the losses accompanying strikes against military objectives are inevitable and occur in any armed conflict.[225]

However, the manner of conducting the Operation "Rolling Thunder" was primarily determined by political motives. The list of the so-called 94 permanent targets of the Joint Chiefs of Staff (JCS) during the Operation "Rolling Thunder" in principle included ammunition depots, POLs, power plants, armament factories, airports, bridges, and radar stations. However, the intensity of combat missions against natural military objectives, such as airports or radar stations, was extremely low.[226] In addition, the US Air Force received rigid guidelines on how to conduct air missions. First, Hanoi and Haiphong zones were excluded from the possibility of attack (establishing a 20-mile exclusion zone over the capital of the DRV and an 8-mile zone over the largest port of the state), which could only be attacked under authorization from the White House.[227] Attacking residential areas and anti-aircraft defense points located in them was also forbidden. In addition, it was ordered that attacks against military objectives be undertaken only in good visibility conditions and according to a specific pattern.[228] However, the US

224 "Destruction of oil storage is a beginning, but the thumb screws will need much more tightening before 'uncle' is called. This does not mean the bombing of populations, but rather of important industrial, transport and agricultural objectives. Third, we must not try to fight a benign war against an enemy who utilizes terror as a basic tactic. If we take up arms against an enemy, we should hit him hard. This means that we should destroy his economy and his will to wage war. Again, let me say, as I have often said, this does not mean mass slaughter" – *ibidem*, p. 24.

225 "My answer to that was to warn the civilian population of North Vietnam that you're going to hit the military objectives wherever they're found and advise them to get away from them" – *ibidem*, p. 76.

226 Intelligence Memorandum, The Effectiveness of the rolling Thunder Program in North Vietnam, 1 January – 30 September 1966, p. 12, https://www.cia.gov/readingroom/docs/CIA-RDP78T02095R000900070034-6.pdf (accessed: 3.06.2025).

227 "At the operational level, these restrictions hindered the achievement of the three stated aims. A 30 nautical mile (NM)-radius ring around Hanoi and a 10 NM-radius ring drawn around Haiphong delineated no-strike zones and so gave these areas of war resource sanctuary against strikes" – G.R. Jackson, *Linebacker II: An Examination of Strategic Use of Airpower*, Alabama 1989, p. 23.

228 A.J. Bellamy, *Massacres and Morality Mass Atrocities in an Age of Civilian Immunity*, Oxford 2012, p. 174.

political leadership was not able to determine the principal objective of the war and whether the US intervention in Vietnam should only support anti-guerilla operations in South Vietnam or extend the scope of the campaign to the areas of the DRV that supported the Viet Cong's actions against the government in Saigon.[229]

The magnitude of the air conflict is illustrated by the fact that in 1968 – at the height of American involvement in South Vietnam, where, in its peak, some 550,000 soldiers were stationed there – the USAF in Southeast Asia had around 85 air squadrons with a total of almost 1,800 combat aircraft. In October 1968, American services reported the destruction of nearly 80% of weapons depots, 60% of fuel depots, 50% of bridges and nearly 20,000 vehicles of various sorts (sea and land-going) used for transport.[230] Despite this, the objectives of the conflict were still a long way off. This was mainly due to the strategic relocation of the most important elements of the DRV war economy to areas located near the border with China, which were relatively densely populated. Moreover, between 1966 and 1972, the state's anti-aircraft defense system was rapidly expanded through the supply of Sino-Soviet anti-aircraft missiles SS-2, SS-3 as well as MiG-17 and MiG-21 fighters.[231] The DRV command quickly recognized the model of conducting operations by the US Air Force and sought to locate military infrastructure in areas which were considered to be restricted or prohibited sectors according to the Rolling Thunder policy.

In addition to strikes against DRV, the US Air Force provided extensive air support to their land forces as part of the Close Fire Support (CFS) mission in South Vietnam, Laos, and Cambodia. It is estimated that nearly 62% of the total tonnage of bombs dropped by the US Air Force in Indochina between 1965 and 1971 hit South Vietnam, and almost 75% of the total number of air missions were carried out over that state.[232] The use of B-52 bombers became famous as part of the "Arc Light" mission, which involved bombardment as direct support of the battlefield in order to destroy the positions of the Vietcong and DRV troops in a carpet attack. Some American authors argue that, in many cases, the above-mentioned actions were associated with operations devoid of military justification, pointing to the abuse of American air superiority during search and destroy missions, the

229 R.A. Pape, *Bombing To Win*…, p. 177.

230 "By October 1968, Rolling Thunder attacks were reported to have destroyed 77 percent of all ammunition depots, over 60 percent of all Pol storage facilities, nearly 60 percent of North Vietnamese power plants, over 50 percent of all major bridges, and 40 percent of all railroad shops. In addition, 12,500 vessels, 10,000 vehicles, and 2,000 railroad cars and engines were reported destroyed" – see: D.M. Drew, *Rolling Thunder 1965: Anatomy of Failure*, Maxwell 1998.

231 M. Clodfelter, *The Limits of Airpower or the Limits of Strategy: The Air Wars in Vietnam and Their Legacies*, "Joint Force Quarterly" 2015, vol. 78, p. 115.

232 M.A. Kocher, T.B. Pepinsky, S.N. Kalyvas, *Aerial Bombing and Counterinsurgency in the Vietnam Aerial Bombing and Counterinsurgency in the Vietnam War*, "American Journal of Political Science" 2011, vol. 55, p. 205.

main task of which was a zone-by-zone purge of DRV troops or Vietcong units from a given area.[233] It should be mentioned that the historical literature omits the circumstances related to an actually deliberate deployment of military objectives nearby populated areas by communist guerrillas. Furthermore, the term "free fire zone" did not refer in any way to the recognition that in a given area, the military side is exempt from the obligation to observe the requirements of the Law of Armed Conflict.[234] The development of the above issue from a legal perspective is still awaiting a detailed analysis of the American archives and a critical look.[235]

7.2. Operations "Linebacker I" and "Linebacker II" and precision-oriented air warfare

On March 30, 1972, the so-called Easter Offensive began – a massive attack launched by DRV troops against the positions of the Army of the Republic of Vietnam near the so-called demilitarized zone and the border with Laos. The initial successes of the North Vietnamese troops were halted by the presence of the remaining US military contingent and massed air strikes (in July 1972, the USAF and the US Navy carried out more than 5,000 combat flights and 2,000 combat missions with the participation of B-52 bombers). Determined to bring the political leadership of the DRV to the negotiating table and stop the possibility of the Democratic Republic of Vietnam collapsing, President Nixon's administration abandoned its previous restrictions on military operations, deciding for the first time in the history of the Vietnamese conflict to launch strategic operations against industrial and infrastructure facilities over the entire territory of North Vietnam.[236]

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233 "Deliberate or negligent unit abuse of firepower, unfortunately, is difficult to prove. In the Vietnam War, it is common for troops to spray or saturate suspicious or possibly dangerous areas with many forms of firepower. Troops in defense perimeters are given to cutting loose with their own weapons and calling in artillery and air support whenever in their judgment danger manifests itself outside the perimeter. Even if proven to have been absolutely unnecessary because based on ungrounded apprehensions, such use of firepower is not a war crime as long as it can be shown that the measures were honestly deemed necessary by those who took them" – W.V. O'Brien, *The Law of War, Command Responsibility and Vietnam*, "Georgetown Law Journal" 1971, vol. 60, s. 634; W.D. Verwey, *Bombing of the North After Tonkin and Pleiku: Repreisals?*, "Revue Belge de droit international" 1969, vol. 5, pp. 475–477.

234 C. Terry, *The Vietnam War in Perspective: Lessons Learned in the Law of War As Applied in Subsequent Conflict*, "Naval Law Review" 2007, vol. 54, p. 94.

235 "It must be left to the historians, at a time when careful factual inquiry is possible, to record to what extent the civilian population and their hamlets and villages have been destroyed by spill-over air attacks, or because they harbored military objectives. The Defense position has been repeatedly and clearly stated that" – H. DeSaussure, *The Laws of Air Warfare: Are There Any?*, "International Law Lawyer" 1971, vol. 5, p. 535.

236 "The President (Nixon): Have we ever used B-52's in North Vietnam? Secretary Laird: No. The President: We have never used them there, but have come close to the North

On May 9, 1972, during Operation "Pocket Money", warplanes of U.S. Navy mined the port of Haiphong, cutting off DRV supplies from the communist bloc states. On May 10, 1972, Operation "Linebacker I" began with the first strategic strikes of the US Air Force aimed at cutting off supplies to the DRV units attacking South Vietnam. The guidelines of the Joint Chiefs of Staff (JCS) assumed that the US Air Force would henceforth apply practical and justified precautions with regard to civilian population instead of the rigid regulations applicable during Operation "Rolling Thunder", ordering, among others, complete avoidance of populated areas despite the presence of legitimate military objectives within them. Right from the beginning of Operation "Linebacker I", there were indications that it was possible to accept some civilian casualties as part of collateral damage accompanying the bombing itself (with regard to people working in a given industrial facility) and possible casualties of airstrikes related to the so-called strike force security – i.e., activities related to the deployment of SAM launchers and batteries of anti-aircraft artillery in populated areas by the DRV. The attacking combat craft were also greenlighted in their fire response to the DRV air defense operations. Some of the civilians were considered to be directly involved in military operations but, interestingly, they were also treated as part of the collateral damage. Due to the consequences resulting from possible side effects of air raids, some categories of targets – in particular water irrigation networks and water dams – were considered to be as facilities requiring special authorization.[237]

On account of many factors, this campaign was a sign of a technological breakthrough in conducting modern air operations. DRV was guarded by an anti-aircraft defense system in the form of artillery and missile-radar installations, and the presence of a group of approx. 200 MiG-17 and MiG-21 fighters of Soviet production.[238] In order to break North Vietnam's air defense, the U.S. Navy and USAF

Vietnamese border from time to time. Is there any reason for our not using B-52's over North Vietnam? It is because they are more vulnerable? Of course, I'm not thinking of bombing Hanoi. Secretary Laird: We have put them in on the passes fairly close to the border. Admiral Moorer: We have had attacked against them from anti-aircraft guns, but haven't lost one yet. The President: I take it the reason is that they might be vulnerable. It would be a great psychological victory for North Vietnam to shoot one down, and their use has been restricted to South Vietnam. Secretary Laird: There has been no mass bombing of the North, and the decision was not to hit civilian centers, but only to use tactical fighters to go in and take out certain targets. We haven't used mass drops at night" – *Foreign Relations of the United States 1969–1976 Volume VII, Vietnam, July 1970 – January 1972*, Washington 2010, p. 938.

237 W. Harris, *The Linebacker Campaigns: An Analysis, A Research Report*, Alabama 1997, p. 15.

238 "Between 1968 and 1972, the North Vietnamese almost doubled the number of SAM sites to around 300, although not all were occupied at anyone's time. The NVNAF grew in size from a handful of MiGs to a force of nearly 250 MIG-17s, -19s, and -21s. The North had improved its air defense communications system dramatically, integrating SAM sites with the over 1,500 AAA batteries throughout North Vietnam and the dozen or so air bases capable of

used Wild Weasel tactics – detecting DRV radar and missile systems by provoking them with a flight of a specially adapted aircraft (initially the F-105 Thunderchief, and later on the F-4 Phantom) to a military response in order to obtain target coordinates and direct other Allied machines, or using their armament in the form of the AGM-78 Standard ARM anti-radar missile, which could seek DRV radar stations, even if they were turned off. Electro-radar jamming transmitters were also used on a large scale, and precision-type ordnance in the form of laser-guided Paveway missiles were also fielded. In 1972, it was clear that, from a military point of view, the presence of the American Air Force was the only factor determining maintenance of the front line. Operation "Linebacker II" (also known as "Christmas Bombing"), of groundbreaking significance, not only politically but also with regard to aerial strategy, commenced with the famous directive of President Nixon directed by the Joint Chiefs of Staff to the Strategic Air Command in the Pacific and Southeast Asia:

> "You are to commence at approximately 1200 Zulu, 18 December 1972, a three-day maximum effort, repeat maximum effort, of B-52/Tacair strikes in the Hanoi/Haiphong areas. Object is maximum destruction of selected targets. Be prepared to extend operations past three days, if directed." Operative tasks are:
> 1) The use of visual and weather-independent measures;
> 2) Use all available means without harming the necessary forces to support the Republic of Vietnam or in emergency situations in Laos and Cambodia;
> 3) Execute repeated strikes against authorized targets, including DRV Air Forces, airbases, and active SAM launchers, if required by the tactical situation and limiting own losses;
> 4) Exercise precaution to minimize risk of civilian casualties utilizing LGB weapons against designated targets. Reduce losses.[239]

The main targets during the operation were railway lines, railway spur lines, radio stations, power plants, airports, anti-aircraft defense, and bridges. It should be noted that the economic structure of North Vietnam was not highly industrialized, unlike, for example, Japan or the Third Reich during World War II. The functioning of the DRV and the possibility of conducting an assault against the Republic of Vietnam resulted from the state's ability to possess sufficient rail, sea, and road infrastructure enabling the efficient shipment of arms supplies from the Warsaw Pact states or China.[240] That is why relatively little emphasis was placed on the

launching MiGs" – E.H. Tilford, *Setup – What the Air Force did in Vietnam and Why*, Maxwell 1991, p. 240.

239 W.H. Parks, *Linebacker and the Law of War*, "Air University Review" 1983, vol. 1–2.

240 C.T. Kamps, *The JCS 94-Target List: A Vietnam Myth that Still Distorts Military Thought*, "Aerospace Power Journal Spring" 2001, Spring, p. 78.

destruction of industry, and the priority was given to strike operations directed at destroying infrastructure and the supply chain within the DRV.[241] According to L. Teixeira, the issue related to the protection of the civilian population during the bombings was the basic parameter for the selection of goals, as well as means and methods. In the first place, the assignment of "sensitive" targets as a subject of the B-52 bombing attack was abandoned, instead using tactical aircraft armed with precision strike munitions (such as the aforementioned Paveway missiles, which ensured approx. 50% of direct hits at the target with an accuracy of 2–3 meters).[242] While the damage to the road or transmission infrastructure was not considered significant, the depletion of the enemy's means of effective anti-aircraft defense (destruction of missile launchers and aircraft located at airports) was highlighted.

The main driver of Operation "Linebacker II" and the largest strike force of the USAF were the expeditions of B-52 bombers using conventional bombs. On December 18, 1972, 129 heavy strategic bombers appeared in the area of Hanoi and Haiphong, bombing railway lines and airports. In total, B-52s accomplished approx. 720 combat missions for 11 days, dropping 15,000 tons of bombs and losing 15 aircrafts. The biggest losses were sustained during the first three days of the campaign and were associated with a rigid directive obliging the crews to maintain a unified attack throughout the flight in order to minimize possible damage to the civilian population – this excluded the possibility of defensive maneuvers over the target.[243] For the protection of the Strike Force (a strike force consisting of B-52 bombers), F-111 (new tactical bombers), F-4, EB-66, and F-105 aircraft were assigned in parallel, which simultaneously attacked anti-aircraft artillery positions and enemy aircraft as well as performed electronic jamming. The air attacks were multi-directional in order to distract the attention of the DRV command from the original directions of air strikes conducted by B-52 formation, as well as to lead to the depletion of SAM missile stockpiles (approx. 1,000 missiles in 11 days).

The events of the Operations "Linebacker I", and "Linebacker II" confirmed from a military point of view the purposefulness of a wider application of precision-guided weapons. An example of this situation is the status of the Thanh Hoa Bridge, located on a critical supply route connecting the south of the state with Hanoi. The installation had been regularly bombed since 1965 by the US Air Force, which in

241 "Linebacker II's military objectives included: (a) destroy war making industry and support infrastructure in North Vietnam, (b) choke the external supplies shipped to the port of Haiphong or arrived by rail from China, and (c) destroy North Vietnam's internal transportation system (35). The operation employed strategic and tactical air power to the fullest to destroy important targets such as radio stations, railroads, Pol and power plants, and airfields located in the Hanoi/Haiphong areas and to mine Haiphong port" – T. Phan, *An Analysis of Linebacker II Air Campaign: The Exceptional Application of US Air Coercion Strategy*, San Antonio 2002, p. 18.

242 L.D. Teixeira, *Linebacker II: A Strategic and Tactical Case Study*, Alabama 1990, p. 28; B.S. Lambeth, *The Transformation of American Air Power*, New York 2000, p. 40.

243 J.T. Correll, *Arc Light*, "Air Force Magazine" 2009, vol. 1, p. 61.

total had carried out nearly 900 combat missions, with the loss of 11 of its bombers, unable to reach the desired effect of taking the bridge out of service. The area of the bridge was considered particularly dangerous – almost 100 American aircraft operating in the target area were destroyed by Vietnamese anti-aircraft defense throughout the conflict. Only after employing laser-guided Paveway missiles, was the structure taken out on April 27, 1972 by the attack of 12 F-4 Phantom fighters. Another example of a proper use of precision missiles was the attack on the hydroelectric power plant in Lang Chi on June 10, 1972, where a conventional bombing would lead to the destruction of the dam and cause severe environmental and civilian damage. The use of laser-guided munitions helped limit the impact of the attack to the destruction of energy transformers, protecting the dam from devastation.[244]

The effects of a precision strike on the economic and military structure of the DRV brought tangible military benefits. North Vietnam's Air Forces lost a tremendous number of their raw materials and supplies, and they also expended all their anti-aircraft resources.[245] The attacks on power plants led to a 90% drop in electricity production.[246] Despite the size of the operation, deaths among the civilian population are estimated at approx. 1,300–1,600. The main consequence of Operation "Linebacker II" was the execution of an extensive air campaign based on legitimate doctrinal assumptions, which, along with a reduction of casualties among the civilian population, achieved measurable military benefits in terms of the collapsing the DRV supply system and neutralizing their capability of invading the Republic of Vietnam.[247] The conclusions of this operation undoubtedly led to the final demise of the myth stipulating the need to attack the civilian population or the acceptance of high collateral losses as a necessary or even indispensable objective in conducting an aerial operation of a strategic nature.[248]

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244 M. Clodfelter, *The Limits of Air Power*…, p. 144.

245 G.D. Joiner, A. Dean, *Operation Linebacker II: A Retrospective, Part 7: Consequences and Changes in Strategic Thought With an Introduction to the Series*, Report of the LSU Shreveport unit for the sac Symposium 2017, p. 2, https://www.lsus.edu/Documents/SAC%20LSUS/Linebacker%207.pdf (accessed: 10.07.2025).

246 "Overall, the attacks on electric power reduced the amount of operational generating capacity from 115,000 kilowatts to 29,000. These attacks, coupled with the damage done during Linebacker I, eliminated almost 90 percent of the generating capacity in North Vietnam" – T. Griffith, *Strategic Attack*…, p. 40.

247 "The crucial lesson from LINEBACKER II was to create target lists that minimized civilian casualties and focus on military units and facilities" – *ibidem*, p. 21.

248 "When 'terror bombing' was still considered an important part of air warfare, a belligerent could easily mistake inaccurate bombing for a 'terror' attack calling for reprisals. Since it is now reasonably established that 'terror' attacks against cities are counterproductive, inaccuracies can be more easily distinguished from deliberately illegal attacks. A heavy burden of proof should now rest on the belligerent claiming to be the victim of a 'terror' attack from the air" – B.M. Carnahan, *The Law of Air Bombardment in Its Historical Context*, "Air Force Law Review" 1935, vol. 17, p. 59.

One of the more publicized incident of collateral damage was the case of the Bach Mai hospital bombing. The medical unit was located next to the North Vietnamese Air Force based at a distance of approx. 1000 meters and on December 21, 1972, it was hit by bombs from B-52s attacking the airfield.[249] As a result of the attack, approx. 30 medical staff were killed.[250] The attack on the hospital was seen as evidence of America's "contempt for international law" and "evidence of a plan to destroy Hanoi by carpet bombing".[251] Meanwhile, during the attack on Bach Mai Airport, one of the B-52s at the beginning of the bomb drop was hit by two SAM missiles, which caused an uncontrolled dispersion of bombs and, as a result, a bomb fell outside of the target's boundary.[252] Existing information confirms that on December 21, 1972, two B-52s codenamed "Scarlet 03", and "Blue 01" were lost during the bombing of Bach Mai Airport.[253]

From a legal perspective, it is worth highlighting that the discussion on the course of the air warfare over Vietnam is only mentioned in the doctrine of international law to a slight extent, which should be acknowledged with regret. Some journalists-oriented discussions seems to be largely ideological or based on a selective analysis of facts based on the general premise of illegality of the USAF air bombings,[254] (a viewpoint endorsed by the so-called Tribunal of Bertrand Russell – Nobel Prize winner and English philosopher).[255] Reflection on the American doctrine is primarily based on the reports of journalists and scientists invited by the DRV in order to document violations of international law by the US armed forces (e.g., the report by H. Salisbury in the "New York Times").[256] One of the most famous, and so far, one of the few, studies of American lawyers edited by Prof. R. Falk, referring comprehensively to the *ius in bello* and the course of the war in Vietnam is based on journalistic reports that are unconvincing at least,

249 W.M. Hammond, *Public Affairs: The Military and the Media, 1968–1973*, Washington 1996, p. 607.

250 C.E. Bartecchi, *The Bach Mai Hospital Project*, Bennington 2013, p. 10.

251 "To pretend that we are doing otherwise-that we are making 'enduring peace' by carpet-bombing our way across downtown Hanoi with B-52s-is to practice yet one more cruel deception upon an American public already cruelly deceived. It is, in brief, to compound what is perhaps the real immorality of this administration's policy-the continuing readiness to dissemble; to talk of 'military objectives' when what we are hitting are residential centers and hospitals and commercial airports; to speak of our dedication to the return of our POWs and our missing in action even while we add more than seventy to their number in little more than a week" – M.F. Herz, *The Prestige Press and the Christmas Bombing, 1972: Images and Reality in Vietnam*, Washington 1980, p. 91.

252 P.M. Shaw, *Collateral Damage and the United States Air Force*, Maxwell 1997, p. 37.

253 W.J. Boyne, *Linebacker II*, "Air Force Magazine" 1997, vol. 11, p. 57.

254 M. Selden, *A Forgotten Holocaust: US Bombing Strategy, the Destruction of Japanese Cities and the American Way of War from World War II to Iraq*, "The Asia-Pacific Journal" 2007, vol. 5.

255 Y. Beigbeder, *Judging War Criminals: The Politics of International Justice*, London 1999, p. 139.

256 A. D'Amato, H.L. Gould, L.D. Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, "California Law Review" 1969, vol. 57.

which consequently raises the question of the reliability of factual findings and, subsequently – the correctness of subsumption and the legal argument presented.[257] The second study was issued in a similar spirit – although it was more critical in relation to the evidence collected – was issued by T. Taylor (one of the members of the US prosecution team in Nuremberg).[258] The above study was met with valid criticism by W.A. Solf (later a participant in the diplomatic conference in Geneva in 1974–1977), who mentioned the problematic shape of the Law of Air Warfare and questioned the factual findings as to the actual course of the conflict based on journalistic reports.[259] Another controversial view of one of the authors of the study by R.A. Falk, H. DeSaussure, is the assumption of the illegality of Operations "Linebacker I" and "Linebacker II" due to the lack of a military objective in their implementation, replaced by a political one (the campaign was aimed at forcing the DRV to negotiate a ceasefire with South Vietnam) – which, for the author of this dissertation is not justified by the provisions of international law (especially to the extent applicable before the codification of the Additional Protocol of 1977).[260]

At the opposite end of the American doctrine, there are works by W. Hays Parks and Burrus M. Carnahan. The latter pointed out that in the case of the Vietnamese conflict, from the perspective of international law, it is not possible to have objections as to the correctness of classifying the objectives during Operations Linebacker I and "Linebacker II", and any civilian casualties may only be a result of inaccuracies and not of deliberate actions.[261] Parks pointed out that, in his opinion, the air strikes involved in Operation "Linebacker II" "fully complied" with the applicable *ius in bello* standards. He pointed out that the campaign set new standards in the field of the precautions of a hitherto unknown nature. The American author (a direct participant in the fighting in Vietnam) argued that

257 L.C. Petrowski, *Law and the Conduct of the Vietnam War*, [in:] R. Falk (ed.), *The Vietnam War and International Law*, vol. 2, Princeton 1968, pp. 498–499.

258 See: T. Taylor, *Nuremberg and Vietnam: An American Tragedy*, New York 1971, pp. 139–140. In a similar vein, M. Lippman states: "At the same time, the condemnation of their planned prosecutions, in part, was also indicative of the fact that aerial bombardment of civilian targets was sufficiently common that this practice had largely been removed from the purview of international legal regulation" – M. Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, "California Wester International Law Journal" 2002, vol. 33, p. 34.

259 "His reasoning is hard to follow. Strategic bombardment of populated places was not considered a war crime at Nuremberg. Neither was the tactical use of fire power in battle areas against military objectives notwithstanding that civilian casualties resulted incidentally from both" – W.A. Solf, *A Response to Telford Taylor's Nuremberg and Vietnam*: *An American Tragedy*, "Akron Law Review" 1972, vol. 5, p. 54.

260 Studies on the so-called genocidal bombing have appeared in American literature. H.A. Bedau, *Genocide in Vietnam*, "Boston University Law Review" 1973, vol. 53.

261 B.M. Carnahan, *The Law of Air Bombardment*…, p. 58.

the directives related to the use of B-52 bombers provided for the necessity of selecting targets, excluding the possibility of accidentally hitting built-up areas by, among others, selecting an attack path. When the above bombing method was not feasible due to the danger it posed to the civilian population, tactical aviation was assigned to perform the task, particularly F-111 aircraft, ensuring greater accuracy. Parks stressed that B-52 crews were required to maintain a steady course of the attack, even if they were in a critical situation, to avoid possible missile dispersal resulting from defensive maneuvers.[262] Anthony P.V. Rogers, commenting on the attack on the Lang Chi dam as part of Operation "Linebacker I", points out that this is a practical example of applying the precautions and the rule of proportionality in one.[263]

7.3. Rules of Engagement (ROE) and targeting

The "principle of using force" by armies in an armed conflict has now gained considerable popularity in the doctrine of international humanitarian law. However, this is not a formulation which is a product of modern states' practice, because, as indicated in the chapters below, specific guidelines for the use of aviation in the conditions of armed conflict were already formulated during World War II. However, it should be noted that it is only since the 1970s (the final period of the Vietnam conflict) that the existence of an issue related to the occurrence of restrictions resulting from international humanitarian law has been emphasized in its guidelines. This concerned, in particular, the guidelines related to Operation "Linebacker II", which for the first time presented a "modern" ROE structure taking into account all three necessary spheres: political (understood as an objective), military (understood as a means) and legal (understood as limitation).[264] Ronald Reed describes that the concept of ROE is a conglomerate of restrictions, guidelines and postulates binding the manner of using armed violence by the armed forces, limited by military requirements, determined by the strategic and political framework and regulated by the disposition of international law.[265]

As previously mentioned, Operation "Linebacker II", in addition to a technological breakthrough, also indicated a new direction for the development of the concept of deploying air force in the event of an armed conflict, which included *ius in bello*. The result of the above breakthrough is the emergence of condensed

262 W.H. Parks, *Linebacker*…

263 A.P.V. Rogers, *Law on the Battlefield*, Manchester 1965, p. 19.

264 G.D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge 2010, pp. 476–477.

265 R. Reed, *Chariots of Fire: Rules of Engagement in Operation Deliberate Force*, [in:] R. Owen (ed.), *Deliberate Force A Case Study in Effective Air Campaigning Final Report of the Air University Balkans Air Campaign Study*, Maxwell Air Force Base 2000, p. 382.

instructions which are as clear and concrete as possible, covering a basic set of principles, rules and obligations related to the operations of armed forces (as well as air forces) in the conditions of an armed conflict. However, it is necessary to agree with J.C. van den Boogaard that the level of "harmonization" of ROE with the obligations arising from treaty and customary *ius in bello* may be varied and potentially incomplete by their very nature.[266] The exact content of ROE is strictly guarded and there are objective research obstacles that make them difficult to verify.[267]

8. Contemporary Air Warfare

8.1. Air clashes in the Iraq-Iran war during the period of 1980–1988

Like most conflicts in the Middle East, the Iraqi overland invasion began on September 22, 1980, and was preceded by an air strike against Iranian air bases. Iraqi MiG-23 groups bombed Tehran's Mehrabad International Airport in addition to military airfields. The consequences of the attack did not eliminate the possibility of retaliation from the Iranian air force, which carried out strikes on the military aviation infrastructure in Iraq as part of Operation "Kaman", also attacking fuel refineries and petrochemical plants, which caused oil exports to be halted. In this respect, it is worth noting that the Iranian air force mainly consisted of American-made machines, including F-4 Phantoms and F-5 Tigers. Just before Shah Reza Pahlavi's government fell, the order for 60 F-14 Tomcat fighters equipped with Phoenix long-range missiles and radars, which effectively prevented Iraqi fighter aviation from counterattacks, was delivered. The Iraqi air force used Soviet-made aircraft (in total, F-14s could have shot down up to 150 Iraqi aircraft in 8 years, with a loss of approx. 15 aircraft).[268]

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266 J.C. van den Boogaard, *Fighting by the Principles: Principles as a Source of International Humanitarian Law*, [in:] M. Matthee, B. Toebes, M. Brus (eds.), *Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald*, The Hague 2013, pp. 21–23.

267 "Rules of engagement regulate the use of force-either through the granting of permission to fire or by restricting the ability to employ the unit's weapons. Obviously, such specifications, definitions of hostile intent, descriptions of the permitted responses to particular threats or indications, and other factors regarding the use of force would be of great value to an adversary" – G.R. Philips, *Rules of Engagement*, "The Army Lawyer" 1993, vol. 4, p. 4.

268 T. Cooper, F. Bishop, *Iranian F-14 Tomcat Units in Combat*, Oxford 2004, p. 84.

8.2. Falkland Islands 1982 as an example of a limited conflict

On April 2, 1982, an Argentine military contingent attacked and occupied British-dependent territory in the Falklands (Malvinas), which met with a strong response from the Royal Navy and the Royal Air Force. The UK deployed Sea Harrier aircraft as the aerial component in the number of approx. 40 machines carried as complement on two aircraft carriers, HMS "Hermes" and HMS "Invincible". From the very beginning, the conflict was geographically limited. Ultimately, it extended within the 200 nautical mile exclusive zone established by the United Kingdom on April 30, 1982, within which the British forces in the South Atlantic reserved themselves the right to recognize any ship, as well as military aircraft and civilian aircraft involved in the process of observing the movements of British forces as hostile.[269] It is worth emphasizing that the establishment of such an area was primarily related to air operations, ultimately aimed at limiting the possibility of neutral or civil aircraft passing through this zone. According to the chief legal advisor of the Royal Navy, the establishment of the zone was intended to serve as a "facilitator" during the targeting process, especially with regard to sea-air weapons, capable of fighting targets many kilometers from the location of British warships and was also a kind of "war trick" that allowed the Royal Navy to make an appropriate early response to the appearance of an enemy aircraft.[270] The establishment of the zone was implicitly assessed mainly as a technical measure of an informative nature, addressed to neutral states, while in no way did it exempt British commanders from the obligation to classify targets.[271] In the maritime context, it is worth noting that one of the most notorious incidents of the Falklands conflict, the sinking of the Argentinian cruiser "General Belgrano" by a British submarine, took place outside the area of the "exclusive combat zone" and, despite some controversies, was deemed a fully legal act.[272] Despite the external conservatism of HRM government, which tried to convey to the public that military operations between Argentina and the United

269 The above comment referred to a Boeing 707 aircraft, which, while in the Argentine Air Force, carried out reconnaissance missions against the British navy.

270 T. Young, *Maritime Exclusion Zones: A Tool for the Operational Commander*, Newport 1992, p. 10.

271 T. Stein, *No-Fly-Zones*, "Israel Yearbook on Human Rights" 1999, vol. 27, p. 197; M.N. Schmitt, *Air Warfare*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 127.

272 C. Greenwood, *Self Defence and the Conduct of International Armed Conflict*, [in:] Y. Dinstein (ed.), *International Law at a Time of Perplexit: Essays in Honour of Shabtai Rosenne*, Dordrecht 1989, p. 279. It should be noted that the legality of the attack on the Argentine cruiser has been questioned due to the fact that submarine attacks on warships ceased after World War II, which should lead to the prohibition of the law in question due to the lack of relevant practice. The doctrine strongly rejects this view, see: W.H. Parks, *Asymmetries and the Identification of Legitimate Military Objectives*, [in:] W. Heintschel von Heinegg, V. Epping (eds.), *International Humanitarian Law Facing New Challenges: Symposium in Honor of Knut Ipsen*, Berlin 2007, p. 95.

Kingdom are only local and are justified in the light of the right to self-defense, expressed pursuant to Article 51 of the United Nations Charter, there was no doubt that both states were involved in an international armed conflict and that Argentinian naval ships were legitimate military objectives under provisions of AP I of 1977. An expression of the aforementioned "conservatism" of London authorities was, among others, the decision to refrain from expanding the air warfare onto Argentinian air bases stationed on the mainland.

Because the only air base in the Falklands located in Port Stanley could not support modern aircraft, Fuerza Area Argentina operated from airports located on the South American continent. The only aircraft capable of operating in the Malvinas region in a direct manner were Pucara attack aircraft, which were assigned to bombing the British warship grouping with unguided bombs and supporting ground troops. Most of these machines were destroyed on May 15, 1982 during a Special Air Service (SAS) raid. The greatest threat to British operations was the presence of fighter bombers Super Etendard, equipped with air-sea missiles of the Exocet type, which sank the British destroyer HMS "Sheffield" on May 4, 1982. On May 25, 1982, a pair of Argentinian A-4 Skyhawks sank the frigate HMS "Coventry". Despite the fierce assault strikes by Argentinian pilots attacking from a low altitude, the presence of Sea Harrier fighters, the success of the British ground offensive and the fear of directing attacks against the Argentinian air bases on the mainland led to the surrender of the garrison defending Port Stanley on June 14, 1982.[273] In total, the Argentinian air force lost 75 military aircraft and shot down only one Lynx helicopter.

The Falklands conflict was one of the largest air-sea battles to take place after the Second World War. Because of the geographical isolation and lack of any civilian population as well as the fact that only military aircraft were directly involved in air combat, there were no major legal controversies pertaining to the above conflict. The customary nature of the principle applicable under international law whereby warships may become the subject of a legitimate military attack by aviation was confirmed.[274]

8.3. Iraq 1991 and air dominance

Following Iraq's aggression on Kuwait, the UNSC in Resolution 678/1991 authorized member states to take "all necessary measures" to implement Iraq's compliance with previous UNSC resolutions, including cessation of further aggression

273 The Argentine Air Force consisted of Israeli-made Dagger aircraft and *Mirage* IIIE fighters, which it was decided, after recording initial losses, to leave to cover bases on land.

274 W. Heintschel von Heinegg, *The Development of the Law of Naval Warfare form the Nineteenth to the Twenty-First Century – Some Select Issues*, "Yearbook of International Humanitarian Law" 2014, vol. 17, pp. 83–84.

and departure from Kuwait territory.[275] In practice, the above wording means authorization for the use of armed force by UN members.[276] On January 17, 1991, after the expiry of the ultimatum set out in the resolution, the coalition (USA, France, United Kingdom, Saudi Arabia) launched an air campaign lasting until February 23, 1991, which allowed a ground offensive to be launched, which ultimately led to the end of the war.

The American command indicated the following as the main strategic objectives of the campaign: 1) actions aimed at achieving air dominance by eliminating enemy air forces and means of air defense, 2) interdiction – actions in the zone just behind the frontline, aimed at destroying targets enabling the enemy to carry out combat operations, 3) Close Air Support (CAS) – direct support of one's own ground troops.[277] The detailed campaign plan provided for the need to eliminate the possibility of Saddam Hussein exercising control over the operation of his own armed forces, including in particular the need to destroy key telecommunications hubs and command centers. The second element of the strategy was to exert psychological pressure against the Ba'ath party regime. The third one was to attack Iraq's potential in the area of weapons of mass destruction, and the fourth was to destroy electricity grid, oil production, railways, and production facilities. All the guidelines included an order to limit losses among the civilian population, as well as long-term consequences for the Iraqi economy.[278] A detailed list of targets included the Iraqi Air Force, air defense, airfields, chemical, biological, and nuclear weapons production facilities, leadership, command network, Republican Guard forces, infrastructure, power grid, fuel depots, and weapons production facilities.[279]

The existing documents indicate that during the planning process, the planners were aware of the possibility of attacking the "dual-use targets" (understood as railways, bridges, energy network and communication centers), but a decision was made to exert double pressure on the Iraqi population to weaken Hussein's regime. A distinction was made between short- and long-term effects of performed strikes, selecting targets whose damage did not cause the need for long-term repair (e.g. fuel storage sites instead of fuel production facilities or transformers instead of power plants).[280] At the same time, a so-called no-fire target list was drawn up, which included: mosques and sites of religious worship, hospitals, dams, cultural

275 Resolution 678/1991, S/Res/678/1991.

276 See: D. Schweigman, *The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice*, Dordrecht 2001.

277 S.B. Michael, *The Persian Gulf War: An Air Staff Chronology of Desert Shield and Desert Storm*, Washington 1994, p. 233.

278 T.A. Keaney, E. Cohen, *Gulf War Air Power Survey Summary Report*, Washington 1993, pp. 36–37.

279 Operation Desert Storm: Evaluation of the Air Campaign, Letter Report, 06/12/97, GAO/NSIAD-97-134.

280 T.A. Keaney, E. Cohen, *Gulf War*…, p. 44.

goods and monuments. Each target ultimately qualified for destruction was subject to verification by the USAF legal service in the light of the requirements of international law.[281] A significant part of the coalition's aerial operations was preoccupied by an attempt to detect and dismantle mobile SCUD launchers, which pose a threat to Saudi Arabia and Israel.[282]

Controversial events related to the legal assessment of the air campaign over Iraq include four major incidents.

1. On January 26–27, 1991, the Iraqi army began evacuating Kuwait, threatened by being cut off from the rest of Iraq. Highway no. 8 towards Basra was a natural route of retreat. In addition to military transports, the main column was also accompanied by dozens of civilian cars confiscated by Iraqi military personnel in Kuwait. The road soon became the subject of all-day and extensive bombardment by Allied aviation, which gave it the nickname "the highway of death". Photographs depicting hundreds of destroyed and abandoned vehicles and killed Iraqi soldiers became it symbol. Soon after the event, some observers began to ask questions concerning: a) the presence of civilian vehicles on the road, b) the possibility of recognizing the retreating Iraqi soldiers as hors de combat in the light of international humanitarian law – also as a result of a huge disproportion of forces and the lack of any possibility of counteraction.
2. On February 5, 1991, the British Tornado bombed a bridge near Baghdad, over which civilians were moving, causing serious losses (an incident directly observed by a British journalist from "The Guardian" editorial board).
3. On February 12–13, 1991, two American F-117A Stealth aircraft bombed the Al-Firdos bunker in Baghdad, serving as a shelter for the civilian population, as a result of which up to 300 people were killed. This incident forced Gen. Norman Schwarzkopf to change the guidelines for conducting operations against the capital of Iraq.[283]
4. As a consequence of the attacks on the Iraqi electricity grid, power supply to hospitals, sewage treatment plants, water treatment points and food storage facilities was cut off. This led to a humanitarian catastrophe and a significant increase in mortality over the years following the 1991 invasion of Iraq, as highlighted in the UN report on the humanitarian situation in Iraq in July 1991.[284] Attacks on other elements of the dual-use infrastructure have resulted in a long-term economic collapse.

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281 P.D. Jamieson, *Lucrative Targets: The U.S. Air Force in the Kuwaiti. Theatre of Operations*, Washington 2001, p. 59.

282 M. Fiszer, *Lotnictwo w osiąganiu celów strategicznych operacji militarnych* [*Aviation in achieving the strategic objectives of military operations*], Warszawa 2011, p. 233.

283 T.A. Keaney, E. Cohen, *Gulf War*…, p. 69.

284 "As far as water is concerned, damage to water treatment plants and the inability to obtain needed spare parts have cut off an estimated 2.5 million Iraqis from the government

The official report to Congress indicated that although the main obligation at the stage of planning the operation was to exclude or minimize collateral losses, in the context of the attack on the electricity distribution system, it was stated that it had not been possible to "effectively separate the consequences related to the limitation of the supply of electricity supporting the work of the Iraqi chain of command and the energy used by the civilian population". Attention was drawn to the fact that a list of targets had been drawn up, under which an attack was not allowed within a 6-mile radius. It was argued that the process of applying the precautions included the selection of weapons, ammunition, time, direction and the expected scope of damage, which were assessed in terms of the possibility of accompanying losses – operations concerning dual-use facilities were carried out at times of the lowest activity of the civilian population and with the use of precision-guided missiles.[285] Elsewhere, it was pointed out that within built-up areas, a pilot was authorized to carry out an attack only if they had previously verified the nature of the target and had found the existence of such weather conditions that allowed the weapons to be guided to a designated point.[286]

The Allied air force campaign achieved instant strategic success with minimal own losses. In just the first 2 days of the campaign, the ability of the Iraqi Air Force and air defense to effective counterattack had been completely eliminated, allowing the coalition to focus their efforts on the remaining targets, at a cost of only approx. 30 lost machines.[287] Over the Iraqi sky, B-52's squadrons reappeared in the role of "carpet" bombers, which attacked the advanced Iraqi divisions on the so-called Saddam line, contributing to mass desertions.[288] The Allies effectively de-

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system they relied upon before the war. The perhaps 14.5 million Iraqis who continue to receive their water through this system are now provided on average with one quarter the pre-war amount per day. Much of this water is of doubtful quality, owing to such problems as defective treatment and lack of sufficient hours of electric power. Major damage was also suffered by the national sewerage system owing to the loss of electric power during the war. Most of this damage has not been repaired, with raw sewage now flowing in some city streets and into the rivers. Diarrhoeal diseases, thought to be mainly caused by water and sewage problems, are now at four times the level of a year ago. The state is already experiencing outbreaks of typhoid and cholera" – *Report to the Secretary-General dated 15 July 1991 on humanitarian needs in Iraq prepared by a mission led by the Executive Delegate of the Secretary-General for humanitarian assistance in Iraq*, S/22799, 17 July 1991, para. 16.

285 Department of Defense, *Conduct of The Persian Gulf War: Final Report to Congress*, Washington 1992, pp. 152–153.

286 *Ibidem*, p. 228.

287 The existing data attributes to aviation approx. 50% of the Iraqi army's equipment losses (approx. 3,000 guns, vehicles and tanks). It is worth noting that the Iraqi Air Force was classified as the sixth air force in the world before the war, with approx. 1,700 aircraft, including what are considered modern MiG-29s and *Mirage* F-1s. Iraq's air defense had nearly 6,000 anti-aircraft artillery pieces and approx. 700 SAM missile sites.

288 B. Yenne, *B-52 Stratofortress: The Complete History of the World's Longest Serving and Best Known Bomber*, Minneapolis 2018, p. 128.

stroyed military airfields including bunkers that shelter aircraft. Nearly 140 Iraqi combat aircraft, including many modern MiG-29s, fled to Iran, where they were interned.[289] As a result, the Allies ground offensive lasted only 72 hours, achieving the goals of the UN Security Council resolution. The existing long-term effects of conducting operations in Iraq in 1991 obscure, to some extent, the overall picture of the correctness of the air campaign conducted by the air force of the coalition acting to repel Hussein's aggression.[290]

8.4. Iraq no-fly zones

In accordance with UNSC Resolution 688/91 of April 5, 1991, the Iraqi repression directed against provinces inhabited by Kurds, as well as against the Sunni minority in the Basra region, was condemned. The document does not, however, contain any provision regarding the establishment of a no-fly zone and its enforcement by UN member states. However, from 1992, the British and French air forces began regular air patrols, joined by the US.[291] As part of Operation "Southern Watch", the coalition's combat aircraft conducted operations against the activity of the Iraqi military aviation that was operating south of the 33rd parallel. During the 10 years of the mission, USAF machines were sporadically fired with SAM-type missiles and anti-aircraft battery fire. In retaliation, the USAF, RAF and French Air Force bombed radar stations and shot down two Iraqi fighter planes violating the prohibited area.[292] On December 16–19, 1998, as part of the "Desert Fox" mission, the USAF carried out strikes on anti-aircraft defense posts, weapons depots and the Republican Guard barracks as a response to Hussein's failure to cooperate with UN inspectors on weapons of mass destruction.[293] In total, more than 150,000 patrol flights were carried out as part of the operation. Operation "Southern Watch" was transformed in the final stages in 2002 into the "Southern Focus" mission, which was essentially a preparation for Operation "Iraqi Freedom" in 2003. The northern part of Iraq was also subjected to air control by the RAF and the USAF, in the first phase as part of the "Provide Comfort" mission, and then extended as Operation "Northern Watch".

289 Interestingly, Iran returned to Iraq planes in service with the Iranian air force after nearly 25 years, in 2014, in connection with the invasion of ISIS.

290 "In the present state of the law, a verdict that the bombing policy in general was illegal would be hard to sustain" – A. Roberts, *The Laws of War in the 1990–1991 Gulf Conflict*, "International Security" 1994, vol. 18, p. 158.

291 J.A. Tirpak, *Legacy of the Air Blockades*, "Air Force Magazine" 2003, vol. 86, no. 2, pp. 48–52.

292 See: S. Chapman, *The War Before the War*, "Air Force Magazine" 2004, vol. 87, no. 2.

293 R. Grant, *Osirak and Beyond*, "Air Force Magazine" 2002, vol. 85, no. 8, p. 77.

8.5. The civil war in the former Yugoslavia and no-fly zone

UNSC Resolution 781/92 of October 9, 1992 established a ban on military flights in the area of Bosnia and Herzegovina, excluding activities carried out in support of UN peacekeeping forces and humanitarian aid.[294] This is also the first example of the establishment of what is called a no-fly zone.[295] However, this prohibition was ineffective, as it did not cover flights of turboprop machines and helicopters, therefore in the UNSC Resolution 816/93 of March 31, 1993 (point 1) it was decided to extend it. Significantly, paragraph 4 of the resolution included a mandate to the UN Member States to take "all necessary measures to enforce compliance with the flight ban over the territory of Bosnia and Herzegovina".[296] Since the UN peacekeeping forces did not have their own aircraft, from April 12, 1993 to December 20, 1995, the flights were entrusted to NATO, whose aircraft began patrolling the airspace over Bosnia.[297] Resolution 836/93 gave UN peacekeepers the right to receive direct air support from NATO.[298] It is important to note that the specific, two-part command model required authorization of air strikes at almost all levels of UN decision-making. This has caused significant impediments in the effective implementation of NATO's mandate.[299] The result was only limited attacks, targeting military vehicles that belonged to the Bosnian Serb army. On February 28, 1994, four Super Galeb combat-training aircraft of the Republika Srpska Air Force, violated the no-fly zone and were shot down by American F-16s (this was the first air-to-air shoot down by NATO forces in history).[300] In April 1994, on a special order of General Ratko Mladic, Serbian anti-aircraft defense attacked NATO aircraft, damaging the French Air Force's Dassault Étendard IV and

294 Resolution 781/1992 Adopted by the Security Council at its 3122nd meeting on October 9, 1992, S/RES/781 (1992).

295 K.P. Mueller, *Denying Flight Strategic Options for Employing No-Fly Zones*, Washington 2013, p. 3.

296 Resolution 816/1993 Adopted by the Security Council at its 3191st meeting on March 31, 1993, S/RES/816(1993).

297 K. Lardotter, *The Development of a NATO Strategy in Bosnia-Herzegovina*, [in:] H. Edström, D. Gyllensporre (eds.), *Pursuing Strategy: NATO Operations from the Gulf War to Gaddafi*, New York 2012, pp. 62–68.

298 "Decides that, notwithstanding paragraph 1 of resolution 816 (1993), Member States, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR in the performance of its mandate" – Resolution 836/1993 adopted by the Security Council at its 3228th meeting on June 4, 1993, S/RES/836(1993).

299 L.K. Wentz, *Lessons from Bosnia: The IFOR Experience, DoD Command and Control Research Program*, Washington 1997, pp. 22–23.

300 D.L. Haulman, *The United States Air Force and Bosnia 1992–1995*, "Air Power History" 2013, Summer, p. 27.

shooting down the Royal Navy's Sea Harrier fighter plane. On June 2, 1995, a *Kub* missile kit shot down an American F-16, the pilot was evacuated from the battle area after a few days by his own units.[301] During the campaign, Serbian units effectively countered the possibility of escalating airstrikes by taking "blue helmets" captive, using their status as "human shields".

On August 30,1995, in response to the bombing of Markale by Bosnian Serb units, NATO decided to launch the "Deliberate Force" operation as an extensive airborne operation aimed at Bosnian Serb military units.[302] Plans for a concentrated air strike in Bosnia had been in place for several years and included: 1) an integrated air defense system in the form of radars, SAM stations, radio installations, 2) ground units, 3) support, supply and command units, 4) military infrastructure ensuring the ability of execution of the operations by ground forces in the form of depots, arsenals, airfields, 5) civilian infrastructure used by the Serbian side as part of combat operations: bridges, power stations and road intersections, 6) strategic command centers.[303] The latter category of targets was treated as a necessary element of a "rational" air campaign, with the intention of limiting the destruction of equipment and installations useful to the civilian population[304]. Particular attention was paid to the risk of collateral damage as a factor that could lead to disruption of the peace process.[305] As a part of precautions it was indicated that there is a need to obtain a positive visual identification of the target before the attack, and also the choice of different time of day and angles of attack. The NATO aerial effort was significant – with approx. 2,500 combat flights, dropped approx. 1,000 missiles, 70% of which were precision-guided weapons, attacked nearly 50 different military objectives.[306] The political and military effects of the

301 See more: M.O. Beale, *Bombs Over Bosnia: The Role of Airpower in Bosnia-Herzegovina*, Alabama 1996.

302 T. Gazzini, *NATO Coercive Military Activities in the Yugoslav Crisis (1992–1999)*, "European Journal of International Law" 2001, vol. 12, pp. 427–428.

303 R. Sargent, *Deliberate Force Targeting*, [in:] R. Owen (ed.), *Deliberate Force: A Case Study in Effective Air Campaigning Final Report of the Air University Balkans Air Campaign Study*, Maxwell 2000, pp. 279–293.

304 "Such targets would include 'some bridges" and roads. "We minimized that because we didn't want to do any more damage to this poor nation that had been beat up so long,' Ryan added. If the bombing campaign had the desired effect of taking away the Serb strengths, 'and they realized it was happening to them,' Ryan said, Deliberate Force would work. However, 'they would not realize it unless we had a sustained operation that would show them that we really meant business'" – J.A. Tirpak, *Deliberate Force*, "Air Force Magazine" 1997, October, p. 41.

305 R.C. Owen, *Operation Deliberate Force in Bosnia, 1995: Humanitarian Constraints in Aerospace Warfare*, [in:] A. Dorn (ed.), *Air Power in UN Operations: Wings for Peace*, Farnham 2014, pp. 231–240. The amount of civilian casualties was estimated at approx. 25 killed; M. Sławiński, *Zjawisko collateral damage w działaniach lotnictwa* [*Collateral Damage in Air Operations*], „Zeszyty Naukowe Akademii Podlaskiej w Siedlcach" 2010, vol. 86.

306 K.F. Miller, *Deny Flight and Deliberate Force: An Effective Use of Airpower*, Fort Leavenworth 1997, p. 49.

campaign were far-reaching, as it provided a direct signal for the start of peace talks in Dayton, which eventually ended the conflict.[307]

During the operation, a missile of the *Striela* type shot down a French Dassault *Mirage* 2000 aircraft on August 30, 1995, and the crew was taken prisoner by Serbian military units. This has led to legal repercussions regarding the status of crewmen performing air operations under the UN mandate (described in more detail in the chapter below).

8.6. Serbia 1999 – confirmation of the Douhet doctrine?

NATO's 1999 intervention in Serbia to stop ethnic cleansing in Kosovo began with a significant legal controversy over the lack of explicit UN Security Council's authorization for military action taken by North Atlantic Alliance members. In connection with the above, the "Allied Force" operation used to be called in the doctrine of international law an illegal action – taken in violation of the provisions of the Charter of the United Nations, but at the same time authorized one, the essence of which was to stop further violations of human rights and international humanitarian law.[308] NATO planners considered it necessary to obtain the effect of intimidation against FRY (Federal Republic of Yugoslavia) President Slobodan Milošević, so that he would not continue operations in Kosovo, and then dematerialize the danger of further operations by FRY troops. The operational plan included a five-phase air operation, which involved: 1) deployment of air forces, 2) achieving air superiority over Kosovo and limiting FRY's ability to command the armed forces, 3) attacking military objectives in Kosovo and up to the 44th meridian in FRY against armed forces supporting Serbian operations in the province, 4) expanding air operations against military objectives throughout Serbia, 5) re-deploying air forces in the event of failure.

It should be noted that the NATO attack was not a surprise for FRY armed forces. Almost until the end of the hostilities, the Serbian anti-aircraft and missile defenses remained a threat to NATO aviation.[309] For example, out of 22 SA-6 *Kub* self-propelled anti-aircraft missile systems, NATO anti-radar missiles destroyed

307 R.C. Hendrickson, *Crossing the Rubicon*, "NATO Review" 2005, no. 3, pp. 1–4.

308 H. Kreiger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974–1999*, Cambridge 2001, p. XXXIX.

309 This was due to the fact that the Serbs, being aware of the possibility of anti-aircraft positions being detected, turned off the sets and radar stations, using them only in extremely safe circumstances. A small number of FRY aviation operated in a similar way. The Serbian air defense also carefully studied the course of hostilities in Iraq in 1991 and over Bosnia during the "Deny Flight" and "Deliberate Force" missions. A bizarre FRY air defense success was the downing of a Stealth F-117A Nighthawk aircraft by an SA-2 kit, transmitting on a frequency deemed by NATO to have been decommissioned due to the obsolete nature of the system. See: J.A. Olsen, *A History of Air Warfare*, Washington 2010, pp. 232–233.

only 3 of them (despite launching more than 400 *HARM* missiles).[310] Considering the above, NATO decided to impose restrictions, banning flights below 15,000 feet due to the danger to its own crews from *Striela*-type mobile launchers and anti-aircraft artillery batteries (with serious consequences for the process of proper target identification). Strikes in the first phase of the operation against command centers and air bases were limited – NATO planners claimed that the initial projection of force by the NATO aircraft would compel the government in Belgrade to accept the terms of the international community.[311] A concentrated air strike against the Serbian capital was also cancelled on the first day, recognizing that the humanitarian situation in Kosovo requires an attack on FRY tactical formations carrying out ethnic cleansing in the first place.[312] The second factor significantly limiting the scope of operations was the bad weather that persisted throughout almost the entire period of the operation, which prevented NATO aircraft from properly verifying ground targets. The third was the specific geographical conditions of southern Serbia. In addition, FRY armed forces carried out a tactical dispersion, which made it difficult to detect military formations.

In the first 11 days, NATO attacked nearly 444 targets; of these attacks, nearly 90% were directed against air defense and FRY forces operating in the Kosovo area. Only 10% were aimed at targets with a strategic dimension. However, it turned out that the effects of the initial attacks did not stop the spiral of violence within the Kosovo area, and it became necessary to extend the offensive to the entire territory of Serbia.[313] In mid-April 1999, a decision was made to include command centers, road infrastructure, fuel depots, telecommunications links, military factories and repair plants, as well as the media responsible for broadcasting propaganda on the list of targets. These decisions were approved at the NATO summit in Washington on April 23, 1999. At the end of the following month, there was a decision to add to the list of targets an energy transmission network; as a result, power lines across the state were attacked, bringing the power supply to a standstill in nearly 70% of the state.[314]

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310 M. Andrew, *Revisiting the Lessons of Operation Allied Force*, "Air Power Australia Analysis" 2009, http://www.ausairpower.net/APA-2009-04.html (accessed: 18.10.2020).

311 See more: B.S. Lambeth, *NATO's Air War for Kosovo: A Strategic and Operational Assessment*, Santa Monica 2001.

312 D.L. Haulman, *The U.S. Air Force in the Air War Over Serbia 1999*, "Air Power" 2015, Summer, p. 11. The originator of the above plan was Gen. Michael Short, however, the project did not meet with the approval of the White House, the United Kingdom and France. Among others, President Jacques Chirac, in an interview with one of the journalists, stated that "thanks to me, the bridges over the Sava River in Belgrade have not been destroyed". See more: M.H. Hampton, *Eagle in the Field of Blackbirds: U. S Military Lessons Learned And Applied in Bosnia and Kosovo*, "AICGS German Issues" 2001, vol. 26.

313 G.N. Bardos, *Balkan History, Madeleine's War, and NATO's Kosovo*, "Journal of North American Society for Serbian Studies" 2001, vol. 15, p. 89.

314 R.H. Gregory, *Clean Bombs and Dirty Wars: Air Power in Kosovo and Libya*, Nebraska 2015, pp. 79–80.

In effort to avoid long-term damage to Serbia's energy structure, NATO decided to use the new BLU-114/B graphite bombs, which led to temporary short circuits in power transmission.[315]

Ultimately, according to various estimates, NATO destroyed approx. 40 rail and road bridges, all Serbian oil refineries, many power and telecommunications relays, 100 aircraft and 10 airports, significantly reducing the ability of FRY forces to receive reinforcements.[316] In the case of infrastructure damage, the circumstances related to the attack on bridges located several hundred kilometers from the front line (e.g. attack on the bridge in Novi Sad) were questioned in the legal context. The bombing of the Chinese embassy in Belgrade on May 2, 1999 was also a high-profile incident. This and other incidents involving the misidentification of targets, the use of precautions, and certain means of combat (such as the widespread use of cluster bombs) led to an extremely lively discussion among *ius in bello* experts (commented on in the chapter below).

8.7. Iraq 2003 and selective elimination

In the early morning hours on March 20, 2003, two F-117s began bombing the alleged location of the Iraqi dictator, launching Operation "Iraqi Freedom". It should be noted that from an operational point of view, it took place under circumstances of complete air domination – most of the Iraq's air defense had already been destroyed as part of the enforcement of the so-called no-fly zone in 2002 or activities immediately preceding the invasion.[317] The Iraqi Air Force airplanes remaining after 1991 were camouflaged or abandoned and did not pose any threat to the functioning of the coalition's aviation – in fact, the Iraqi Air Force did not make any flight during the campaign.[318] On March 20–21, 2003, the Iraqi air defense was finally eliminated. Operation "Iraqi Freedom" was based on a scheme operating in 1991, taking radar and communication installations as well as government buildings as its targets. Later, the actions of the coalition's air forces were reduced to the direct battlefield support, as well as the so-called spontaneous targets, indicated by ground operators from the CIA or special forces units located in Iraq before the invasion began.[319] As part of

315 B.S. Lambeth, *NATO's Air War*…, p. 41.

316 A.H. Cordesman, *The Lessons and Non-Lessons of the Air and Missile Campaign in Kosovo*, Westport 2001, p. 157.

317 R. Grant, *Gulf War II Air and Space Power Led the Way. An Air Force Association Special Report*, 2003, p. 3.

318 D.L. Haulman, *What Happened to the Iraqi Air Force?*, n.d., https://www.dafhistory.af.mil/Portals/16/documents/Airmen-at-War/Haulman-WhatHappenedIraqiAF.pdf?ver=2016-08-22-131410-023 (accessed: 3.06.2025).

319 C. Dale, *Operation Iraqi Freedom: Strategies, Approaches, Results, and Issues for Congress*, CRS Report for Congress, Washington 2009, pp. 12–13.

operational planning, it was decided to abandon the attacks on the state's power grid and infrastructure, and instead focus on executing operations of the Shock and Awe character – that is, demonstrating psychological dominance through the projection of force and precision of Allied actions, designed to affect Iraqi soldiers. The above tactics turned out to be extremely effective – for example, the "Al-Nida" armored division, considered elite in the Iraqi Republican Guard, lost 90% of its 13,000 soldiers and 500 combat vehicles as a result of air attacks and, above all, mass desertions, even before coming into contact with Allied ground troops.[320] Interestingly, the RAND think-tank report stated that an overall analysis of the performance of the air campaign during the first phase of Operation "Iraqi Freedom" cannot serve as a template for subsequent operations – the conditions of the US Air Force over Iraq in 2003 consisted of many extremely favorable circumstances that resulted in the general breakdown of combat capabilities of the Iraqi army.[321]

One of the hallmarks of the air operations carried out during the "Iraqi Freedom" mission was the emphasis on the attempt to eliminate the senior political and military leadership of Iraq and the regime of Saddam Hussein (as part of the famous "deck" of the most wanted).[322] The identified strategic goals included 59 targets related to the key state figures and nearly 104 objects and buildings related to the functioning of the Ba'ath Party.[323] The available reports indicate that it was during this type of tasks (and missions related to the so-called spontaneous targets) that the civilian casualties were particularly high, as in many cases the intelligence data provided to the coalition air forces turned out to be incorrect.[324] The Human Rights Watch organization also questioned the selection of targets in the form of Iraqi transmission networks, as well as state radio and television buildings. The legal assessment of the 2003 air campaign was examined by the Prosecutor of the International Criminal Court, who declined to prosecute, finding no evidence of war crimes.[325]

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320 S.T. Hosmer, *Why the Iraqi Resistance to the Coalition Invasion was so Weak*, Santa Monica 2007, p. 93.

321 B.R. Pirnie, J. Gordon IV, R.R. Brennan Jr., F.E. Morgan, A.C. Hou, C. Yosts, *Air Operations*, [in:] W.L. Perry, R.E. Darilek, L.L. Rohm, J.M. Sollinger (eds.), *Operation Iraqi Freedom: Decesive War, Elusive Peace*, Santa Monica 2015, pp. 149–179.

322 The so-called deck (Most-Wanted Iraqi Playing Cards) was in fact a list of the most important Iraqi officials and senior officials of the Ba'ath Party, headed by Hussein and his family, wanted by US personnel for identification and capture or liquidation. BBC, *Iraq's most wanted – where are they now?*, 2010, https://www.bbc.com/news/world-middle-east-11155798 (accessed: 18.10.2020).

323 K.L. Shimko, *The Iraq Wars and America's Military Revolution*, Cambridge 2010, pp. 152–153.

324 N. Grief, *The Iraq War: Issues of International Humanitarian Law and International Criminal Law*, [in:] P. Shiner, A. Williams (eds.), *The Iraq War and International Law*, Oxford 2008, p. 102.

325 ICC, *The Office of the Prosecutor, Communication concerning the situation in Iraq*, 2006, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDE-BEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (accessed: 18.10.2020).

8.8. Libya 2011

On March 17, 2011, the UN Security Council adopted Resolution 1973/11, introducing a no-fly zone over Libya to protect civilians, while authorizing UN member states to "take all necessary measures to enforce compliance with the ban on flights imposed".[326] On March 19, 2011, the French Air Force conducted the first strikes against Colonel Gaddafi's forces gathered around the city of Benghazi. On March 30, 2011, NATO began coordinating the operation centrally under the codename "Unified Protector". The Libyan missile and radar networks, with little combat capability, were quickly eliminated, and the Libyan Air Force did not put up any fight against the North Atlantic Alliance air forces. The overwhelming burden of air operations was to provide direct air support to rebel troops fighting in various parts of Libya. The NATO campaign led to a complete turnaround in the course of the war within a few months, ultimately resulting in the overthrow of Colonel Gaddafi's rule.[327] The mission proved the important role of ISR (Intelligence, Surveillance and Reconnaissance) missions in the accurate selection of targets and the execution of air missions, especially with regard to the cooperation of unmanned vehicles with conventional air combat assets.[328] On March 3, 2011 (prior to the official NATO intervention), three Dutch navy pilots were detained by Libyan government forces during an evacuation mission carried out by a Lynx helicopter from the deck of the Dutch Navy ship "Tromp". The crew members were uniformed.[329] The video shown on Libyan state television indicates that the helicopter also bore markings of the Dutch navy.[330] On March 11, 2011, the crew of the Dutch helicopter were released and the helicopter was requisitioned.[331]

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326 Resolution 1973/2011 Adopted by the Security Council at its 6498th meeting on 17 March 2011, S/Res/1973/2011. The resolution was adopted by votes of France, the United States and the United Kingdom, with abstentions from China and Russia. Subsequently, these states questioned the scope of the NATO operation, pointing out that it went beyond the mandate of the resolution and directly aimed at unauthorized regime change. See more: W.D. Hood, *Humanitarian Intervention in Syria: Is Crisis Response and Limited Contingency Operations the Solution?*, "Military Law Review" 2015, vol. 223, p. 622.

327 See more: K.P. Mueller, *Precision and Purpose. Airpower in the Libyan Civil War*, Washington 2015; J. Vincente, *Back to the Future: Aerial Warfare in Libya*, "JANUS.NET, e-journal of International Relations" 2013, vol. 4, pp. 59–72.

328 Royal Aeronautical Society, *Lessons Offered from the Libya Air Campaign*, July 2012.

329 CBSNews, *Dutch marines held in Libya after failed rescue*, 2011, https://www.cbsnews.com/news/dutch-marines-held-in-libya-after-failed-rescue/ (accessed: 18.10.2020).

330 BBC, *Libya TV shows captured Dutch navy helicopter crew*, 2011, https://www.bbc.com/news/world-europe-12645675 (accessed: 18.10.2020).

331 M. Corder, *3 Dutch marines freed by Libya arrive home*, "Washington Post", March 12, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/03/12/AR2011031201889.html??noredirect=on (accessed: 18.10.2020).

Despite the first-ever use of exclusively precision-guided missiles in the history of aerial warfare during the campaign, several incidents occurred that were examined for compliance with international humanitarian law by the Investigative Commission of the United Nations Human Rights Council.

8.9. Ukraine 2014

The Ukrainian Air Force played a leading role in responding to separatist uprisings in the eastern part of the state from April 2014 onwards. Aerial activity was quickly curtailed due to escalating losses and equipment shortages within the Ukrainian army. On June 2, 2014, the most serious incident involving a Ukrainian Air Force aircraft occurred when it attacked the local administration building in the center of Luhansk using small-caliber ammunition, resulting in significant casualties among non-combatants (approx. 20 people). The circumstances of the attack were confirmed by the CNN investigation and the OSCE report.[332] In two instances of shoot-downs that occurred in July 2014, the Ukrainian side accused the Russian Air Force of destroying three Ukrainian fighters in the air with air-to-air missiles.[333] On July 17, 2014, a missile, from a Buk anti-aircraft system, fired by the Pro-Russian separatist, shot down the Malaysia Air MH17 passenger airliner en route from Amsterdam to Kuala Lumpur.[334] In August 2014, the separatist side shot down three combat aircraft of types: MiG-29, Su-24 and Su-25. Ukrainian helicopters suffered numerous losses. Due to the supply of new weaponry to the

332 Latest news from the OSCE Special Monitoring Mission to Ukraine (SMM), based on information received until 18:00 hrs, 2 June (Kyiv time).

333 *Ukraine claims fighter plane shot down by Russian missile*, "The Guardian", July 17, 2014, https://www.theguardian.com/world/2014/jul/17/ukraine-claims-plane-shot-by-russian-missile (accessed: 18.10.2020).

334 The circumstances of the shooting down of MH17 were investigated by the so-called Joint Investigation Team, a special expert group operating under the aegis of the Netherlands, bringing together the states of those killed. In 2015, the Netherlands tried to push through a resolution at the UN Security Council establishing an *ad hoc* international criminal tribunal to punish those guilty of crimes, but the resolution was vetoed by the Russian Federation. In 2016, the investigative team's report indicated that the plane had been shot down by a missile fired from the Buk-type launcher, which was supplied from the Russian Federation. In 2017, Ukraine signed an international agreement with the Netherlands, transferring full criminal jurisdiction over the shooting down of MH17. "Depending on the nature of the conflict and conduct, the alleged crimes that may have been committed in relation to downing MH17 include willful killing under Article 8(a)(i), intentionally directing attacks against civilians under 8(b)(i), murder under Article 8(c)(i), and 'intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities' under Article 8(e)(i)" – R. De Hoon, *Navigating the Legal Horizon: Lawyering the MH17 Disasters*, "Utrecht Journal of International and European Law" 2017, vol. 84, p. 97.

rebels, since September 5, 2014, the Ukrainian Air Force ceased combat operations over the Donbass region, aiming to preserve their most valuable military machines for the defense of the state.[335]

9. Aviation in the War on Terror

9.1. Use of unmanned military aircraft

On October 7, 2001, less than a month after the attacks of September 11, 2001, a Predator drone attacked a vehicle in which the presence of Mullah Omar, the political and religious leader of the Taliban movement, was suspected. The above date not only marked a new era in the development of air forces – unmanned aviation, but the use of air forces as part of the so-called Global War on Terror announced by the administration of President George W. Bush. On November 5, 2002, one of the Al-Qaeda operators in Yemen was killed by a Hellfire missile fired from a drone, serving as the first example of the targeted killing policy – the "targeted killing" of targets deemed a threat to the national security of the United States in areas not involved in an active armed conflict. The doctrine of selective elimination is not only an American domain – it has been used by the Israeli Air Force in a number of cases, such as the high-profile case of the attack on the wheelchair-bound spiritual leader of Hamas, Ahmed Yassin, carried out on March 22, 2004 by a group of F-16s and AH-64 attack helicopters.[336] Issues related to assessing the legality of the aforementioned activities in the light of *ius in bello* inherently intertwine with the question of the existence of a non-international armed conflict.[337] The prevailing legal controversies revolved around two contentious perspectives: 1) recognition of the fight against Al-Qaeda as a global armed conflict unrestricted by the existing state borders, 2) adopting the concept of *co-belligerence* – acknowledging that other terrorist groups ideologically aligned with Osama Bin Laden's organization are "co-combatants/belligerents" in

335 F. Holcomb, *The Order of Battle of the Ukrainian Armed Forces: A Key Component in European Security*, Washington 2016, p. 7. In 2025, in *Ukraine and Netherlands v. Russia*, Russia was held internationally responsible by ECtHR for destroying the MH17 aircraft (ECtHR, Judgement of July 9, 2025, *Ukraine and Netherlands v. Russia,* ref. 11055/22 et al., para. 452).

336 S. David, *Israel's Policy of Targeted Killing*, "Ethics and International Affairs" 2003, vol. 17, p. 117.

337 See: J. Dorsey, C. Paulussen, *The Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism*, "International Center for Counter-Terrorism Research Paper" 2013, no. 3.

the War on Terror.[338] The expansion of the "Targeted Killing" program occurred both numerically and geographically during the Obama administration.

The Targeted Killing campaign in 2009–2015 raised serious concerns among non-governmental organizations and independent groups, reporting that the scale of civilian casualties could reach up to 90% in regions including Afghanistan, Pakistan, Yemen, Libya and Somalia. Official information provided by the White House administration indicates a number of 64–116 civilian casualties during the Obama presidency, with a simultaneous killing of killing approx. 2,500 "terrorists". Importantly, these figures (according to the classification made in 2013) did not include the regions of Afghanistan, Syria, Iraq, which were treated as areas deemed to be "outside active combat zones".

A significant moment in shaping the legal perspective on the extensive use of unmanned aerial vehicles by the U.S. military was President Obama's speech on May 23, 2013, at the National Defense University. First of all, the American leader pointed out that the air force operations in the war on terror had been effective, effectively preventing terrorist organizations from carrying out planned attacks against the United States and Europe. He also acknowledged that the White House administration was fully aware of the civilian death toll during these operations as a tragic but unavoidable risk of any war, emphasizing that these losses had been significantly exaggerated by external reports. He also pointed out that in target selection and methods of attacks, the standard of "almost 100% certainty that civilians will not be killed or injured" is applied. The choice of drones as a means of combat was considered the sole and necessary alternative to the resistance of local governments and communities against the use of conventional air forces and less precise missiles than drones, as well as the presence of ground troops.[339]

The elaboration of the above concept was the document entitled *US. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*. President Obama's guidelines directly divided the operational theaters of the U.S. Air Force into zones of active military operations and other areas in the war on terror. In this context, offensive actions of a lethal nature could be undertaken only after verification that it is practically impossible to capture a particular individual, and there is a near certainty that non-combatants will not be injured or killed. Importantly, the footnotes to the instructions indicated that members of the armed forces of the adversary state, individuals directly participating in armed activities, and those who could become the subject of an attack due to a justified threat justifying self-defense

338 See more: Association of the Bar of the City of New York International Law Committee, *The Legality under International Law of Targeted Killings by Drones Launched by the United States*, New York 2014; P. Alston, *The CIA and Targeted Killings Beyond Borders*, "Harvard National Security Journal" 2011, vol. 2.

339 The White House Office of the Press Secretary, Remarks by the President at the National Defense University National Defense University Fort McNair Washington, D.C., May 23, 2013.

are not classified as civilians.[340] On the contrary, the above rules did not apply in areas of active armed conflicts – in Afghanistan, Iraq, Syria, and until 2016, also in Libya.[341]

9.2. Air operation in Afghanistan 2001

The majority of international law doctrine considers that the initial period of the conflict in Afghanistan, from October to December 2001, looked like an international armed conflict, due to the Taliban regime's effective control over the functioning of the state.[342] The Islamic Emirate of Afghanistan also had a governmental structure and some recognition on the international stage. The above circumstances fundamentally implied, for example, the status of captured Afghan fighters as prisoners of war in the light of the requirements of the Third Geneva Convention of 1949, but it also accordingly affected the legal situation of coalition soldiers and pilots.[343]

On October 7, 2001, the US Air Force commenced the bombing of military objectives in Afghanistan, targeting anti-aircraft defense positions and a few Soviet-made combat aircraft such as the MiG-21 and Su-22.[344] Despite the virtually zero capability of SA-2 and SA-3 SAM missile batteries and the Taliban's fighter aircrafts, the air campaign was considered risky in view of the experiences stemming from the presence of the USSR in Afghanistan, in particular due to the significant amount of portable anti-aircraft weaponry in the hands of Afghan fighters.[345] In the initial phase of the campaign, the American air force focused on supporting the Northern Alliance operations and received guidance from American special forces operators. As part of these activities, a wide range of military means was employed, including the mass bombing of the Tora Bora mountain area (considered to be a Taliban and Al-Qaeda stronghold) by strategic B-52 and B-2 *Spirit* bombers, using unguided BLU-82/B Daisy Cutter bombs

340 The White House Office of the Press Secretary, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, May 23, 2013.

341 C. Savage, *U.S. Removes Libya From List of Zones With Looser Rules for Drone Strikes*, "The New York Times", n.d., https://www.nytimes.com/2017/01/20/us/politics/libya-drone-airstrikes-rules-civilian-casualties.html (accessed: 18.10.2020).

342 A. Bellal, G. Ciacca, S. Casey-Maslen, *International Law and Armed Non-state Actors in Afghanistan*, "International Review of the Red Cross" 2011, vol. 93, p. 61.

343 J.P. Bialke, *Al-Qaeda and Taliban Unlawful Combatant Detainees, Unlawful Belligerency and the International Laws of Armed Conflict*, "Air Force Law Review" 2004, vol. 55, p. 16.

344 R. Grant, *The Afghan Air War, I*, An Air Force Association Special Report 2002, p. 11.

345 T. Nameredac, *Operation Enduring Freedom: Potential Air Power Questions for Congress*, Washington 2001, p. 4.

as a means of destroying underground tunnel networks and corridors.[346] In the remaining part, the U.S. Air Force used JDAM (Joint Direct Attack Munition) missiles, a special kit consisting of a GPS receiver and aerodynamic components enabling precise guidance of the missile in flight. This system, which became a standard for precision-guided ammunition in the 21st century, could hit targets within a target accuracy of approx. 10 meters (effectiveness in 2001).[347] The share of JDAM missiles in all of the air-launched munitions used in Afghanistan is estimated at approx. 65%. The Pentagon pointed out that, due to the nature of the conflict and the "sensitive" social situation in Afghanistan, the U.S. Air Force imposed strict requirements regarding the obligation to visually confirm the nature of the target before an attack. However, there were instances of accidental bombings of warehouses containing food and medicines operated by the International Committee of the Red Cross in Kabul by F-18 and B-52.[348] The air operations enabled the first landings of American ground forces on November 25, 2001, and the establishment of the ISAF (International Security Assistance Force) mission on December 20, 2001, thereby concluding the initial phase of the campaign in Afghanistan. The acquisition of the Bagram airbase by the coalition forces allowed for the redeployment of aviation for tactical tasks, conducting direct combat support missions since 2003 as part of the NATO stabilization mission – ISAF.[349]

9.3. Syria 2011–2018

It was only in 2012 that the Bashar al-Assad regime decided to deploy air forces against the Syrian opposition. Combat missions in this regard were mainly carried out by light attack aircraft L-39, bombing machines Su-22 and Su-24, as well as helicopters. In other respects, the MiG-25 and MiG-29 fleet, due to significant mechanical wear and tear, is used only for patrolling their own airspace.[350] According to non-governmental organizations, the significant level of obsolescence, the incapacity of older aircraft types to carry precision-guided ammunition, and the use of so-called unguided bombs in populated areas are

346 J.A. Tirpak, *Enduring Freedom*, "Air Force Magazine" 2002, February, p. 38.

347 E.E. Theisen, *Ground-Aided Precision Strike. Heavy Bomber Activity in Operation Enduring Freedom*, "Air War College Maxwell Paper" 2003, no. 31, pp. 4–5.

348 B.S. Lambeth, *Air Power Against Terror: America's Conduct of Operation Enduring Freedom*, Santa Monica 2005, pp. 98–102.

349 Human Rights Watch, *"Enduring Freedom". Abuses by U.S. Forces in Afghanistan*, March 2004, https://www.hrw.org/report/2004/03/08/enduring-freedom/abuses-us-forces-afghanistan (accessed: 15.07.2025).

350 S.E. Boxx, *Observations on the Air War in Syria*, "Air and Space Power Journal" 2013, March–April, pp. 155–157.

the most critical factors contributing to civilian casualties during the conflict, indicating the clear intent to directly bomb the civilian population.[351] A significant number of the available sources report bombings carried out in violation of the principle of distinction by the Russian Federation's air force, intervening as part of a military contingent in September 2015, which significantly altered the course of the conflict in favor of the government in Damascus.[352] Although information available from the Russian side indicates the use of teleoptically or laser-guided bombs such as KAB-500 and KAB-250 in operational conditions for the first time since the Chechen War, in December 2015 Amnesty International accused the Russian Air Force of using unguided bombs in urban areas, as well as fuel-air explosive bombs.[353] Accusations from other non-governmental organizations concern the use of so-called barrel bombs (improvised metal explosives filled with sharp objects), cluster munitions and white phosphorus by Syrian and Russian aircraft.[354]

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351 "Furthermore, the regime has used its Mi-8/17 helicopters to toss old storage tanks or sheet metal cylinders packed with explosives and metal scrap – 'barrel bombs' – out of helicopters. No one knows whether the air force used this tactic to maximize its helicopters' multifunctionality or to save factory-grade munitions for the attack jets. Regardless, high-altitude employment of these 'bombs' clearly terrorized the civilian populace to great effect. One Syrian refugee described the bombs as so big that 'they sucked in the air and everything crashes down, even four-story buildings'" – S.E. Boxx, *Observations*…, p. 155. The report of the Center for Civilian Rights and Minority Rights from November 2015 informs that in the years 2014–2015 up to 12,000 people could have died as a result of air operations (*Civilian Deaths in the Anti-ISIS Bombing Campaigns January 2014–September 2015*, Ceasefire Centre for Civilian Rights and Minority Rights Group International November 2015, p. 9). Human Rights Watch, *Death from the Skies Deliberate and Indiscriminate Air Strikes on Civilians*, April 10, 2013, https://www.hrw.org/report/2013/04/10/death-skies/deliberate-and-indiscriminate-air-strikes-civilians (accessed: 18.10.2020).

352 Human Rights Watch, *Russia/Syria: Deadly Airstrikes on Trapped Civilians. Cluster Munitions, Attacks on Main Roads, Residential Areas in Idlib Area*, October 31, 2017, https://www.hrw.org/news/2017/10/31/russia/syria-deadly-airstrikes-trapped-civilians (accessed: 3.06.2025).

353 Amnesty International, *Syria: Russia's shameful failure to acknowledge civilian killings*, December 25, 2015, https://www.amnesty.org/en/latest/news/2015/12/syria-russias-shameful-failure-to-acknowledge-civilian-killings/ (accessed: 18.10.2020); Amnesty International, *Syria: 'Civilian Objects Were Not Damaged' Russia's Statements on its Attacks in Syria Unmasked*, 2015, https://www.amnesty.org/en/documents/mde24/3113/2015/en/ (accessed: 18.10.2020).

354 See: Amnesty International, *'Death Everywhere' War Crimes and Human Rights Abuses in Aleppo, Syria*, London 2015, https://www.amnesty.org/en/documents/mde24/1370/2015/en/ (accessed: 3.06.2025); *Report: Russian Strikes on Syria's Civilians: Cluster Munitions, Vacuum Bombs and Long-Range Missiles*, Violations Documentation Center in Syria (VDC) November 2015, https://web.archive.org/web/20170117102350/http://www.vdc-sy.info/pdf/reports/1447972413-English.pdf (accessed: 3.06.2025).

9.4. Aviation in operations against the so-called Islamic State

The course of air bombings associated with the second phase of Operation "Enduring Freedom" linked to reduced ISAF engagement, indicates that since 2012, the average number of combat flights remained at approx. 100–150 combat missions per month. However, according to the latest information on the conflict in Afghanistan at the turn of 2017/2018, the USAF conducted approx. 2,000 combat flights (more than in 2015 and 2016 combined) as a result of changes in the rules of engagement (ROE) made by the Trump administration.[355] On January 28, 2017, the new White House administration issued instructions regarding the final elimination of the so-called Islamic State in Iraq and Syria. One of its points was "a change in rules of engagement (ROE) for the United States armed forces by eliminating provisions whose content exceeds the requirements of international law".[356] On March 10, 2017, a group of former military-political advisers employed in key departments of the United States sent a letter to President Trump, drawing attention to the consequences of changing the above guidelines in a socio-strategic context. The authors of the document clearly emphasized the lack of benefits resulting from accepting a wide margin of civilian casualties, exposing American military efforts to "loss of trust and fuel for extremist propaganda".[357] The latest press releases indicate the return of the USAF to using more conventional means of combat, such as the B-52s, which are carrying out combat missions in Syria and, since mid-2017, also in Afghanistan, using precision-guided missiles.[358]

The latest reports regarding Operation "Inherent Resolve" conducted since 2014, related to actions against the so-called Islamic State, indicate that the Coalition's air forces executed a total of 24,566 combat flights in Syria and Iraq by August 2017 and they also dropped nearly 80,000 various types of weapons (missiles, bombs, or other projectiles), significantly depleting existing stocks of GPS or laser-guided JDAM munitions missiles.[359] There are various estimates regarding the extent of civilian casualties – official information points to approx. 800 civilians killed during air operations, while non-governmental organizations report

355 M. Bearax, *A New US Air Blitz in Afghanistan Won't Stop for Winter. But Will It Stop the Taliban?*, "Washington Post", 17.01.2018.

356 *Presidential Memorandum Plan to Defeat the Islamic State of Iraq and Syria*, 2017, https://br.usembassy.gov/presidential-memorandum-plan-defeat-islamic-state-iraq-syria/ (accessed: 3.06.2025).

357 Principles to Guide U.S. Counterterrorism Use of Force Policies, March 10, 2017.

358 E. Schmitt, *Hunting Taliban and Islamic State Fighters, From 20,000 Feet*, "The New York Times", December 11, 2017, https://www.nytimes.com/2017/12/11/world/asia/taliban-isis-afghanistan-drugs-b52s.html (accessed: 18.10.2020).

359 J. Trevithick, *USAF Fought ISIS with the Wrong Bombs and Tactics for Months*, "The Warzone", May 31, 2017.

a number as high as 4,000–5,000 fatalities.[360] On March 17, 2017, while supporting the attack of Iraqi forces during the battle for Mosul, a coalition military aircraft via a GBU-38 JDAM bomb destroyed, at the request of direct combat support, a concrete building, on the roof of which were two ISIS snipers firing on incoming Iraqi troops. As a result of the attack, approx. 100 civilians who were on the lower floors of the building were killed. In its explanations, the State Department indicated that the coalition's actions were based on guidelines taking into account the law of armed conflict, in particular the principles of distinction, proportionality and military necessity, which allowed for the recognition, on the basis of given circumstances, that ISIS snipers were the target of the attack. It was indicated that air reconnaissance capabilities were limited on the day of the attack, while ground observers did not confirm the presence of civilians in the building – as a result, the coalition was unaware of the fact that non-combatants were there. Upon visual inspection of the site, it was determined that the bomb explosion had triggered the detonation of explosives collected by ISIS and the collapse of the structure.[361]

Officially, the coalition command does not provide data on the nationalities of the aircraft involved in the operation or the exact information on the combat measures used. A USAF Central Command report of August 31, 2017 generally informs that precision-guided weaponry is used during the mission and that it was used on July 3, 2017 to execute "surgical attacks on ancient city walls, in order to limit damage to cultural heritage"[362]. The targets of the attack are "legitimate

360 "During this period, the Coalition completed the assessment of 64 reports: 55 were assessed to be non-credible, four were assessed to be duplicates of previous reports, and five were assessed to be credible, resulting in 15 unintentional civilian deaths. To date, based on information available, CJTF-OIR assesses at least 801 civilians have been unintentionally killed by Coalition strikes since the start of Operation Inherent Resolve. A total of 695 reports are still open" – *CJTF-OIR Monthly Civilian Casualty Report*, November 30, 2017, https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1383637/combined-joint-task-force-operation-inherent-resolve-monthly-civilian-casualty/ (accessed: 3.06.2025).

361 "At 08:24 on 17 March, 2017 in accordance with the applicable rules of engagement and the law of armed conflict, a coalition U.S. aircraft delivered a single GBU-38 precision guided munition against two ISIS snipers, engaging the Iraqi CTS. Neither coalition nor CTS forces knew that civilians were sheltered in the bottom floors of the structure" – *Department of Defense News Briefing on the Findings of an Investigation into a March 17 Coalition Air Strike in West Mosul Press Operations U.S. Army Major General Joseph Martin; U.S. Air Force Brigadier General Matthew Isler; Captain Jeff Davis, Director, Defense Press Office May 25, 2017*, 2017, https://www.defense.gov/News/Transcripts/Transcript/Article/1194694/department-of-defense-news-briefing-on-the-findings-of-an-investigation-into-a/ (accessed: 3.06.2025).

362 United States Air Forces Central Command Combined Air Operations Center, Aipower Effects as of 31 July 2017, https://www.afcent.af.mil/Portals/82/Documents/Airpower%20summary/Airpower%20Summary%20-%20July%202017.pdf?ver=2017-08-08-115255-900 (accessed: 18.10.2020).

military objectives", which include those directly involved in ISIS propaganda activities. Human Rights Watch, in its report of September 24, 2017, expressed concern about the changing practice of coalition's aviation operations, arguing that the precautionary measures taken in relation to alliance operations in Syria do not meet the standards set by the boundaries of international humanitarian law and may, in many cases, lead to violations of the principle of proportionality.[363] The organization also raised concerns about the possible use of white phosphorus ammunition by ground troops and the coalition air force.[364]

A reflection of the broadly understood "war on terror" are also the cases of the use of combat aviation in the armed conflict in Yemen since 2015, where the coalition led by Saudi Arabia is accused of carrying out indiscriminate airstrikes, for example on December 26, 2017, when – as a result of two attacks by the Royal Saudi Air Force – approx. 100 civilians were killed.[365] Another example is the use of the Philippine Air Force to combat ISIS structures located in the south of the state during the liberation of the Marawi City in the summer of 2017.[366]

9.5. Ukraine 2022

On February 24, 2022, in the early hours of the night, Russian air traffic control (FIR) issued a NOTAM (Notice to Airmen) message announcing the closure of part of the airspace in the areas bordering Ukraine, causing a similar message to be released by the Ukrainian air traffic control for the whole Ukraine. The appearance of the NOTAM message signaled the start of air operations in connection with Russian aggression against Ukraine.

The invasion began with an air-to-air missile strike directed against the Ukraine's main air bases, radar stations and air defense systems. The course of the first phase of the air campaign over Ukraine is puzzling from a doctrinal point of view. The "first salvo" of Russian strikes is believed to have achieved only moderate success due to their dispersal, despite the significant commitment of missile assets. Russian

363 See more: Human Rights Watch, *All Feasible Precautions? Civilian Casualties in Anti-ISIS Coalition Airstrikes in Syria*, September 24, 2017, https://www.hrw.org/report/2017/09/24/all-feasible-precautions/civilian-casualties-anti-isis-coalition-airstrikes-syria (accessed: 18.10.2020).

364 Human Rights Watch, *Iraq/Syria: Danger From US White Phosphorus, Take All Needed Measures to Minimize Civilian Harm*, June 14, 2017, https://www.hrw.org/news/2017/06/14/iraq/syria-danger-us-white-phosphorus (accessed: 18.10.2020).

365 B. Kentish, *Yemen civil war: Saudi-led air strikes kill 68 civilians in one day, says UN*, 2017, http://www.independent.co.uk/news/world/middle-east/yemen-civil-war-saudi-arabia-air-strikes-civilian-deaths-one-day-killed-un-united-nations-a8131841.html (accessed: 18.10.2020).

366 B. Nepomuceno, *Air Force played key role in Marawi liberation*: *AFP chief*, 2018, http://www.pna.gov.ph/articles/1036587 (accessed: 18.10.2020).

radiotechnical warfare measures proved effective in disrupting S-300 or SA-11 *Buk* air defense systems, but only in the first moments of the invasion. The first strikes did not lead to the elimination of Ukrainian fighter aircraft, despite serious disparities in aviation equipment. Moreover, they did not generate significant damage to airbases.[367] As a consequence, the Russian side failed to meet the preconditions for air superiority. This resulted in Ukrainian MiG-29s and Su-27s being able to perform defensive Counter-Air missions and effectively prevented the Russian Air Force from exploiting its numerical and qualitative advantage over Ukrainian airspace.[368] Many commentators of the conflict have pointed out that, as a result of lack of coordination and sufficient means of reconnaissance, the Russian Air Force did not take the risk of operating deep inside Ukrainian territory, nor did it carry out attacks on elements of transport infrastructure: roads, bridges, railway junctions or viaducts.

After an initial dynamic period of fighting, a change in the nature of air operations was forced by the Russian side's failure to gain air superiority and the start of heavy urban fighting (especially in the Mariupol and Kharkiv areas). The air operations, and in particular the course of bombings, were the subject of research by an expert team appointed by the Organization for Security and Co-operation in Europe (OSCE) as part of the so-called Moscow Mechanism. Panel members raised significant difficulties in investigating violations of the principles of conducting armed combat, including air operations, due to the need to take into account the *ex ante* perspective and the lack of access to operational documents of the Russian and Ukrainian sides. In turn, the Independent International Commission of Inquiry on Ukraine established by the UN Human Rights Council, indicated that Russia performed direct battlefield support missions in a manner that violated the prohibition on indiscriminate bombing (use of bombs and missiles of significant weight in urban areas), as well as serious doubts expressed about the use of precautionary measures (imprecise means of warfare).[369] In some incidents, even the deliberate targeting of civilians (attack on the Mariupol Theater) or facilities under special protection (hospitals) occurred.

In the autumn of 2022, the air campaign over Ukraine entered a new phase with attacks targeting Ukraine's energy sector, causing major disruptions to the electricity supply. In November 2022, it was estimated that almost 10 million people had been cut off from energy and half of the power system was not functioning.

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367 It is estimated that before the Russian invasion, the Ukrainian air force had approx. 100 Su-27, MiG-29, Su-24 and Su-25 machines. In contrast, the estimated strength of the Russian air force is approx.

368 The newest aircraft in the Flanker family, the Su-35, has a radar capable of detecting targets at a range of around 400 km and is believed to significantly outperform the avionics capabilities of older types of the Flanker family such as the Su-27.

369 "Significant civilian harm, both in terms of casualties and damage to buildings and infrastructure, resulted from indiscriminate airstrikes using multiple unguided bombs in populated areas" – Report of the Independent International Commission of Inquiry on Ukraine, A/77/533, para. 50.

Analysts estimated that with these strikes, the Russian side tried to implement the SODCIT (Strategic Operation for the Destruction of Critically Important Targets) doctrine – through airstrikes using cruise missiles and drones to neutralize the so-called critical infrastructure and undermine morale among the civilians.[370] However, the operation had no psychological effects and, due to an increase in the level of Western supplies of anti-aircraft equipment (Patriot, NASAMS and IRIS – T sets), ended in early spring of 2023. The impact of the air strikes on Ukraine's warfare capability (war-sustaining) is debatable, as power supply was largely restored through the efforts of repair teams or replaced by foreign-supplied power generators. Attacks against critical infrastructure have been condemned by the UN General Assembly resolution of March 2, 2023 (A/RES/ES-11/60).

The next, fourth phase of the air campaign began with the start of the Ukrainian counteroffensive in June 2023. In this regard, the Russian Air Force was reduced to the role of a "fire brigade" preventing the front from breaking through, which it successfully achieved by stopping Ukrainian attacks in the Zaporozhye region (through the use of FAB-500-type glide bombs). Due to the use of Lancet type loitering ammunition against the Ukrainian air defense, Russian aircraft gained local operational freedom and began conducting more complex air operations such as SEAD and DEAD missions. This had a significant impact on limiting the activity of the Ukrainian Air Force, which carried out several successful strike missions around the Crimean Peninsula using Storm Shadow missiles. According to press reports, by December 2023, the Russian Air Force had launched 7,400 missiles and 3,700 drones, including Iranian-made Shahed strike drones.[371] Estimates of civilian casualties raise that at the end of 2023, 5,337 civilians had been killed and 12,879 wounded in Ukraine, 14% of whom due to aerial bombardment.[372]

The air war over Ukraine is a battle study of a fully symmetrical conflict that has been unprecedented on a global scale since the Vietnam War. Despite having a numerical and qualitative advantage, the Russian Air Force was not able to defeat the Ukrainian Air Force, nor was it able to significantly degrade the work of the Ukrainian air defense. With the progress of the conflict and supplies of NATO equipment, the situation over Ukraine became entrenched in a so-called air parity phase, with short windows of operation under favorable flight conditions in certain sectors of the frontline. At this time, the impact of deliveries of F-16 and *Mirage* 2000 multipurpose aircraft cannot be determined. The conflict is also the

370 The concept of critical infrastructure under international humanitarian law will be developed in the following legal section.

371 *Russia has fired 7,400 missiles, 3,700 Shahed drones in war so far, Kyiv says*, 2023, https://www.reuters.com/world/europe/russia-has-fired-7400-missiles-3700-shahed-drones-war-so-far-kyiv-says-2023-12-21/ (accessed: 5.06.2025).

372 Air-launched explosive weapons have caused 14% (2,489) of civilian casualties. *Ukraine: AOAV explosive violence data on harm to civilians*, 2025, https://aoav.org.uk/2023/ukraine-casualty-monitor/ (accessed: 5.06.2025).

first in which various types of unmanned systems, especially circulating ammunition, are used on such a large scale. It also emphasized the importance of an initiating air strike.

In 2025, the air domain of Ukraine is dominated by the operations conducted by various UAV's systems and loitering munition, forcing conventional aviation to reduce its presence in the proximity to frontline, and deploy the *stand-off* munition such as glide bombs, Storm-Shadow, ASSM Hammer or SCALP.

9.6. Gaza Strip 2023 – Operation "Iron Swords"

On October 7, 2023, Hamas, while launching an attack against civilians in southern Israel, also began intensive rocket fire on Israeli territory, largely ineffective due to the operation of the Iron Dome interceptor system. The Israeli Air Force began an intensive bombardment of the Gaza Strip, dropping approx. 6,000 bombs weighing 4,000 tons within the first week alone.[373] The scale of the air campaign began to raise serious concerns among observers and international bodies, and on December 12, 2023, U.S. President Joe Biden described the bombing of the Gaza Strip as an example of indiscriminate attacks.[374] On November 1, 2023, 18,000 tons of bombs were reported to have been dropped, approaching the tonnage achieved during Operation "Linebacker II". On November 6, 2023, the Euro-Med Human Rights Monitor estimated that the Israeli Air Force dropped 25,000 tons of bombs during 12,000 combat missions. A CNN investigation on December 22, 2023, reported that nearly 500 craters were discovered in the Gaza Strip after the fall of 2,000 pound (900 kg) bombs, the "Wall Street Journal" reported the dropping of 29,000 missiles.[375] As of December 6, 2023, it was indicated that the number of civilians killed exceeded 20,000, and the extent of damage to urban buildings is estimated at between 40% and nearly 70%; in March 2025 it was reported that the number of fatalities exceeded appox. 50,000.[376]

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373 *Israel drops 6,000 bombs in Gaza in 6 days, nearly matching US total in Afghanistan in 1 year: Report*, 2023, https://www.aa.com.tr/en/middle-east/israel-drops-6-000-bombs-in-gaza-in-6-days-nearly-matching-us-total-in-afghanistan-in-1-year-report/3017833 (accessed: 5.06.2025).

374 "They're starting to lose that support by indiscriminate bombing that takes place" – C. Long, A. Madhani, *Biden takes a tougher stance on Israel's 'indiscriminate bombing' of Gaza*, 2023, https://apnews.com/article/biden-israel-hamas-oct-7-44c4229d4c1270d9cfa484b664a22071 (accessed: 5.06.2025).

375 T. Qiblawi, A. Goodwin, G. Mezzofiore, N, Elbagir, *'Not seen since Vietnam': Israel dropped hundreds of 2,000-pound bombs on Gaza, analysis shows*, 2023, https://edition.cnn.com/gaza-israel-big-bombs/index.html (accessed: 5.06.2025); J. Malsin, S. Shah, *The Ruined Landscape of Gaza After Nearly Three Months of Bombing*, 2023, https://www.wsj.com/world/middle-east/gaza-destruction-bombing-israel-aa528542 (accessed: 5.06.2025).

376 N. Al-Mughrabi, E. Farge, *Gaza death toll: how many Palestinians has Israel's offensive killed?*, 2025, https://www.reuters.com/world/middle-east/how-many-palestinians-has-israels-gaza-offensive-killed-2025-01-15 (accessed: 5.06.2025).

The course of the air campaign over the Gaza Strip has an alarming dimension, because if one were to believe the information about the dropping of 25,000 tons of bombs per agglomeration per month (from October 7 to the beginning of November 2023), with an estimated kill rate of 10,000 civilians, a tonnage per killed ratio of 2.5 (2.5 tons of bombs per 1 killed) would then have been reached, making this the deadliest air campaign in terms of civilian casualties since World War II. Up to 50% of dropped ammunition is unguided.[377] A number of decisions on the classification of targets and the manner in which the attacks were carried out were questioned as to compliance with the principle of distinction (attack on the Islamic University in Gaza, attacks on medical facilities and transports), the rule of proportionality (raid on a refugee camp in Jabalia, which caused significant losses among the civilian population), or precautionary measures (issuing general evacuation orders, selection of weapons with extensive impact, e.g. bunker-buster weapons).[378] All the actions of the Israeli side take place under the conditions of complete air dominance of the Israeli Air Force.

9.7. The "Twelve Days-War"

On June 13, 2025, Israeli Air Force conducted initial airstrike against Iranian nuclear infrastructure (Operation "Rising Lion"), involving attacks against Iranian leadership, anti-aircraft capabilities, and long-range missile systems. The opening phase of conflict, through the coordination of the multi-domain resources, *standoff* munitions, stealth capabilities (F-35I *Adir*), and dynamic-intelligence was labeled as a major success for the Israeli Air Force, as ultimately lead to establishment of the air superiority[379]. Israeli operations were particularly successful in downgrading the radar coverage of the adversary. This achievement allowed to perform strike missions across Iran with limited interference from the Iranian air defense and Iranian Air Force. On June, 22 2025, the United States directly participated in ongoing international armed conflict, by launching "Operation Midnight Hammer". The United States Air Force deploy B-2 *Spirit* strategic bombers with the aim

377 N. Bertrand, K.B. Lillis, *Exclusive: Nearly half of the Israeli munitions dropped on Gaza are imprecise 'dumb bombs,' US intelligence assessment finds*, 2023, https://edition.cnn.com/2023/12/13/politics/intelligence-assessment-dumb-bombs-israel-gaza/index.html (accessed: 5.06.2025).

378 Diakonia International Humanitarian Law Center, *Legal Brief: 2023 Hostilities in Israel and Gaza: December 2023*, 2023, https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2023/12/Legal-Brief-2023-Hostilities-in-Israel-and-Gaza.pdf (accessed: 5.06.2025).

379 D. Malayasov, *Israel Gains Air Dominance over Iran*, 2025, https://defence-blog.com/israel-gains-air-superiority-over-iran/ (accessed: 16.07.2025).

to destroy the underground nuclear facilities by massive ordnance bombs. The operation invoked questions regarding the possibility of regime change mechanism through the air campaign (as discussed bellow)[380].

9.8. Between Ukraine and Gaza: Robert A. Pape's air power coercion strategies

Robert A. Pape argues that military coercion strategies necessary to achieve military success in the aerial context are divided into the strategies of punishment, risk, denial and decapitation. The strategy of punishment is to conduct warfare through the application of the ideas of Giulio Douhet: in a way that increases the cost of further resistance of the adversary, e.g. through attacks directly or indirectly targeting civilians and economic capacity. The strategy of risk is military operations aimed at giving the impression of a real increase in losses, assuming a gradual increase in pressure on the civilian population and infrastructure, making appropriate demonstrations in this regard (Pape points to Operation "Rolling Thunder" during the Vietnam War as an example in this regard). The strategy of denial is to make the enemy conclude that further resistance will not bring any benefit. It differs from the above in that it assumes the concentration of effort on enemy military capabilities (e.g. selective action of Allied aviation aimed at stopping German fuel production in 1944). The last type of air operation is based on decapitation strikes against the leadership (shooting down a plane with Isoroku Yamamoto in 1943). Pape argues that strategies of "punishment" are not successful, because it is difficult to break the opponent's resistance in a conventional conflict: in this respect, he raises the failure of the idea of morale bombing in the period of the Joint Bombing Offensive in 1942–1945, American surface bombing during the war in Korea, recognizing that the best way to achieve political and military success is to act based on the strategy of "denial".[381]

10. Conclusions

Air operations have become a permanent element of armed conflicts since the Second World War, and since the operations in Serbia in 1999 – their exclusive dimension. To some extent, it can be debated whether, through the development

380 B.Y. Saab, D.D. White, *Lessons Observed from the War Between Israel and Iran*, 2025, https://warontherocks.com/2025/07/lessons-observed-from-the-war-between-israel-and-iran/ (accessed: 16.05.2025).

381 R.A. Pape, *Bombing to Win*…

of technology and tactics for the use of military aviation, the premise of Douhet's concept of air dominance as the decisive and exclusive element bringing victory in future armed conflict has been fulfilled. However, a conclusion in this respect must be drawn with caution, given the differing objectives of individual air operations, as well as the characteristics of the campaigns concerned. Aviation is proving to be a decisive (but not exclusive) factor in interstate, conventional and at least partly symmetric conflicts. Precise strikes aimed primarily at air defense installations, and then at military infrastructure of various types facilitate conventional (Israel 1967, Iraq 1991, 2003, Libya 2011) or some form of political success (Vietnam 1972, Serbia 1999). Nevertheless, recent lessons learned from the use of aviation in the so-called war on terror in Syria or Afghanistan indicate that even having total dominance in the air does not guarantee effective control over a given area in all circumstances.

Standpoints on the issue of treating civilians as direct target of air attacks have also changed radically.[382] The breakthrough in this regard came with the success of Operation "Linebacker II", which forced the side of the conflict displaying "resilience" in the face of high levels of its own losses to take action on the diplomatic field. At the same time, the operation specifically targeted military facilities, which proved to be the most effective tool for influencing the decision of the political-military leadership to cease hostilities. In the meantime, states have accepted the overriding view that military efforts must have military intents – including on a legal level.

Recent reported air operations invokes an unsettled since Douthet dilemma regarding the ability of air power to achieve single-handedly strategic victory via demoralization of society or regime change. This is also confirmed by the course of the air campaign over Ukraine, including a failed attempt to demoralize Ukrainian society as a result of attacks on the Ukrainian energy sector in the autumn and winter of 2022. Similar observations can be made with regard to the conduct of Operation "Iron Swords" in the Gaza Strip. While the Operation "Rising Lion" was successful in achieving air superiority over Iran, it does not compel or contribute in political changes in this state. In turn, in the context of operations carried out by NATO and the United States, it should be pointed out that the extensive use of precision-guided ammunition (since 2011 in almost 100% of cases of air operations) does not guarantee a complete avoidance of accompanying losses among the civilian population. It should be noted here that there is no equation mark between the concepts of precision and accuracy in air operations.

382 Secretary of State R. McNamara put it in a rather succinct way during a hearing before the Congressional Defence Committee: "In the context of breaking the will to fight of the North Vietnamese people, I don't see any reason from the intelligence reports that less selective aerial bombardment could affect the morale of the North Vietnamese people" – H. Averch, *The Rhetoric of War: Language, Argument and Policy During the Vietnam War*, Lanham 2002, p. 88.

Table 2. Amount of precision-guided ammunition used in some armed conflicts since 1972

	World War II: Third Reich	Line-backer II	Iraq 1991	Serbia 1999[a]	Iraq 2003[b]	Libya 2011	Syria 2014–2017	Mosul 2017–2018	Gaza Strip
Number of combat flights	1,440,000	1,800	46,000	10,484	20,738	9,700	24,566		10,000–22,000
Quantity of missiles used/tonnes	2,700,000 (tonnes)	20,370 (tonnes)[c]	18,000	23,614	29,199	7,642	80,000	29,000	29,000 missiles
% of high-precision missiles	NA	1–2<	8	29	66	100	100	100	50
Civilian casualties	300,000	approx. 1,300–1,600[d]	approx. 3,500 people	approx. 500 people	approx. 3,750 people[e]	approx. 100 people	approx. 800–5,000 people	2,600	21,000
Ratio of missiles/ tonnes per 1 killed	9:1	13:1	5:1	47:1	8:1	76:1	100:1/16:1	11:1	1:38:1
Airborne control	Favorable air situation	Air parity/ Favorable air situation	Air superiority	Air superiority	Air Supremacy	Air Supremacy	Air Supremacy	Air Supremacy	Air Supremacy

[a] D.L. Haulman, *The U.S. Air Force in the Air War Over Serbia 1999*, "Air Power" 2015, Summer.
[b] S. Goldenberg, *Up to 15,000 people killed in invasion, claims think tank*, "The Guardian", n.d., https://www.theguardian.com/world/2003/oct/29/iraq.suzannegoldenberg (accessed: 18.10.2020).
[c] The reported figure is approx. 24,000 precision-guided missiles used throughout the Vietnam conflict.
[d] J.E. Hickey, *Precision-Guided Munitions and Human Suffering in War*, New York 2016, p. 88.
[e] P.M. Taylor, *War and the Media: Propaganda and Persuasion in the Gulf War*, Manchester 1992, p. 220.

Source: M. Piątkowski, *Użycie amunicji precyzyjnego rażenia w świetle prawa konfliktów zbrojnych* [*Usage of precision-guided ammunition in the light of the law of armed conflicts*], [in:] A. Wetoszka, B. Grenda, A. Truskowski (eds.), *Taktyka i dowodzenie w lotnictwie wojskowym* [*Tactics and command in military aviation*], Dęblin 2015, p. 227.

As indicated by the course of hostilities during drone operations, as well as conventional aviation in the "Inherent Resolve" mission, civilian casualties are still an integral part of any air campaign. Furthermore, it should be noted that in high-intensity conflicts, limited stocks of precision-guided ammunition are available and, as examples of the conflict in Ukraine and the Gaza Strip show, states are also reaching for unguided missiles when executing operations in urban settings. The future conflicts in the air will possibly entail a "contest" between the multi-layered anti-aircraft defense systems, and various means of overwhelming it, such as combination of drones, missiles, electronic warfare and conventional aviation.

CHAPTER II

THE LAWS OF AIR WARFARE AND THEIR SOURCES

1. Preliminary remarks

This chapter systematizes the "law of air warfare" concept and propose their definition. Subsequently, sources of international law are presented, from which the provisions of rights and obligations accompanying the operations of military aviation in the conditions of an armed conflict can be derived.

2. Definition of the law of air warfare

The phrases "legal regime of air warfare" or "the rules of air warfare" denote a term distinct from the issue of air warfare. The phrase "the law of air warfare" has not been sufficiently defined in the doctrine of international humanitarian law in any of the studies known to the author so far.[1] Therefore, for the purposes of this study, it is necessary to define this concept. It is a term of international law defining the entirety of the norms of international humanitarian law governing the conduct of military operations in airspace, regulating deployment of military aircraft (manned and unmanned) belonging to the belligerents during an armed

1 In many scientific studies, reference is made to the concept of "the rules of air warfare", but it is not developed in the definitional dimension. Cf. e.g., M.R. Aaron, D.R.D. Nauta, *Operational Challenges of the Law on Air Warfare. The Example of Operation Unified Protector*, "Military Law and Law of War Review" 2013, vol. 52. A limited definition is proposed in the study by Judge Advocate General School, *Air Force Operations and the Law*, Alabama 2014, p. 20: "The laws of aerial warfare apply the general principles of the law of armed conflict to distinctive aspects of the air domain. This part deals with military aircraft and aircrew, means and methods of aerial warfare, and measures short of attack".

conflict, including military operations against other aircraft and objects on land and at sea.[2] The rules of air warfare include:

1) the status of a military aircraft,
2) rules for marking military aircraft,
3) the status of a military aircraft,
4) admissibility of using a specific type of weaponry,
5) air-to-air combat between other aircraft and bombing targets on land and at sea,
6) rights and obligations of neutral parties.[3]

Michael N. Schmitt reduces issues related to the rules of air warfare to four fundamental questions:

1. Where can air force operations be conducted?
2. What goods or personnel may be the target of attack?
3. How should air force operations be conducted?
4. What armaments can be used[4]?

Part of the norms of the law on air warfare are applied by other types of armed forces – including the navy assets and land troops. A special place in this structure is occupied by anti-aircraft and missile defense forces, which are also obliged to comply with standards – for example, the prohibition of firing at descending personnel evacuating from damaged aircraft also includes ground units.

3. Definition of a military aircraft

There is no doubt that the central element of the rules of air warfare is the special subject covered by its regulation, namely a military aircraft, which was granted special rights under the above-mentioned regime (in the first place, the right to participate in military operations). The so-called *San Remo Manual on International Law Applicable to Armed Conflicts at Sea of 1994* by the International Institute of Humanitarian Law defines a military aircraft in Rule 13(j) as "an aircraft operated by a unit of the armed forces of a state, bearing the military insignia of the state,

2 A similar concept, but in relation to the concept of "air warfare" was proposed by Prof. Remigiusz Bierzanek (R. Bierzanek, *Wojna a prawo międzynarodowe* [*War and International Law*], Warszawa 1982, p. 299). Y. Dinstein, *Air Warfare*, [in:] F. Lachenmann, R. Wolfrum (eds.), *The Law of Armed Conflict and the Use of Force*, Oxford 2017, p. 13.

3 M. Piątkowski, *A Brief History of the Law of Aerial Warfare*, Beau Bassin 2017, p. 17; Y. Dinstein, *The Laws of War in the Air*, "Israel Yearbook of Human Rights" 1981, vol. 11, p. 42.

4 M.N. Schmitt, *Air Warfare*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 125.

commanded by a member of the armed forces and manned by a crew being subject to military discipline".[5] Yoram Dinstein points out that this includes not only the most classic military aircraft, such as fighter aircraft or bombers, but also transport aircraft and helicopters[6]. The HPCR Manual of 2009 (*Manual of International Law Applicable to Air and Missile Warfare* – HPCR) essentially duplicated the definition proposed by the San Remo Manual, pointing out, however, that "physical crewing" is not a necessary element of the definition, envisaging the possibility of a crew controlling an aircraft through its "programming" subjected to the discipline of the armed forces.[7] As pointed out by I. Henderson, the above definitions have their foundation in customary law, illustrated by the provisions of the Hague Rules of Air Warfare of 1923.[8] The historical development of the definition of a military aircraft and issues related to the marking of military aircraft and their manning by a crew subjected to military discipline are discussed in the relevant chapters below.

4. Generations of the law of air warfare

The rules of air warfare are regrettably characterized by reactivity to the phenomenon of air warfare. Breakthroughs in aviation technology have never been covered by any regulations preceding them. This is a circumstance which often occurs in the history of international humanitarian law because few means and methods of combat had been banned or regulated before they were fielded.[9] For this reason, it

5 "A military aircraft means an aircraft operated by commissioned units of the armed forces of a State having the military marks of that State, commanded by a member of the armed forces and manned by a crew subject to regular armed forces discipline" – *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, June 12, 1994, https://www.legal-tools.org/doc/118957/pdf/ (accessed: 5.06.2025).

6 Y. Dinstein, *Legitimate Military Objectives under Current Ius in Bello*, "Israel Yearbook of International Law" 2001, vol. 31, p. 30; *idem*, *The Laws of War*…, p. 42.

7 "«military aircraft» means any aircraft (i) operated by the armed forces of a State; (ii) bearing the military markings of that State; (iii) commanded by a member of the armed forces; and (iv) controlled, manned or preprogrammed by a crew subject to regular armed forces discipline" – rule 1, pt X.

8 "With the adoption of the Chicago Convention, the HRAW [The Hague Rules of Air Warfare of 1923 – author's note] do not reflect customary international law in peacetime concerning marking of aircraft. However, those parts of the HRAW concerning marking of military aircraft do appear to reflect the relevant customary international law applicable during an international armed conflict" – I. Henderson, *International Law Concerning the Status and Marking of Remotely Piloted Aircraft*, "Denver Journal of International Law and Policy" 2011, vol. 39, p. 624.

9 An exception in this respect may be the adoption of the 1995 Protocol on Laser Weapons (the so-called IV Protocol to the CCW).

was breakthroughs in the field of aviation technology that essentially determined the development of legal norms governing air warfare, but always with a delay resulting mainly from the lack of will on the part of the international community to set standards for it. Another characteristic feature in this respect is the fact that, as a rule, negative experiences related to unrestrained operation of aviation triggered the need to adopt a solution in the form of a treaty.[10] However, the "relevance" of standards was limited in time and depended on the next technological breakthrough. Due to the above, the following relationship between the development of air warfare legal norms and technical progress can be observed.

The first phase of the development of aircraft (1794–1912) produced various types of aerostats (balloons and airships), initially intended as a communication or reconnaissance tool. They were characterized by low speed, limited lifting capacity, also difficult to operate and dangerous (airships). Their military use continued until the invention of an effective counter weapon. The armament carried by aerostats included small explosive munitions, mainly grenades or small bombs with a limited destructive range. Later, German airships during World War I were also equipped with machine guns. At the same time, the first phase of the development of international humanitarian rules of air warfare was constituted by documents related to the Hague Declaration of 1899 and the Fourteenth Hague Declaration of 1907, signaling the intention to ban the possibility of conducting air warfare – in particular, aerial bombardment.

The second phase of aircraft development was the introduction of an airframe construction propelled by an internal combustion engine serving to overcome the force of gravity (1903–1945). The concept of the Wright brothers from 1903 was soon significantly expanded and strengthened by the construction of a more durable structure capable of carrying stronger powerplants, also allowing multi-engine designs. Technically, military aviation was divided into reconnaissance, fighter and bombing units with different modes of operation. It was also possible for aircraft to engage in combat duels. The second phase of weapon development was the use of unguided bombs, with increasing mass, various specifications (incendiary, demolishing), as well as means of defense and combating other aircraft in the form of automatic cannons and machine guns. The second phase of the

10 "However, this has meant that the law has increasingly been dictated by the need to curtail practice rather than reflect it, thereby creating tensions in relation to the implementation of the law in the twentieth century. Changes in the law largely prohibited certain new practices, such as the use of chemical weapons and massive bombardments of cities, although those who indulged in such practices were of the opinion that they had military utility. Other practices continued to be allowed despite some attempts to outlaw them; they have been responsible for a great deal of destruction and suffering. Examples include the use of submarines, bombardment by aircraft, mines, and long-range missiles" – L. Doswald-Beck, *Implementation of International Humanitarian Law in Future Wars*, "International Law Studies" 1998, vol. 71, p. 42.

development of international humanitarian law was an attempt to regulate air warfare in the form of a document from 1923 (the Hague Rules of Air Warfare), regulating the scope of permissible air operations, as well as addressing comprehensively issues related to aircraft nationality, the issue of neutral aircraft and the status of aircraft crew.

The third phase of the development of aviation technology (1945 – present) was the introduction of the jet-powered aircraft, capable of supersonic flight. The third phase of weapon development was to equip air forces with firing assets of greater precision, i.e., the so-called smart munitions. The third phase of the development of international humanitarian law is the AP I regulation, the first document legally regulating armed conflicts that also refers to military operations in airspace.

The fourth phase of the technical development of aviation is unmanned operation (1970 – present) understood as a situation in which there are no personnel on board an aircraft responsible for its control. Aircraft operation is controlled remotely via wireless communication or is the result of the actions taken by the aircraft's artificial intelligence. In the author's opinion, the development of aviation technology is currently entering the fifth phase, which is autonomy.

5. Sources of the law of air warfare

5.1. Preliminary remarks

By definition, the laws of air warfare are a component of international humanitarian law of armed conflicts, occupying a position in this system of law which is equal to the norms applicable to land and sea warfare. Historically, it is also a set of rules developed the latest, after the first great codification of international humanitarian law (which took place in The Hague in 1899 and 1907) applicable to naval and land warfare. As pointed out by N. Ronzitti, the rules of air warfare are still not a fully codified part of international law, and relevant norms regarding various aspects of its conduct are only a component (scattered) of international law treaties relating to other matters or aspects of conducting military operations or functioning only as a reflection of the practice implemented by states.[11] Dinstein points out that apart from the only attempt to comprehensively regulate legal issues related to conducting air operations, which took place in 1923, there is no international treaty that comprehensively regulates the use of combat aviation in

11 N. Ronzitti, *The Codification of Law of Air Warfare*, [in:] N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006, pp. 3–4.

an armed conflict.[12] The adoption of AP I in 1977 introduced codification for an important aspect of the rules for aerial bombardment, although it left other issues of air warfare outside the scope of this treaty. In the remainder (in which borrowings from the regulations being in force in naval or land warfare are impractical), the rules of air warfare are based on the analysis of *usus* and *opinio iuris*.[13] Gregor Schwarzenberger pointed out that the rules applicable to air warfare are divided into three basic categories:

1) rules applicable to all types of military operations,
2) rules applicable to air warfare by analogy with the law of naval and land warfare,
3) rules strictly dedicated to air warfare.[14]

Unfortunately, the German author did not provide a broader commentary on the division, merely pointing out that this distinction is evidence of the autonomous status of the rules of air warfare within *ius in bello*. The author decided to refer to another division of a general nature, in which he divided all the rules and regulations applicable in his opinion in each type of military operations into the following categories:

1) rules prohibiting acts contrary to civilization standards and with no major military justification, such as the wanton destruction of property,
2) rules relating to chemical weapons, which, with minimal tactical benefits, cause fatal humanitarian consequences,
3) the rules of "compromise" between civilizational considerations and war necessity,
4) rules with relative application due to the possibility of removing the obligation resulting from said rules on account of "considerations of a military nature".[15]

The author, recognizing the above principles as existing in every type of military operation, mentioned the possibility of applying a similar pattern in the context of air warfare too, dividing the regulations governing it as follows:

1) rules prohibiting attacks on military and civilian hospitals – in accordance with the provisions of the Geneva Conventions of 1949 – as an example of a norm contrary to civilization standards;

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12 Y. Dinstein, *Concluding Remarks*, [in:] A.-S. Millet-Devalle (ed.), *Guerre aérienne et droit international humanitaire*, Paris 2015, p. 336.

13 J.G. Gomez, *The Law of Air Warfare*, "International Review of the Red Cross" 1998, no. 323, pp. 350–353.

14 G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, London 1968, p. 141; *idem*, *The Law of Air Warfare and the Trend Towards Total War*, "University of Malaya Law Review" 1959, vol. 1, p. 121. A similar division was proposed by M. Marcinko, *Conducting aerial warfare in the light of international humanitarian law of armed conflict*, [in:] Z. Falkowski, M. Marcinko (eds.), *Międzynarodowe prawo humanitarne konfliktów zbrojnych* [*International humanitarian law of armed conflict*], Warszawa 2014, p. 307.

15 G. Schwarzenberger, *A Manual of International Law*, London 1969, pp. 198–199.

2) prohibition of the use of chemical, bacteriological, as well as nuclear weapons as rules applicable in any type of armed conflict;
3) the "compromise" rule, or content of Article 25 of the Hague Regulations of 1907 and the provisions of the St. Petersburg Declaration of 1868;
4) norms of a relative nature relating to the medical status of the aircraft.

Joseph Kroell had a different view on the issue of the autonomy of the law of air warfare, claiming that the existing possibility of "converting" norms applicable in the domain of naval and land warfare removes the necessity to create a new normative network dedicated to the rules of air warfare (*La guerre aérienne n'exige donne pas nécessairment la création d'un droit aérien special*). He believed that it was possible to decode the rules applicable to military aviation during an armed conflict on the basis of the previously codified *ius in bello* of maritime and land conflicts.[16] Due to the "speculative" nature of the rules governing air warfare, A.S. Hersey emphasized that they must be derived by analogy from the provisions applicable to naval and land warfare.[17] Waheed Raafat pointed out that while air warfare would certainly be based both on the dispositions of standards applicable to sea and ground operations, in certain situations it would be necessary to build a conglomerate of regulations devoted exclusively to air operations.[18] Meanwhile, as early as in 1936, the "International Law Studies" published by the Naval War College in Newport, pointed out that "the rules governing air warfare cannot be derived from the rules applicable to land warfare in every situation, because both forms of military operations are not of a similar nature".[19] Yoram Dinstein confirmed that the conditions of air warfare prevent the "proper application" of the provisions applicable to naval and land warfare.[20]

The first writer to notice the "uniqueness" of the air warfare regime and, consequently, the need to adopt a special treaty regulation was J.M. Spaight. He considered the voices addressing the lack of autonomy of the rules of air warfare as an example of "misconception of the character and role of the new arm".[21] He argued that there is no "uniform" law regulating both naval and land operations, and the fundamental circumstance that separates the two regimes is the profound dissimilarity of the conditions prevailing in naval and land warfare. Yvenson St-Fluer

16 J. Kroell, *Traité de Droit international public aérien: L'Aéronautique en temps de guerre*, vol. II, Paris 1936, p. 9.
17 A.S. Hershey, *The Essentials of International Law and Organization*, New York 1927, p. 659.
18 W. Raafat, *La guerre aérienne et le droit des gens*, "Revue générale de droit aérien" 1934, p. 753.
19 "The introduction of aircraft as a means of warfare greatly modified the conduct of war upon the earth surface, on theater as well as on land. The earlier rules for warfare were concerned with surface combat. These rules could not in every instance be extended by analogy to aerial warfare, because the forms of warfare were not analogous" – "International Law Situation" 1936, p. 39.
20 Y. Dinstein, *The Laws of War*…, p. 41.
21 J.M. Spaight, *Aircraft in War*, London 1914, p. 99.

expresses a different view, pointing out that the belief in the separation of norms governing air and naval warfare in reference to the basic principles applicable to land warfare is erroneous.[22]

It should be rightly emphasized following Y. Dinstein, who pointed to the specific status of the rules of air warfare, that they are of special nature both as part of public international law and, in the context of *lex specialis*, in relation to international humanitarian law. However, this cannot mean accepting that "a number of exceptions to the general principles may arise", because all foundations of *ius in bello* still apply in every type of armed conflict, regardless of its form.[23] The complex nature of issues related to the conduct of air warfare necessitates the development of a regime which is special, but still based on the cardinal principles of international humanitarian law.[24]

5.2. The Martens Clause as a source of the law of air warfare

The Martens Clause, first included in the preamble to the Second Hague Convention of 1899 on the laws and customs of war, is considered a turning point in the construction of axioms that form the basis of *ius in bello.* References to "public conscience" and "requirements of humanity" form a link between norms of a legal nature and moral rights.[25] However, the decoding of the actual normative value of the clause raises doctrinal disputes. Diverse views on this matter are presented. On the one hand, it is indicated that this clause sets out the basic paradigm of international humanitarian law, resulting from the "principles of public conscience", and for this reason it may be an autonomous source of law in unregulated situations or a tool to close gaps in positive law.[26] On the other hand, it is argued that the clause is only a statement according to which there still exists customary law

22 "Thus, the use of aircraft as an instrument of war in modern warfare is subject to the same basic legal regime that applies to land and sea warfare" – Y. St-Fleur, *Aerial Belligerency within a Humanitarian Rhetoric: Exploring the Theorizing of the Law of War/Terrorizing of Civilians' Rights Nexus*, "Chinese Journal of International Law" 2009, vol. 8, no. 2, p. 355.

23 A similar conclusion was drawn by a committee of jurists in 1923. See: W.L. Rodgers, *The Laws of War Concerning Aviation and Radio*, "American Journal of International Law" 1923, vol. 17, p. 635.

24 Y. Dinstein, *Air and Missile Warfare Under International Humanitarian Law*, "Military Law and the Law of War Review" 2013, vol. 52, p. 84.

25 G. Distefano, E. Henry, *Final Provisions, Including the Martens Clause*, [in:] A. Clapham, P. Gaeta, M. Sassòli (eds.), *The 1949 Geneva Conventions: A Commentary*, Oxford 2016, p. 183.

26 J.C. van den Boogaard, *Fighting by the Principles: Principles as a Source of International Humanitarian Law*, [in:] M. Matthee, B. Toebes, M. Brus (eds.), *Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald*, The Hague 2013, p. 20.

concurrently with the rules of a *lex scripta* type.[27] It is also noted that the preamble to the Fourth Hague Convention of 1907 on the Laws and Customs of War on Land contains only certain axioms of a moral nature, thus not constituting binding legal norms.[28] It is argued that the modern understanding of the Martens Clause does not have much in common with the preparatory work of the first peace conference in The Hague in 1899, where the leitmotif of the Russian diplomat was to "rescue" the honor of the Russian imperial court from the eventuality of blocking works on conventions as a result of the resistance put up by smaller states (Belgium, the Netherlands) with regard to the status of resistance movements in occupied territories.[29] The same circumstance led Judge Shahabuddeen to adopt the opposite conclusion – the withdrawal of the protest by these states because of the submission of a draft preamble by Friedrich Martens is evidence of the existing normative value of the clause.[30] Ultimately, the same advisory opinion of the International Court of Justice of 1996 on the *Legality of the Threat or use of Nuclear Weapons* did not determine the final form of the 1907 clause (more on it in the relevant chapter).[31]

Looking through the prism of the subject of the work, the reference to the content of the preamble to the Fourth Hague Convention of 1907 on the laws and customs of war on land as an autonomous source of the rules of air warfare, in many cases turned out to be an insufficient argument in the process of its development, practically absent from the literature in the period preceding the adoption of AP I of 1977.[32] Characteristically, the *ius in bello* experts who prepared opinions on the rules of air warfare for the International Red Cross and Red Crescent in 1930 did not refer to the 1907 clause in any way.[33] This results from the strongly positivist nature of *ius in bello*, especially in the period preceding World War II (established by the Permanent Court of International Justice judgment in the *Lotus* case).[34]

27 T. Widłak, *Klauzula Martensa na tle pojęcia "ludzkość" w prawie międzynarodowym* [*The Martens Clause against the background of the concept of 'humanity' in international law*], "International Humanitarian Law" 2012, vol. II, pp. 176 ff.

28 T. Weatherall, *Ius Cogens: International Law and Social Contract*, Cambridge 2015, p. 80.

29 F. Kalshoven, L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Cambridge 2011, p. 11.

30 Dissenting Opinion of Judge Shahabuddeen, pp. 408–409.

31 B. Dunne, H. Durham, *The Prosecution of Crimes Against Civilians*, [in:] G. Fitzpatrick, T.L.H. McCormack, N. Morris (eds.), *Australia's War Crimes Trials 1945–1951*, Nijhoff 2016, p. 218. "The status of the Martens Clause, which remains a source of inspiration for the entire field of humanitarian law, has never been conclusively clarified" – C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford 2014, p. 343.

32 R.W. Tucker, *The Law of War*, New Jersey 2006, pp. 239–240.

33 See Chapter V, Subsection 10.

34 "On one hand, observations made by Meron, Sassòli and Bouvier recall that the principle of humanity predicated on morality and ethical concepts of justice constitutes one of the rationale underpinnings of the edifice of IHL, and that this principle intrinsically affects the

Morton W. Royse does not refer to the above-mentioned axiom anywhere in his study, paying attention to the broad understanding of the principle of "military necessity" limited, in addition to the laws and customs of war, by the "rationality of the battlefield".[35] Zbigniew Rotocki, despite classifying the Martens Clause as a source of the rules of air warfare, at the same time argues that the provisions of the Hague Regulations of 1907 determining "prohibition of excessive suffering", "limitation of means of harming the enemy" and "prohibition of wanton destruction of private property" are too general or imprecise in the context of air operations.[36] Eberhard Spetzler argues that the Fourth Hague Convention of 1907 together with the Regulations does not contain any norm of positive law protecting the civilian population against aerial bombardment (also referring this to the preamble).[37]

In the trial of Aflried Krupp, the United States Military Tribunal pointed out that the clause is not merely a collection of "pious declaration".[38] However, neither the International Military Tribunal (IMT) nor other tribunals of the occupation zones used clauses in situations where there were no obvious legal norms (such as the topic of the legality of aerial bombardments as part of the *tu quoque* argumentation presented by the defendants in the Einsatzgruppen trial) or the legality of certain practices of belligerents, of course, contradicted the content of the preamble to the Fourth Hague Convention of 1907 (as in the process of the German Supreme Command in terms of the blockade of Leningrad).[39] The reasons for the above inconsistency in the position of the IMT and the tribunals of the occupation zones can be explained as follows:

1. The Martens Clause referred to situations not covered by the Fourth Hague Convention of 1907 and the Regulations. It might be argued that it also *per analogiam* referred to international custom (this is consistent with the inter-

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process of norm-identification and norm-interpretation. Here, the valuepervious and value-actualizing nature of legal interpretation is highlighted by the operation of moral values and ethical aspirations" – Y. Arai-Takahashi, *The Principle of Humanity Under International Humanitarian Law in the 'Is/Ought' Dichotomy*, "Japanese Yearbook of International Law" 2011, vol. 54, p. 336.

35 "If an act is essential, if the destruction is effective and wanton, and if the result to be gained by such an act are not grossly disproportionate to the extent of destruction, the act can hardly be condemned regardless of the ammount of suffering and violence" – M.W. Royse, *Aerial Bombardment and the International Regulation*, New York 1928, p. 136.

36 "Notwithstanding, they are too general (Article 22) and unprecise (Article 23g), and also fail to take into account the specific nature of air operations (marking of targets), and, therefore, may only serve as auxiliary norms in determining the scope of rules binding on air force. Finally, the Martens clause applicable to all operations of war is also applicable in air warfare" – Z. Rotocki, *Polish Directives of 1939 concerning Aerial Bombardment in the Light of International Rules of Air Warfare*, "Polish Yearbook of International Law" 1970, vol. 3, p. 149.

37 E. Spetzler, *Luftkrieg und Menschlichkeit*, Göttingen 1956, p. 48.

38 *Case No. 58: The Krupp Trial*, United States Military Tribunal, Nuremberg 1948–1949, p. 133.

39 *Law Reports of Trials of War Criminals: Selected and Prepared By The United Nations War Crimes Commission: Volume XII: The German High Command Trial*, London 1949, p. 84.

pretation of the clause as a "reminder" of the continued validity of norms that are customary in nature). Therefore, assuming that the rules of air warfare (although in way a far from being perfect) were regulated by the provisions of Articles 25 and 26 of the Hague Regulations of 1907, this reference to the clause became redundant in this matter (this may correspond to the position of the United States Military Tribunal on the blockade of Leningrad).

2. As an example of a general clause, the Martens Clause does not have the normative capacity to become a source of more detailed rules for conducting armed combat, including technical aspects of carrying out aerial bombardments related to the selection of acceptable targets or acts of diligence during an air attack.[40]
3. The practice of states did not indicate that the combatants were to invoke the Martens Clause, indicating it as the basis for the violation of the laws and customs of war in relation to air warfare.
4. In the circumstances of the *Alfried Krupp* case it was noted that the negotiation of the Martens Clause was related to a compromise regarding the status of the civilian population in relation to the occupying state – in other words, the court argued that there was a normative link between the legal background of the *Aflried Krupp* case (accused, among others, of using forced labor in occupied Europe) and the historical interpretation of the Martens Clause.
5. Nowadays, attention should be paid to the new foundations of the clause itself, which took shape in connection with the development of the standards of human rights protection, also applicable in circumstances of armed conflict.

It should be noted that today the Martens Clause retains its validity by transposing the preamble to the Fourth Hague Convention of 1907 to Article 1, para. 2, AP I of 1977. For this reason, N. Ronzitti argues that the covers all kinds of warfare: land, naval and air".[41] The experts on the HPCR Manual agree with this position, referring to the content of the clause in rule 2(b), with reservation that it should first "remind of the existence of customary law".[42] Ian Henderson argues that while the clause has a normative value, its actual scope is "unsettled".[43] Additionally, it should be pointed out that the role of the Martens Clause as an

40 Y. Dinstein, *The Principle of Proportionality*, [in:] K. Larsen, C. Cooper, G. Nystuen (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law*, Cambridge 2013, p. 74.

41 N. Ronzitti, *The Codification*…, p. 15.

42 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge 2013, p. 55. Y. Radziwill also includes "considerations of humanity" in the above conglomerate of the customary rules of air warfare as a reflection of the principle of humanitarianism, located within the framework of the Hague Rules of Air Warfare of 1923 – Y. Radziwill, *Cyber-Attacks and the Exploitable Imperfections of International Law*, Leiden 2015, p. 182.

43 I. Henderson, *The Contemporary Law of Targeting*, Leiden 2009, p. 23.

interpretative directive of international humanitarian law is unquestionable, which will determine not only the directions of interpretation of applicable standards, but also the basis for the *de lege ferenda* development. The consequence of this may be found in the *ius in bello* normative network for the principle of resolving existing doubts about the practical application of laws and customs of war in favor of the status of the civilian population, civilian goods or protected persons (*in dubio pro humanitate*). The above is indicated by the provisions introducing presumptions of, for example, civilian use of certain goods or buildings. This principle should be co-interpreted with the principle of common sense or a reasonable commander.[44]

The ethical-legal nature of the clause may find a completely new dimension in relation to armament, under which the decision to use armament is no longer up to a human operator.[45]

5.3. Intertemporal rule

It should be noted that this dissertation includes an analysis of factual circumstances which occurred in the past. In the case of the legal analysis of historical events, it is necessary to emphasize the principle of non-retroactivity of law, which is confirmed by the content of Article 28 of the VCLT, stating that a treaty does not apply to events that occurred before the date of entry into force of the treaty. The importance of the above rule was revealed by the ruling of the Permanent Court of Arbitration in the *Island Palmas* case, where the Swiss arbitrator Max Huber pointed out that the assessment of a specific legal event should take place in the context of the law in force at the time of its occurrence – the so-called intemporal law issue.[46] A similar issue arose in the case of the decision of ICJ in *The Minquiers and Ecrehos* case (France v. United Kingdom).[47]

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44 R. Kolb, A. Hyde, *An Introduction to the International Law of Armed Conflicts*, Oxford 2008, p. 79.

45 See: P. Asaro, *Ius nascendi. Robotic weapons and Martens Clause*, [in:] R. Calo, A.M. Froomkin, I. Kerr (eds.), *Robot Law*, Northampton 2016, p. 378. See the interesting position of the Republic of Poland on the discussion on autonomous systems as part of the sessions discussing Certain Conventional Weapons (CCW) (in chapter IX).

46 "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled". Recueil Des Sentences Aribtrales, *Island of Palmas Case (Netherlands, USA)*, April 4, 1928, vol. II, p. 845. The view of Huber is criticized by D'Amato, who pointed out, in the *Las Palmas* case, that if the acquisition of territory in the 16th century was in accordance with the international law in effect at the time, then any later change of the rule in this respect is irrelevant. A. D'Amato, *International Law, International Problems*, [in:] R. Bernhardt, P. Macalister-Smith (eds.), *Encyclopedia of Public International Law*, Amsterdam 1992, p. 1235.

47 "To revive its legal force to-day by attributing legal effects to it after an interval of more than seven centuries seems to lead far beyond any reasonable application of legal considerations" – ICJ, *The Minquiers and Ecrelzos case, Judgment, 17 November 1953*, I.C.J. Reports 1953, para. 47.

The issue of application of the law relevant to the circumstances that occurred in the past is of paramount importance in cases of territorial disputes – the lack of an equivalent principle of *lex retro non agit* in international law may lead to undermining the principle of legal certainty.[48]

While the aim of the work is not to analyze the norms of intertemporal law, it should certainly be noted that the view on the issue of the obligations and rights of the fighting parties resulting from *ius in bello* should take into account the models of interpreting treaties, views on the possibility of establishing a norm of customary law being in force in the period – for example, preceding the outbreak of World War II or the general attitude of the international community, expressed in an extremely positivist perspective on restrictions resulting from the legal provisions of armed conflicts.[49] The above view is confirmed by, for example, the content of Article 13 of the ILC *Draft articles on Responsibility of States for Internationally Wrongful Acts*.[50] Quasi-historical issues also include the right to an individual compensation claim for violations of *ius in bello*, recognized on the basis of Article 3 of the Fourth Hague Convention of 1907. An attempt to "transplant" solutions resulting from the development of international humanitarian law after World War II or after 1977, resulting from the impact of human rights theory, can be considered a violation of the rules of intertemporal law.[51] Yoram Dinstein also referred to the above principle, arguing that experts in international humanitarian law make a "first magnitude error" by assessing historical (or contemporary) facts, using different legal regimes in force in different periods of history.[52] A similar position was expressed by W.J. Fenrick, who directly pointed

48 B. Boczek, *International Law: A Dictionary*, Lanham 2005, p. 227.

49 "The relevant German acts – which are described in paragraph 52 – occurred in 1943–1945, and it is, therefore, the international law of that time which is applicable to them" – ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment*, I.C.J. Reports 2012, para. 58.

50 "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs" – International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, A/56/10, http://www.refworld.org/docid/3ddb8f804.html (accessed: 26.10.2020).

51 "Modern solutions of international law cannot be applied backwards, that would be a violation of the rules of intertemporal law" – J. Westlake, *International Law*, vol. 1, London 1904, p. 112; See more: E. McWhinney, *The Time Dimension in International Law: Historical Relativism and Intertemporal Law*, [in:] J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, Dordrecht 1984, p. 195.

52 "The essence of the principle as it exists today has developed subsequent to (and as a direct result of the experience of) World War II. It is therefore an error of the first magnitude to apply «inter-temporal» law either backward or forward. Much of the current law was unknown in World War II, and some of the law then in place is no longer relevant at present (except when juxtaposed as an historical backdrop)" – Y. Dinstein, *Air and Missile Warfare*…, p. 87.

out that it is "[…] inappropriate to penalize World War II bombing practitioners for conduct which might contravene today's standards, but which may have been acceptable by the standards of the day".[53]

5.4. Treaties and means of interpretation

In the history of international humanitarian law, treaties or other types of agreements concluded between states and regulating how warfare is conducted are of a post factum nature in relation to the original source of duties and rights in an armed conflict, which was created in a customary way. As F. Kalshoven pointed out, the nature and scope of unwritten norms have always been the subject of doubt and susceptibility to subjective interpretation, which ultimately led to attempts at codifying them in the mid-nineteenth century.[54] The emergence of solutions concerning *ius in bello in* in the form of positive law took the form of multilateral international treaties, with three "grand" codifications of 1907, 1949 and 1977. In the context of interpretation, the solutions adopted under the treaties of international humanitarian law are subject to the same rigors as any other treaties concluded between states, with an indication of the specificity of the area to be regulated, aimed at protecting "the dignity of a human person".[55] Amongst the models of interpreting treaties, three different schools can be distinguished: textual, subjective and teleological.[56] The views of the so-called textual school prevailed during the work on the VCLT of 1969 and, unless the treaty itself determines the priority of any of the possible methods of interpretation, it speaks in favor of recognizing the linguistic interpretation model as the most natural way of interpreting a treaty, also due to the specific order in the contents of Article 31 para. 1 VCLT.[57] In addition to the linguistic interpretation, there

53 W.J. Fenrick, *The Prosecution of War Criminals in Canada*, "Dalhousie Law Journal" 1989–1990, vol. 12, p. 262.

54 F. Kalshoven, L. Zegveld, *Constraints*…, p. 4.

55 *Prosecutor v. Delalic*, Judgement 20th February 2001, IT-96-21-A, para. 172.

56 O. Corten, P. Klein, *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford 2011, p. 808.

57 "The Vienna Convention's general rule for treaty interpretation is a compromise combining all three approaches, though textualism is dominant According to the rule, treaty interpretation must rely primarily on the terms of a treaty while context and the treaty's object and purpose must inform its meaning" – D.S. Jonas, T.N. Sanders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, "Vanderbilt Journal of Transnational Law" 2010, vol. 42, p. 578. "The references to «context» and to «object and purpose» in Article 31(1) do not appear to represent any substantial compromise. Indeed, it seems that they were calculated not to moderate but to confirm the triumph of textualism implicit in the article's opening words" – T. Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of 'International Armed Conflict'*, "Columbia Law Review" 1971, vol. 71, p. 42.

is a systemic (contextual) interpretation and a functional interpretation due to the inclusion of phrases in the contents of the provision in the form of the subject and purpose.[58] According to A. Mueller, the teleological interpretation may apply in the case of treaties based on the protection of the individual, including international humanitarian law and human rights.[59] In this regard, the importance of the premise of good faith in the interpretation of a treaty is emphasized.[60] If the text, context, subject matter and purpose of the treaty still do not resolve doubts ("leave the meaning ambiguous or obscure" or "lead to a result which is manifestly absurd or unreasonable"), then according to the provisions of Article 32 of VCLT, supplementary means of interpretation are allowed by referring to the preparatory work of the treaty and the circumstances of its conclusion.[61] It should be noted that in the context of the rules of air warfare, in many cases (such as in the interpretation of Article 25 of the Hague Regulations of 1907) the use of *travaux préparatoires* is indispensable – due to the obscurity and ambiguity of the wording contained in the provision. However, this is not an exceptional situation in the field of international humanitarian law.[62] Important comments on the background of interpreting international humanitarian law treaties were made by R. Kolb. First of all, he drew attention to the strictly technical nature of the provisions, which requires a foundation in written form (including in the context of customary law). Secondly, *ius in bello* provisions are addressed to military personnel who have at most basic legal training – the simplest means of communication in this respect is to refer to models existing in the material (written) sense. The third element is the circumstance of applying rules most often in emergency situations, contrary to peacetime, which requires simplicity and precision which can be only found in treaties.[63] The interpretation

58 M. Ris, *Treaty Interpretation and IC Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties*, "Boston College International and Comparative Law Review" 1991, vol. 14, pp. 113–118.

59 A. Mueller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health Related Issues in Non-international Armed Conflicts*, Leiden 2013, p. 5.

60 C. Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situation of Armed Conflict*, "Israel Law Review" 2007, vol. 40, p. 327.

61 "It is possible to withdraw from the adopted textual (objectivist) conception in favour of the intentional (subjectivist) conception only if strict adherence to the text of the treaty does not lead to anything meaningful" – M. Frankowska, *Prawo traktatów* [*Law of Treaties*], Warszawa 2007, p. 123.

62 A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge 2010, p. 175; S. Oeter, *Methods and Means of Combat*, [in:] M. Bothe (ed.), *The Handbook of International Humanitarian Law*, Oxford 2015, p. 159; S. Mehring, *First Do No Harm: Medical Ethics in International Humanitarian Law*, Leiden 2013, p. 282. See more: ICTR, *The Prosecutor v. Akayesu*, Judgment of 2 September 1998, para. 501.

63 R. Kolb, *Advanced Introduction to International Humanitarian Law*, Cheltenham 2014, p. 51.

of treaties may transform with the passage of time – the International Military Tribunal at Nuremberg (IMT) in its judicial decisions signaled a view testifying to the possibility of adopting a model of dynamic interpretation.[64] This type of conclusion was revealed in Friedrich Flick's trial before the United States Military Tribunal, where it was stated that:

> […] the conventions of 1907 were drawn up at a time when railways and horses were the basic means of transport, and the car was at the stage of manufacturing the Ford T. The plane as a tool of war was a dream, and nuclear weapons were a pure abstraction. […] Total war became the reality of th/1e last conflict. These changes require an assessment of the defendants' attitude to contemporary conditions and circumstances, which cannot be theoretical but reasonable and practical.[65]

Treaties of particular importance for the rules of air warfare are, chronologically:

1) Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight of December 11, 1868 (also known as the Saint Petersburg Declaration of 1868);
2) Declaration concerning the Prohibition of the Discharge of Projectiles and Explosives from Balloons of 1899 and 1907 (also known as the Hague Declarations);
3) Hague Convention (IV) of 1907 respecting the Laws and Customs of War on Land, together with its regulations (Articles 25–27, also known as the Hague Regulations of 1907);
4) The Hague Convention (IX) of 1907 on Bombardment by Naval Forces in Time of War (Article 2);
5) Protocol Additional (I) to the Geneva Conventions of August 12, 1949, to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts of 1977 (Articles 48–62);
6) Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 1980, together with the Protocol III on the Prohibitions or Restrictions on the Use of Incendiary Weapons.

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64 "The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing" – Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Washington 1947, p. 51.

65 *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission*, "The Flick Trial", vol. IX, London 1949, p. 32.

Treaties indirectly related to air warfare are the following:

1) Geneva Convention Relating to the Treatment of Prisoners of War of 1929 (Articles 2 and 9);[66]
2) Second, Third, and Fourth Geneva Conventions of 1949;
3) Rome Statute of the International Criminal Court of 1998.

When analyzing the normative value of the treaties governing air warfare, it is worth paying attention to the element of the subjective step made by a party to an international agreement by submitting reservations or interpretative declarations. VCLT states that reservations are a unilateral declaration of a state, which is made at the moment of signing, ratifying, accepting, approving or acceding to a treaty, modifying the legal effects of certain treaty provisions. The unrestricted right of states to freely determine the actual content of the agreement is subjected to significant limitations, by excluding the possibility of submitting reservations in full (e.g. Article 120 of the Rome Statute of the International Criminal Court) or the prohibition of making statements contrary to the subject and purpose of the agreement, as well as the possibility of objecting to submitted reservations, which may lead to the exclusion of the validity of a given provision between the state submitting the reservation and the state submitting an objection. In the doctrine of international law a dispute has persisted for many years regarding the mutual relationship of Articles 19 and 20 of VCLT as part of the so-called permissibility school and opposability school, regarding whether an objection is admissible to any reservation or only to one which, in a way, *ex lege* pursuant to Article 19 of the VCLT is not contrary to the purpose and subject matter of the treaty.[67]

Treaties on the rules of air warfare as part of international humanitarian law are a set of special-purpose regulations that regulate matters important from the point of view of the international community. Many of the *ius in bello* agreements did not provide for a prohibition of reservations. In its advisory opinion on the *Reservations to the convention on the Prevention and Punishment of the Crime of Genocide of 1948*, the International Court of Justice (ICJ) drew attention to the fact that the subject of certain international agreements makes it impossible to modify their content if the reservation is inherently contrary *per se* to their essence.[68] The above solution, in conjunction with Article 19 of VCLT, unambiguously limits the content of certain types of reservations to documents of international humanitarian law, such as those derogating from the prohibition of making the civilian population the object of attack.

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66 In a historical approach. Pursuant to Article 134 of the III Geneva Convention. The 1929 Convention was replaced by a subsequent treaty.

67 A. Szarek, *Nieważność zastrzeżeń do traktatów – kilka uwag w związku z zakończeniem prac Komisji Prawa Międzynarodowego nad zagadnieniami zastrzeżeń do traktatów* [*Invalidity of Treaty Reservations: A Few Remarks on End of the ILC Works on Treaty Reservations*], "Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2012, vol. 10, pp. 89–91.

68 ICJ, *Reservations to the Convention of Genocide, Advisory Opinion*, I.C.J. Reports 1951, para. 24.

Formally, so-called interpretative declarations should be distinguished from reservations, which reflect the view of the state – a party to a given agreement on the interpretation of a specific provision thereof, which are a reflection of the position expressed during preparatory works. Ultimately, the declaration does not exclude the legal effect of a given provision but is an expression of the party's position on its interpretation.[69] Robert Kolb indicates that if a state actually makes its own interpretation of the provision in a declaration, then such a reservation should be considered an interpretative declaration.[70] However, as indicated by A. Wyrozumska, in the current practice of international relations, the boundaries between an interpretative declaration and a reservation are becoming blurred.[71] In particular, among the declarations of states submitted when becoming bound by AP I provisions (the contents of the UK declaration ought to be indicated as a "model" example[72]), there are some difficulties in distinguishing the two different concepts. However, more arguments are in favor of considering a given reservation as an actually interpretative declaration (by, among others, formulating its own interpretation of the provision). Doubts are raised, in turn, by the declarations summited by France and Federal Republic of Germany, which referred to the admissibility of reprisals.[73] What is important, many of the interpretative entries made by the United Kingdom are often cited and approved by the doctrine of international law, e.g., on the issue of applying the so-called Rendulic rule (see chapter below).

Although many of the *ius in bello* treaties did not provide for a prohibition of filing reservations (such as the Fourth Hague Convention of 1907 together with its Regulations), submitting them or declarations interpreting documents of international humanitarian law was a rare practice until 1945. The protest of Western states was caused by reservations submitted by the Eastern Bloc states to Article 85 of the Third Geneva Convention of 1949, which essentially deprived prisoners of war who were tried and convicted of war crimes of protection under the convention. An objection of similar contents was filed by the North Vietnamese government.[74] During the Vietnam War, the Vietnamese government tried to

69 A. Henriksen, *International Law*, Oxford 2017, p. 49.

70 R. Kolb, *Treaties for Armed Conflict*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 70.

71 A. Wyrozumska, J. Barcz, *Prawo międzynarodowe publiczne* [*Public International Law*], Warszawa 2013, p. 89.

72 The content of the United Kingdom's declaration is available at International Humanitarian Law Databases, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, 1998, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2%20 (accessed: 26.10.2020).

73 J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law: Volume 1, Rules*, Cambridge 2005, p. 521.

74 "The Democratic Republic of Vietnam declares that prisoners of war tried and convicted of war crimes or crimes against humanity, in accordance with the principles laid down by the

apply the contents of the reservation to captured American airmen, which caused obvious controversy, and the United States unequivocally protested against the contents of the reservation.[75] A serious controversy was caused by the submission of a reservation by the United States on January 21, 2009 to the contents of the Protocol III to the Convention on Certain Conventional Weapons (CCW), under which the United States reserved the right to use incendiary weapons against military objectives located near places of civilian concentration, provided that this would ensure fewer accidental losses than the use of other means of combat, contrary to the provisions of Article 2 para. 2 of the Protocol III to CCW prohibiting in all circumstances aerial bombardment of military objectives located near locations of the civilian concentration.[76] This reservation was contested by many states, which considered it to be contrary to the purpose and subject matter of Protocol III, noting, however, that they do not oppose to the application of the treaty *per se* (most European Union states, including Poland).[77]

5.5. Customary international law

Long before the establishment of the first international bodies of justice, the doctrine of international law emphasized the importance of a custom as a medium of rights and obligations of belligerents with primary significance. In 1910 A. Pearce Higgins argued that a custom reflects accepted practice, often initiated by the largest states.[78] In the context of international humanitarian law of armed conflicts, a custom is of special nature due to its historical role in shaping the rights and obligations of the warring parties. The law of war until the mid-nineteenth century had materialized only as an element of the practice of states (*usus*), which was considered binding (*opinio iuris*), thus creating the basis of a custom. At the beginning of the 20th century, J.B. Porter pointed out that the customary law being in force in wartime is variable in the history of armed conflicts, making certain

Nuremberg Judicial Tribunal, shall not benefit from the provisions of the present Convention as is specified in Article 85" – D. Schindler, J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, Dordrecht 1988, p. 592.

75 R. Provost, *International Human Rights and Humanitarian Law*, Cambridge 2004, pp. 148–149.

76 "In light of its obligations under customary international law, it is likely that the United States' reservation and understanding violate the object and purpose of Protocol III" – M. Callan, C. Henry, *Baptized by Fire: Protocol III's Imperfect Ban on Incendiary Weapons Against Civilians in Times of War*, "Boston University Public Law" 2015, vol. 24, p. 191.

77 The contents of the objections – Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III) Geneva, October 10, 1980, https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=3&mtdsg_no=XXVI-2&chapter=26&lang=en#EndDec (accessed: 26.10.2020).

78 A. Pearce Higgins, *The Binding Force of International Law*, Cambridge 1910, p. 6.

legal practices illegal (e.g., killing prisoners of war), as well as *a contrario* (e.g., aerial bombardment) through the construction of *desuetude*.[79] Lassa Oppenheim emphasized that the evolution of the law of war established the creation of the so-called *usus in bello*, which allowed for isolating a custom and thus the creation of a legal norm.[80] The indicated views perpetuate the conviction that the doctrine of the second half of the 19th century and the first half of the 20th century was primarily based on the analysis of the actual conduct of belligerents in numerous conflicts taking place in the world during this period.[81] The International Military Tribunal (IMT) included among the sources of the law of war not only treaties, but also "the customs and practices of states that have gradually gained universal acceptance".[82]

It is widely accepted that in order to become relevant, the practice of states should be permanent, uniform and common. Based on the proceedings on *Asylum case* (Colombia v. Peru), the ICJ stated that the practice of Latin American states, marked by excessive dispersion, made it impossible to ascertain the existence of a uniform standard.[83] In the matter of *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), the court indicated that absolute observation of the rule set out by the limits of customary law was not necessary unless the waiver was of a general nature and a possible violation was treated as a breach of a rule and not as the creation of a new custom.[84] This is an important

79 J.B. Porter, *International Law: Having Particular Reference to the Laws of War on Land. A Course of Twelve Lectures Delivered to the Staff Class of the Army Service Schools*, Fort Leavenworth 1914, pp. 3–4.

80 L. Oppenheim, *International Law: A Treatise. II – War and Peace*, London 1905, p. 75. At this point, it is worth mentioning that L. Oppenheim separated the so-called usages – that is, customary norms *in statu nascendi*, which have not yet acquired a "legal foundation", but there is already a certain practice among the combatants – *ibidem*, p. 25.

81 "The written law is to be found in such international agreements as the Hague Conventions, and perhaps the consensus of juristic opinion; the unwritten is the practice uniformly followed by armies in the field" – T. Baty, J. Morgan, *War: Its Conduct and Legal Results*, New York 1915, p. 166.

82 "The lam of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate. reference the principles of law already existing" – Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*…, p. 51. M. Cherif Bassiouni draws attention to the fact that in 1945 the IMT understood the custom in the first place as the actual practice of states supported by *opinio iuris* – M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, Cambridge 2011, p. 147.

83 ICJ, *Asylum case (Colombia v. Peru), Judgement, 20 November 1950*, I.C.J. Reports 1950, para. 277.

84 "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should,

circumstance in the context of international humanitarian law, emphasized by the contents of the International Committee of the Red Cross (ICRC) study (*Study of Customary International Humanitarian Law of 2005*), which drew attention to the fact that that an attempt to challenge a customary norm should go through a similar process as in the case of the creation of a new custom.[85] The practice does not have to be long-standing but should be extensive and at the same time uniform through the conduct of particularly involved states.[86] In the context of air warfare, it is worth paying attention to the statement of C. de Vaisseau Yvon, who indicated that in relation to the analysis of customary law, the practice of air warfare during World War I provided a relatively small number of norms produced by universal consensus between the warring parties.[87] This is confirmed by Y. Dinstein, who states that customary law could not in any way replace the defects resulting from the lack of norms of a treaty nature.[88]

For a customary norm to exist, it is necessary to demonstrate *opinio iuris*, i.e., "belief in the legality of a given practice" (also called a subjective element of the custom).[89] In many cases, the separation of the elements of a custom between *usus* and *opinio iuris* may encounter numerous practical problems.[90] It is acknowledged that the evidence of *opinio iuris* may be the external activity of states, including activity in the forum of international organizations – through, among others, the method of voting on the adoption of resolutions of these organizations. In this respect, the jurisprudence of the ICJ draws attention to the special value of United Nations General Assembly's (UNGA) resolutions, which, despite the lack of formal binding force, serve as a specific indicator of the legal view of either individual states or the entire international community. In this context, resolutions adopted unanimously or by a significant majority (such as the UNGA resolutions on the

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in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule" – ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, I.C.J. Reports 1986, para. 186.

85 M. Henckaerst, L. Doswald-Beck, *Customary International Humanitarian Law*…, p. 54.

86 ICJ, *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, para. 74.

87 C. de Vaisseau Yvon, *La Guerre Aérienne*, "Revue juridique internationale de la locomotion aérienne" 1924, vol. 244, p. 254.

88 Y. Dinstein, *Air Warfare*, p. 14.

89 M. Roscini, *Cyber Operations and the Use of Force in International Law*, Oxford 2015, p. 25; ICJ, *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, para. 74.

90 W. Schabas, *Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals*, [in:] J. Doria, H.-P. Gasser, M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blischenko*, Leiden 2009, pp. 84–87; D. Djukic, N. Pons (eds.), *The Companion to International Humanitarian Law*, Leiden 2009, p. 274.

basic principles of protection of civilians in an armed conflict mentioned in subsection 5.10) are of particular interest to the doctrine and international courts.[91] In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ argued that although "UNGA resolutions have no binding force, they have normative value, in particular, they can be evidence of the existence of a norm having a customary nature, demonstrating *opinio iuris*".[92] Bin Cheng pointed out that such resolutions adopted in the forum of international organizations are an expression of *opinio iuris generalis* of the entire international community, which constitutes the sum of individual views of the states forming this community (*opinio iuris individualis*).[93] Such a process may also be reversed – if a given practice of a single state garners general recognition among other states, then the conviction of legality may lead to the conclusion on the existence of the practice in a universal way.[94] Based on the case of *Norwegian Fisheries*, the ICJ did not proceed to the *opinio iuris* study, recognizing that the lack of consistent practice of states concerning a specific method of determining the baseline determines the lack of a norm of customary law.[95] However, views suggesting that the norm of customary law can be created only on the basis of *opinio iuris* are considered controversial.[96] According to the concept of a *sliding scale*, it is assumed that a continuous practice may also be *per se* an expression of "belief in the legality of the practice" unless it is challenged by a contrary intention.[97] In the same way, a clear demonstration

91 "His opinio juris may, though with al1 due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled «Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations». The effect of consent to the text of such resolutions cannot be understood as merely that of a «reiteration or elucidation» of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves" – ICJ, *Military and Paramilitary Activities in and against Nicaragua*…, para. 188; G.J.H. van Hoof, *Rethinking the Sources of International Law*, Deventer 1983, p. 183; T. Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, Cham 2017, pp. 206–207.

92 ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, para. 70.

93 B. Cheng, *Custom: The Future of General State Practice In a Divided World*, [in:] R. MacDonald, D. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, Dordrecht 1989, p. 549.

94 B. Cheng, *Some Remarks on the Constituent Elements(s) of General (or-called Customary) International Law*, [in:] A. Anghie, G. Sturgess (eds.), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*, The Hague 1998, p. 386.

95 ICJ, *Fisheries case, Judgement*, I.C.J. Reports 1951, p. 19.

96 See: ILA, *Final Report of The Committee: Statement of Principles Applicable to the Formation of General Customary International Law*, London Conference, London 2000, p. 61.

97 F.L. Kirgis, *Custom on a Sliding Scale*, "American Journal of International Law" 1987, vol. 81, p. 149.

of opinio iuris can only be sufficient evidence of the existence of a customary norm without the existence of its confirmation resulting from practice. The consequence of the above is the assumption that the weaker dimension of one of the elements tends to be compensated by the existence of a stronger influence of the other.[98] This concept is rightly criticized as an attempt to undermine the necessity of the existence of a two-factor definition of custom, especially in the context of recognizing the UNGA resolution as an "instant" customary law without analyzing the factual compliance of states' conduct with their contents.[99]

Customary humanitarian law was rediscovered in the early 1990s within the jurisprudence of the ICTY. This was primarily related to the need to determine the scope of substantive law (and, consequently, the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) in this respect) applicable in the conditions of armed conflicts of a non-international nature, where due to the small scope of positive law, limited only to the provisions of the so-called common Article 3 for the Geneva Conventions of 1949 and AP II to the Geneva Conventions of 1977, it was necessary to determine which of the *ius in bello* provisions at the interstate level also have a dimension applicable in an internal conflict.[100] As J.J. Paust stated, "customary international law is universal […] It is not subject to control by a few actors in the international legal process, and it binds all participants in international and non-international armed conflicts to the extent that it is applicable to such conflicts ".[101] The UN Secretary-General's comment on the Statute of the ICTY indicated that the court may apply the norms of customary international law "beyond any doubt part of customary law […]".[102] The ongoing phenomenon of increasingly frequent armed conflicts of a non-international nature, in the absence of specific norms, led the ICRC to attempt to write down rules, which, in the opinion of the Committee, are of a customary nature. The result of the work was the preparation of the above-mentioned *Study of Customary International Humanitarian Law*.[103]

In its methodology of analyzing the practice of states, the study considered two types of acts: verbal and physical. The former includes all kinds of legislative

98 B.D. Leparad, *Customary International Law: A New Theory with Practical Applications*, Cambridge 2010, p. 25.

99 M.P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*, Cambridge 2013, pp. 57–58.

100 G. Mantilla, *From Treaty to Custom: Shifting paths in the recent development of international humanitarian law*, "Leiden Journal of International Law, Leiden Journal of International Law" 2024, vol. 37(2), pp. 359–378.

101 J.J. Paust, *The Importance of Customary International Law during Armed Conflict*, "ILSA Journal of International and Comparative Law" 2006, vol. 12, p. 601.

102 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808/1993, S/25704, para. 34.

103 J.-M. Henckaerst, L. Doswald-Beck, *Customary International Humanitarian Law*…

products, instructions and orders addressed to the armed forces, statements on the international forum, protests, and opinions of legal advisers. The latter deals with the actual course of warfare.[104] Identification of the practice implemented by states, as well as beliefs about the legality of a given practice are hindered by the generally cited reasons of national security and state secrecy.[105] The ICRC methodology proposed in the *Customary International Humanitarian Law Study* is not approved by all states and by a part of the doctrine of international law. Dinstein emphasized that not all the states' declarations are relevant to the emergence of international custom, suggesting excessive vagueness of the study's findings in this regard.[106] Representatives of the United States made allegations against the scheme adopted by the ICRC for focusing only on the observation of so-called passive practice of states without considering so-called active practice – the analysis of the reality of the battlefield along with the excessive acceptance of the contents of the practice resulting from the analysis military manuals – understood by the legal services of the US armed forces as an element of *opinio iuris*.[107] Many doubts are also raised by the adoption of the view, both in the contents of the ICRC study and the ICTY jurisprudence in the *Kupreskic* case (further discussed in the study), that it is possible to crystallize a norm of customary international law without adequate practice or a convincing *opinio iuris* of contrary nature.[108] *Prima facie*, this view seems to contradict the definition of custom. Nevertheless, only the United States explicitly criticizes the review of customary law carried out by the ICRC. On the other hand, it cannot be overlooked that since the adoption of the study, its so-called authoritative value ("value of persuasion") has increased, through recourse to the document by international tribunals, national courts, and finally a positive reception by many

104 *Ibidem*, p. 38.

105 "Practice and opinio iuris et necessitates are often difficult to discern in military matters as the practice and motivations of states are quite often obscured and shrouded within a penumbral veil of national security and hence, secrecy. Nonetheless, we argue that national military manuals, military orders, and unclassified peacetime rules of engagement are all indicative of the opinio iuris et necessitates of states on these matters" – M. Bourbonniere, L. Haeck, *Military Aircraft and International Law: Chicago Opus 3*, "Journal of Air Law and Commerce" 2001, vol. 66, p. 889.

106 Y. Dinstein, *The ICRC Customary International Humanitarian Law Study*, "International Law Studies" 2006, vol. 82, p. 101.

107 J.B. Bellinger, W.J. Haynes, *A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law*, "International Review of the Red Cross" 2007, vol. 89, pp. 445–446.

108 "It appears that international courts and tribunals on occasion conclude that a rule of customary international law exists when that rule is a desirable one for international peace and security or for the protection of the human person, provided that there is no important contrary opinio juris" – J.-M. Henckaerst, L. Doswald-Beck, *Customary International Humanitarian Law*…, p. 58. J.T. Hill, *Ius in Bello Futura Ignotus: The United States, The International Criminal Court, and the Uncertain Future of the Law of Armed Conflict*, "Military Law Review" 2015, vol. 223, p. 676.

states. Among the doctrines, it has become standard to treat the study as the basic carrier of information about the substance of customary law.[109]

In one of its first and most important procedural decisions, the International Criminal Tribunal for the former Yugoslavia concluded that the process of creating the law of armed conflicts is difficult to observe, especially if it is carried out from the perspective of the battlefield. In this matter, the ICTY gave priority to official communiqués of a state of a verbal nature (interestingly, it began its argument regarding the existence of customary norms of international law applicable in a conflict of a non-international nature by citing the contents of the resolution of the League of Nations of September 30, 1938, on aerial bombardment).[110] In another place, the study indicated that due to practical difficulties in distinguishing between *usus* and *opinio iuris*, if the practice is simultaneously coupled with the belief in its legality, there is no obligation to examine *opinio iuris* to this extent.[111] It should be noted that as part of the work taking place at the UN International Law Commission (ILC) forum, it was decided to recognize the traditional view on forming a norm of a customary nature – in consequence requiring the existence of both elements (referring to both *usus* and *opinio iuris*).[112] As indicated in the ILC report "the belief that something is (or should be) law without the support of practice is at most an aspiration […]".[113] An interesting observation comes from R. Heinsch, who indicates that in the context of international humanitarian law, the standards required to create a norm of a customary nature are lowered, which results from the "general needs of the international community".[114] Emily

109 M. Milanovic, S. Sivakumaran, *Assessing the authority of the ICRC Customary IHL Study*, "International Review of the Red Cross" 2022, vol. 920–921.

110 "In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions" – *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2nd October 1995, para. 99.

111 Although this view *prima facie* seems to contradict the two-element definition of custom in international law, it is not completely meaningless in the light of the ICJ judgment in the case of *Western Sahara*, in which the court concluded the existence of a specific view on the status of the so-called *terra nullius* precisely on the basis of a specific practice occurring during the colonial period. ICJ, *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, p. 12, para. 80.

112 *Third report on identification of customary international law by Michael Wood*, Special Rapporteur, International Law Commission, Sixty-seventh Session, Geneva, 4 May – 5 June and 6 July – 7 August 2015, A/CN.4/682, paras. 12–18.

113 ILC, Draft conclusion on identification of customary international law, with commentaries, A/73/10, p. 126.

114 R. Heinsch, *Methodology of Law-Making, Customary International Law and New Military Technologies*, [in:] D. Saxon (ed.), *International Humanitarian Law and the Changing Technology of War*, Leiden 2013, pp. 31–32; C. Stahn, J. Iverson, J.S. Easterday, *Introduction: Protection of the Environment and Ius Post Bellum: Some Preliminary Reflections*, [in:] *eidem* (eds.), *Environmental Protection and Transitions from Conflict to Peace*, Oxford 2017, p. 24.

Crawford considers that the above conclusion is reinforced by the "unique nature of the law of armed conflicts".[115] On the other hand, however, ICJ emphasizes that a constitutive element of the customary norm is the need to demonstrate the existence of "actual practice".[116] An interesting perspective in this respect was presented by N. Chandrahasan, who pointed out that the *ius in bello* rules have a mainly prohibitive dimension – as a result, the reflection of practice in this respect should be the actual refrainment on the part of belligerents from specific steps prohibited by a given norm.[117] William H. Boothby argues that when reading the study, one cannot forget about the fact of creating practice only by observing the behavior of states.[118]

Military legislation, including manuals and commentaries, addressed to the armed forces, may play an important role in determining the elements of custom (evidentionary role).[119] For N. Beretta, in view of the difficulties in decoding the practice of the battlefield, the above documents can reflect both *usus* and *opinio iuris* – because they are an expression of the state's belief in the validity of the rules, which are expressed as binding on its own armed forces.[120] Anna Wyrozumska pointed out that acts of a verbal nature are often cited as evidence of both *usus* and *opinio iuris*[121] at the same time. However, a situation in which manuals describe a given matter as relatively binding or controversial (as in the case of the Hague Rules of Air Warfare of 1923) becomes more problematic.

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115 E. Crawford, *Blurring the Lines between International and Non-International Armed Conflicts-The Evolution of Customary International Law Applicable in Internal Armed Conflicts*, "Australian International Law Journal" 2008, vol. 15, p. 38.

116 ICJ, *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment*, I.C.J. Reports 1985, para. 27.

117 N. Chandrahasan, *The Continuing Relevance of Customary International Law in the Development of International Humanitarian Law*, "Sri Lanka Journal of International Law" 2009, vol. 55, p. 59.

118 W.H. Boothby, *Weapons and the Law of Armed Conflict*, Oxford 2009, p. 32.

119 R. Bierzanek, *Wojna a prawo*…, p. 46; K. Wolfke, *Custom in Present International Law*, Wrocław 1964, p. 147.

120 "Generally, given the difficulty of ascertaining significant state practice in periods of hostility, manuals of military law and national legislation providing for the implementation of humanitarian law norms are accepted as among the best types of evidence of such practice. The practice of states is also reflected in the adoption of international instruments such as normative declarations and, especially, multilateral treaties. Opinio juris refers to the existence of a state's sense of obligation to uphold a specific rule of law. Opinio juris, in reference to the United States, can be found in both international treaties signed by the United States as well as in the existence of parallel rules within national military law manuals" – N. Barrett, *Holding Individual Leaders Responsible for Violation of Customary International Law: The U.S Bombardment of Cambodia and Laos*, "Columbia Human Rights Law Review" 2000–2001, vol. 32, p. 444; D. Turns, *At the "Vanishing Point" of International Humanitarian Law: Methods and Means of Warfare in Non-international Armed Conflicts*, "German Yearbook of International Law" 2002, vol. 45, p. 135.

121 W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne: zagadnienia systemowe* [*Public International Law*], Warszawa 2014, pp. 106–107.

It is worth pointing out after the ICJ ruling on *Military and Paramilitary Activity against Nicaragua*, stating that "if the state acts *prima facie* contrary to a recognized rule, but justifies its conduct, then in fact such an attitude strengthens and confirms the content of the norm, not weakens it".[122] The above construction is particularly visible in the context of the doctrine of reprisals widely used during the air war.[123]

5.6. General principles recognized by civilized states

These are mentioned by the Statute of the ICJ in Article 38 para. 1(c) as sources of law, general principles of law recognized by civilized nations. In the past, there has existed some controversy over the recognition of this category as a formal source of international law. Principles are treated as a kind of bridge between the positivist and naturalist theory of international law.[124] Currently, it is recognized that within the framework of the principles above, there are principles in force based on national legal orders that have gained widespread acceptance (lock, stock and barrel – McNair).[125] They are derived from the Roman legal tradition and have been adapted by international law.[126] General principles of law are of particular importance in court proceedings – for example, *res iudicata*, *in dubio pro reo*, *ne bis in idem* – and are generally used as a procedural element in international jurisprudence.[127] There are also cases of the material use of certain principles as a basis for legal decisions.[128] General principles prove the completeness of the system of international law and ultimately are a means of avoiding gaps in international law and situations related to the emergence of the *non liquet* state – that is, subsumption, which leads to establishing non-existence of a norm, which paradoxically could have taken place in the context of the lack of clear legal regulation relating to air warfare in the past.[129]

122 ICJ, *Military and Paramilitary Activities in and against Nicaragua*…, para. 186.
123 R.W. Tucker, *The Law of War and Neutrality at Sea*, "International Law Studies" 1957, vol. XLX, p. 32.
124 A. Kaczorowska-Ireland, *Public International Law*, Oxon 2015, p. 49.
125 A. Rieu-Clarke, *International Law and Sustainable Development*, London 2005, p. 28.
126 See: H. Lauterpach, *Private Law Analogies in International Law*, London 1926.
127 M. Shaw, *International Law*, Cambridge 2006, p. 100.
128 For example, recognizing that a breach of an international legal obligation entails a responsibility for damages "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form" – see: PCIJ, Factory at Chorzow (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26), para. 55).
129 J. Barcik, T. Srogosz, *Prawo międzynarodowe publiczne* [*Public International Law*], Warszawa 2017, p. 5; G.M. Danilenko, *Law-Making in the International Community*, Dordrecht 1993, p. 173.

In the context of international humanitarian law, the principle of immanent importance is good faith.[130] The principle of good faith operates on two levels in the context of international humanitarian law. The first one is the performance of duties and the enforcement of rights under international law in good faith. This results, among others, from the provisions of Article 2 para. 2 of the UN Charter, according to which members of the organization should fulfil their obligations in accordance with good faith, as well as many provisions of the VCLT of 1969. An independent exemplification of this principle in international humanitarian law is the Common Article 1 of the Geneva Conventions of 1949, which provides for the obligation to comply and ensure compliance with the convention in all circumstances. The second level is the specific provisions of international humanitarian law, to which R. Kolb primarily includes regulations in the field of perfidy, as an act of betrayal of good faith.[131]

The science of international humanitarian law also uses the concept of common sense.[132] Already in his work *On the Law of War and Peace*, Grotius referred to interpretations based on the belief that there is a certain balanced and rational decision-making center in the human mind, resulting from "creating it in the image and likeness of God".[133] The use of the above paradigm as an interpretative tool in the context of factual situations related to the legal issue relating to war as an institution of international law was addressed by the US Supreme Court as part of the so-called prize proceedings, arising in connection with the Civil War. The court found that "international law is built on common sense".[134] Michał Kałduński notes that the elements of the above paradigm can be found in the principle prohibiting abuse of law as "an arbitrary use of law, the opposite of which is the reasonable exercise of law".[135] The above statement is confirmed by C. Focarelli, arguing that the abuse of law means applying it in contradiction to common sense existing within the international community.[136] This concept has a significant impact on the interpretation of the norms

130 E. Lis, *Zasada dobrej wiary w prawie międzynarodowym* [*Principle of Good Faith in International Law*], "Studia Iuridica Lublinensia" 2016, vol. XXV.

131 R. Kolb, *Good Faith in International Law*, Oxford 2017, pp. 250–253.

132 "If international humanitarian law applicable in armed conflicts was not to become a dead letter, it was essential, first that the rules of that law should place the parties on an equal footing – in other words that the rules should be equally binding on all the parties to the conflict; secondly, that those rules should constitute a well-balanced compromise between humanitarian considerations and military necessity; lastly that they should be drafted in such a way us to ensure that all the parties to the conflict would have an equal interest in their application" – CDDH/III/SR.28, para. 8, p. 261.

133 O. Yasuaki, *War*, [in:] *idem* (ed.), *A Normative Approach to War, Peace, War and Justice in Hugo Grotius*, Oxford 1993, p. 73.

134 U.S. Supreme Court, Prize Cases, 67 U.S. 635 (1862).

135 M. Kałduński, *Zasada dobrej wiary w prawie międzynarodowym* [*Principle of Good Faith in International Law*], Warszawa 2017, p. 246.

136 C. Focarelli, *International Law as Social Construct: The Struggle for Global Justice*, Oxford 2012, pp. 73–86, 323.

of international humanitarian law, especially on the contents of interpretative declarations (e.g., United Kingdom) submitted to AP I. The doctrine of *ius in bello* refers to common sense as part of an attempt to construct an acceptable interpretation of the norms of humanitarian law. Dieter Fleck pointed out that although international humanitarian law is not based on the principle of reciprocity, the common sense of the combatants orders them to comply with it due to the possibility of retaliation.[137] In the commentary to the First Geneva Convention of 1949, J.S. Pictet indicated that the meaning of the words "wounded and sick fighting" should be determined in relation to common sense and good faith.[138] The same author elsewhere explicitly refers to the need for interpretations based on these premises.[139]

The above issue is closely related to the existence of the so-called normative model or pattern – considered to be a reference to the desired standard of conduct allowing for the assessment of all the subject-matter circumstances of a given act (pattern of judicial application of law – J. Wróblewski).[140] The normative model of a reasonable entrepreneur/specialist is approved in the jurisprudence of many states.[141] It is reflected in the jurisprudence of international criminal tribunals in the form of the so-called Rendulic rule – or the reasonable commander standard (described in the chapter below).[142] The premise of common sense has a special reference in the case of interpreting the formulations of international humanitarian law of a *prima facie* nature with an elusive, uniform and definitive standard – such a model of interpretation is proposed in the ICRC Commentary on AP I.[143] An example of the use of a normative model of a reasonable commander is, among others, the verification of obligations resulting from the targeting process – the planning phase preceding an attack.[144]

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137 The same author considers the existence of basic principles governing international armed conflict in the case of non-international conflicts to be derived from common sense. D. Fleck, *The Handbook of International Humanitarian Law*, Oxford 2013, para. 1226. The same view in relation to an armed conflict of a non-international nature is expressed by H. Spieker, *Twenty Five Years After the Adoption of Additional Protocol II: Breakthrough or Failure of Humanitarian Legal Protection*, "Yearbook of International Humanitarian Law" 2001, vol. 4, p. 145.

138 J.S. Pictet, *The Geneva Conventions of 12 August 1949. Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva 1952, p. 136.

139 "The correct interpretation of the phrase is a matter of common sense and good faith" – *ibidem*, p. 203.

140 J. Wróblewski, *Sądowe stosowanie prawa* [*The judicial application of law*], Warszawa 1988.

141 G.P. Fletcher, *Rethinking Criminal Law*, Oxford 2000, p. 494.

142 M. Piątkowski, *The Rendulic Rule and the Law of Aerial Warfare*, "Polish Review of International and European Law" 2013, vol. 2; W. O'Brien, *The Conduct of Just and Limited War*, [in:] J. White (ed.), *Contemporary Moral Problems: War, Terrorism and Torture*, Boston 2012, p. 28.

143 See, for example, the commentary on Article 57 (p. 682), Article 61 (p. 731), Article 86 (p. 1015); Y. Sandoz, C. Swinarski, B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva 1997.

144 D. Akerson, *The Illegality of Offensive Lethal Autonomy*, [in:] D. Saxon (ed.), *International Humanitarian Law and the Changing Technology of War*, Leiden 2013, p. 88.

5.7. International jurisprudence

Decisions of international courts are, in the light of Article 38 para. 1(d) of the Statute of the ICJ recognized as "auxiliary means for setting legal standards".[145] There is no doubt that the authority of international justice bodies has a significant impact on the development of international law. In the case of international humanitarian law, of paramount importance is the body of jurisprudence of the courts established to try war criminals after World War II, which contributed both to developing the basis for the prosecution and trial of perpetrators and also clarified a number of *ius in bello* norms. The legacy of the ICTY, on the other hand, is a milestone in the development of the law of non-international armed conflict, confirming that the gravity of judgments rendered by international courts can be key evidence of either a customary norm or a binding interpretation of treaty provisions.

Paradoxically, legal issues related to the issue of air warfare occurred directly in two cases in the pre-war period. In the remaining scope, the reference to the rules of air warfare occurred only indirectly or in the context of refuting the arguments aimed at undermining the material legitimacy of the IMT (*tu quoque*) or in relation to the AP I standards of a nature common to all types of military operations (ICTY). This is quite surprising in connection with the importance of air force in an armed conflict. It is also evidence *per se* of the complex nature of the issues addressed by this work and specific research difficulties. In the context of the rules of air warfare, the following court decisions are of particular relevance:

1) rulings of the mixed arbitration tribunals – German/Greek and German/Romanian – established after the First World War based on Articles 297–304 of the Treaty of Versailles for the examination of claims made by natural persons for the adoption of "extraordinary war measures" against their property,[146]
2) judgments of the International Military Tribunal (IMT), International Military Tribunal for the Far East (IMTFE) and trials of war criminals of Japan and Germany organized by Allied military courts,

145 H. Lauterpach, *The Development of International Law by the International Court*, Cambridge 1982, pp. 20–22; A. Chmielowiec, *Źródła prawa międzynarodowego – zagadnienia wstępne* [*Sources of International Law – General Issues*], "Roczniki Administracji i Prawa: Teoria i Praktyka" 2013, R. XIII, p. 98.

146 "Citizens of the Allied and Associated Powers shall be entitled to compensation for loss or damage inflicted on their estates, rights or interests including companies or associations in which they held shares in the German territory within the borders of August 1, 1914, – by the application of exceptional war orders and enforcement measures referred to in Articles 1 and 3 of the appended Annex. The claims of said nationals regarding this matter shall be investigated and the amount of compensation determined by the Mixed Arbitration Tribunal provided for in Section VI, or by a conciliator to be appointed by this Tribunal; the compensation shall be chargeable to Germany, and shall be recoverable from the property of German nationals situated in the territory or under the control of the State of the claimant" – Article 297(e) of the Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles on June 28, 1919 (Journal of Laws of 1920 No. 35, item 200).

3) advisory opinion of the ICJ on the *Legality of the Use or Threat of Use of Nuclear Weapons* of 1996,
4) rulings of the Eritrea-Ethiopia Claims Commission – established under Article 5 of the agreement between Ethiopia and Eritrea of June 18, 2000, to investigate, inter alia, serious violations of international humanitarian law,
5) ICTY rulings made in cases related to the assessment of the conduct of hostilities in the former Yugoslavia – in particular, the extent of artillery bombardment and the assessment of the methods of use of certain weapons as operating without distinction.

One of the most important rulings on the rules of air warfare took place because of the process of application of international law by a national court. Judgment in the case of Shimoda v. Japan was brought before the Tokyo district court on December 7, 1963 and is the only court decision examining the legality of aerial bombardments of the Japanese Islands during World War II.

5.8. Draft international treaties

It is particularly noteworthy that the 1923 draft rules of air warfare were a constant reference point of international law doctrine until the 1977 regulations were adopted. What distinguishes this document from other projects run by individual scientists or research associations is the fact that it was prepared by authorized representatives of states. The second document with a similar status is the 1956 initiative entitled "Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War".[147] These regulations were signed by representatives of the states, but were not ratified by any of the states, and therefore the only possible plane of formal validity of the above drafts are norms of the customary type.

5.9. Unilateral declarations of states

A unilateral declaration of a state may also be a source of international obligation.[148] It should be emphasized that, from the perspective of the rules of air warfare, statements of this type were made by those with the capacity to bind the state (heads of state, heads of government or foreign ministers). This is especially true

147 ICRC, *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War*, Geneva 1956.

148 "The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the state to which the Minister belongs" – PCIJ, *Legal Status of Eastern Greenland* (Denmark v. Norway), Judgment, PCIJ Series A/B, No. 53, ICGJ 303 (PCIJ 1933), p. 71.

in the inter-war period (see the declaration of the Japanese side, as well as the Secretary of State of the United States in connection with the conduct of the air war in China). It should be emphasized, however, that such a declaration is only valid provided there is a clearly articulated intention to cause legal effects.[149] This consequently makes it necessary to separate declarations of a legislative nature from statements or declarations of a political nature.[150]

5.10. The position of international organizations

As noted above, although UNGA resolutions are non-binding, as the ICJ pointed out in the case of military and paramilitary activity against Nicaragua, they can be evidence of an existing customary international law. In the study of international humanitarian law in particular, three resolutions are of special importance in relation to the rules of air warfare:

1) resolution of the Assembly of the League of Nations of September 30, 1938, on Protection of Civilian Populations against Bombing from the Air in case of War;[151]
2) UNGA resolution of December 19, 1968, No. 2444/XXIII on Respect for Human Rights in Armed Conflicts;[152]
3) UNGA resolution of December 9, 1970, No. 2675/XXV on Basic Principles for the Protection of Civilian Populations in Armed Conflicts.[153]

5.11. The position of quasi-judicial bodies

The international justice system is not perfect. In the case of the ICJ, the resolution of disputes between states is ultimately dependent on the consent of the parties, and states agreeing to recognize the jurisdiction of the ICJ pursuant to Article 36 para. 2 of the ICJ Statute in several cases (according to their interests) exclude the possibility of a dispute with the other state in matters relating to the actions of the armed forces (FRG, Romania, Hungary, Lithuania, Greece,

149 ICJ, *Nuclear Tests (Australia v. France), Judgment*, I.C.J. Reports 1974, para. 43.

150 ICJ, *Application of the convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment*, I.C.J. Reports 2007, para. 378; *Report of the Commission to the General Assembly on the work of its fifty-eighth session*, "Yearbook of the International Law Commission" 2006, vol. II, p. 162.

151 Quoted in D. Schindler, J. Toman, *The Laws of Armed Conflicts*…, pp. 221–222.

152 UN General Assembly, Twenty-third Session, 2444(XXIII), *Respect for human rights in armed conflict*, pp. 50–51.

153 UN General Assembly, Twenty-fifth Session, 2675(XXV), *Basic principles for the protection of civilian population in armed conflict*, p. 67.

India, Pakistan).[154] In the context of international criminal law, the prosecution of war criminals under the jurisdiction of the ICC, which has existed since 2002, faces a lack of universal acceptance of the ICC Statute from states with particularly significant experience in military operations (USA, Russia, Israel), and in the remaining scope it is subject to restrictions resulting from the principle of complementarity or other conditions of admissibility of proceedings (e.g. insufficient importance of the case) resulting from Article 17 of the Statute of the ICC.

Given these circumstances, the international community developed a kind of observational system in the early 20th century in the form of creating special teams, groups or commissions of inquiry to investigate violations of international law as a subsequent "platform" for further action. Over the course of the 20th century, the reasons for establishing the above-mentioned bodies have varied, such as the need to determine the actual course of the event in dispute (as one method of peaceful dispute resolution) or to assess the facts in question in the light of international law. A distinctive feature of the proceedings was the fact that they were conducted by persons independent of the parties involved, who at the same time had expertise in both the subject matter under study and law. Such was the nature of, for example, a special commission composed of naval officers dealing with the investigation of the Dogger Bank incident in 1904.[155] More problematic was the study of the cases of *ius in bello* violation during an armed conflict, especially of an internal nature. The first landmark initiative in this regard was the establishment, based on UNSC Resolution 780/1992, of an independent commission of experts to investigate serious violations of the Geneva Conventions and international humanitarian law in former Yugoslavia.[156] The work of the commission became the basis for the establishment of the first *ad hoc* criminal tribunal since the IMT. Later, not only the UNSC, but also the UNGA, the UN Human Rights Council, the UN Secretary-General and the United Nations High Commissioner for Human Rights established their own commissions of inquiry, for which it was agreed to use the name *fact-finding commission*.

These structures were active in almost every armed conflict after 1990, including Darfur, Gaza, Lebanon, Libya, Syria, Yemen, Georgia and Ukraine. These bodies had varying mandates, as well as different research methodologies, and introduced more or less extensive subsumption. For some reports – such as the

154 List of states as of October 27, 2020 recognizing the mandatory jurisprudence of the ICJ, along with the content of the submitted declarations – International Court of Justice, *Declarations recognizing the jurisdiction of the Court as compulsory*, n.d., http://www.icj-cij.org/en/declarations (accessed: 27.10.2020).

155 L.J. van der Herik, *An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law*, "Chinese Journal of International Law" 2014, vol. 13, p. 514.

156 Resolution 780(1992) Adopted by the Security Council at its 3119th meeting on 6 October 1992, S/RES/780(1992).

report on Israel's activities during the operation "Cast Lead" in 2009 in the Gaza Strip – some theses went well beyond the scope of the standard required by the "assessment of the situation from the point of view of international humanitarian law and human rights standards" when trying to assess certain events under international criminal law – which was met with justified criticism of the doctrine. In 2015, in order to harmonize the above standards, the United Nations High Commissioner for Human Rights issued a document in which they emphasized that the essential dimension of the activities of these bodies (not of a judicial nature) is to investigate alleged *ius in bello* violations with regard to human rights and to indicate recommendations on the basis of factual and legal findings.[157] It was also argued that the context of some missions and the implementation of mandates requires findings on individual responsibility, evading, however, in the above document from a deeper analysis of the problem.[158]

It should be emphasized that the findings of the fact-finding commission are not a source of international law. In principle, the activities of these bodies are only meant to be a set of concrete recommendations and a basis for launching further mechanisms – just as the first group of experts operating in the former Yugoslavia contributed to the ICTY. However, it should be noted that in many cases the members of the investigative groups are leading representatives of the doctrine of international law – e.g., Mahmoud Cherif Bassiouni (Yugoslavia 1992) or William Anthony Schabas (Gaza Strip 2014). In the reports submitted by the committees, one can find many noteworthy legal considerations related to determining the nature of the conflict and assessing certain events in the light of *ius in bello*, of a much more practical than theoretical nature. Despite the lack of formally binding nature of the submitted recommendations, they deserve attention as elements of a practical look at specific examples of the application of international humanitarian law in conditions of armed conflicts, taken by recognized authorities and based on facts displaying in most cases a credible nature.[159] Their value is all the more important as they are often the only form of reference by international law to the circumstances of the conflict that has occurred.[160] However, it should not be forgotten that the strongly subjective nature of the provisions of international humanitarian law does not allow for more extensive assessments than "only surmising ones" without taking into account the entirety of objective and subjective

157 United Nations Human Rights Office of the High Commissioner Commission of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law, *Guidance and Practice*, New York 2015, p. 7.

158 *Ibidem*, pp. 12–13.

159 D. Akande, H. Tokin, *International Commission of Inquiry: A New Form of Adjucation?*, 2012, https://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/ (accessed: 27.10.2020).

160 S. Darcy, *Laying the Foundations; Commission of Inquiry and the Development of International Law*, [in:] C. Henderson (ed.), *Commission of Inquiry: Problems and Prospects*, Oxford 2017, pp. 232–234.

circumstances, and in this respect, a fundamental difference should be found between court proceedings and findings made in the context of fact finding.[161]

Interestingly, one of the first independent commissions of inquiry into violations of international law was set up specifically to investigate the conduct of aerial bombardment during the Spanish Civil War of 1938–1939 (a mixed Franco-British expert group) and report on its activities to the Council of the League of Nations. Issues related to the use of aviation in an armed conflict appeared in the reports of fact-finding commissions on armed conflicts in Darfur, Lebanon, Gaza, Libya and Syria (to be discussed below). As a side note to these considerations, we should mention the existence of the International Fact-finding Commission established under Article 90 of the AP I. Its launch took place only in 1991 after receiving an appropriate number of declarations required by the provisions of Article 90 para. 1 AP I. The Commission ultimately acts either on a basic declaration (Article 90 para. 2(a) AP I) or at the invitation of the disputing parties.[162] The Commission is authorized to examine any fact which is a serious violation of the provisions of the convention or Protocol and to present recommendations through good offices – what is important, the actions of the Commission are not publicly disclosed. It was only in 2017 that the commission, described by F. Kalshoven as the "sleeping beauty", was called upon for the first time to investigate the incident related to the attack on OSCE representatives in eastern Ukraine.[163]

A special place in the analysis of the law of air warfare is occupied by the report of the committee of experts under the ICTY Prosecutor appointed to examine the legality of the NATO air campaign in 1999.[164] It is the only report in recent years entirely dedicated to issues closely related to the law of air warfare in its contemporary dimension. It should be noted that this document, unlike the reports issued by the fact-finding commissions, was written within the scope of the office in the structures of the international court established by the UNSC's decision to bring and support indictments by conducting a preliminary examination of the case. Due to the above, the value of its report seems to be similar to the value resulting from international jurisprudence, i.e., an auxiliary mechanism determining the content of the legal norm in the light of Article 38 of the Statute of the ICJ.

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161 C. Garraway, *Fact Finding and States in Emergency*, "ILSA Journal of International and Comparative Law" 2016, vol. 22, p. 476.

162 *Idem*, *The International Humanitarian Fact-Finding Commission*, "Commonwealth Law Bulletin" 2008, vol. 34, p. 814.

163 See: F. Kalshoven, *The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?*, "Humanitäres Völkerrecht – Informationsschriften" 2002, vol. 4; C. Azzarell, M. Niederhauser, *The Independent Humanitarian Fact-Finding Commission: Has the 'Sleeping Beauty' Awoken*, "Humanitarian Law and Policy" 2018, January 9.

164 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, International Criminal Tribunal for the former Yugoslavia, n.d., http://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal (accessed: 2.01.2021).

5.12. Military Commands

As noted in the jurisprudence of the Nuremberg Tribunal, military regulations have an important evidentiary value in relation to the customs which are applicable as part of conducting military operations.[165] Since the beginning of the 20th century, some of the world's armies have decided to publish its instructions, which are a form of concise guidelines addressed to the armed forces. As a rule, the contents of these instructions are of general nature and ultimately repeat the main principles of *ius in bello*, revealing, however, a certain individual approach of the state to a given norm of international humanitarian law. These guidelines should not be confused with Rules of Engagement (ROE), which have a much more extensive practical nature, but their contents are not publicly disclosed. The following military regulations with research value in the historical and contemporary context of air warfare can be mentioned:

1) FM 27-10 Rules of Land Warfare from 1914 and a new edition of FM 27-10 Rules of Land Warfare from 1940 – in terms of aerial bombardment law,
2) guidelines on the principles of aerial bombardment issued by various states in the period preceding the outbreak of World War II (discussed in detail in the chapter below – for example, the guidelines of the General Inspector of the Armed Forces of August 30, 1939),
3) AFP-110-31 Air Force Pamphlet, International Law – The Conduct of Armed Conflict and Air Operations issued in 1976 in Washington – important due to the period preceding the adoption of AP I, as well as because the United States did not become bound by this document,
4) the air operations law manual The Law of Air, Space and Cyber Operations of 2020 and the British handbook on the law of armed conflict (JSP 383, The Joint Service Manual of the Armed Conflict),
5) the latest United States manual (2023) – the Law of War Manual – containing an extended version of the target identification in relation to the contents of Article 52 para. 2 AP I.

5.13. The stance of the doctrine, organizations associating experts, academic initiatives

It should be noted that in the absence of a comprehensive international treaty relating to all circumstances connected with the use of air force in an armed conflict to this day, the existence of a gap in international law has naturally become

165 "The law of war is to be found not only in treaties, but in customs and practices of States which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world" – *Trial of the Major War Criminals Before the International Military Tribunal, 14 November 1945–1 October 1946*, vol. 1, Nuremberg 1947, p. 221.

the subject of interest in the doctrine of international law. Extensive literature on this subject was shown in the introduction to this work and in its subsequent chapters. However, it is worth mentioning in general terms that the first studies still relate to the period preceding the World War I, generally indicating the possibility of military aviation playing a key role in future armed conflicts. It should be emphasized that during this period many scientists proposed their own drafts of the air warfare code (Fauchille, Spaight, Le Moyne). Interwar times were the time of attempting to refer to the influence of the 1923 Hague Rules of Air Warfare and to assess the actions taken as part of the 1932–1934 Geneva Conference (Conference for the Reduction and Limitation of Armaments). A particularly interesting aspect can be seen in the legal discussion on the aftermath of the "silence" of international jurisprudence in the context of the air war during World War II, conducted by the greatest authorities of the doctrine. Since the adoption of the AP I regulations in 1977, there has been a sharp increase in the number of studies by currently recognized *ius in bello* experts.

In addition to the activities of individual experts, it is worth paying attention to the activities undertaken on the basis of associations or groups of researchers of international law. Chronologically, the first such initiatives were taken by the Institute of International Law, which widely discussed the issue of air warfare in the period immediately preceding its appearance as a method of conducting military operations.[166] The second scientific organization of this type was the International Law Association, which prepared its own resolutions both before World War II and in the post-war years.[167] The third extremely valuable initiative was the creation of a special research group within Harvard University, which prepared a manual on international law applicable to air and missile warfare in 2009. Especially the latter initiative, in parallel with the study of the International Institute of Humanitarian Law from San Remo on the subject of naval warfare undertaken in 1994 and the *Study on Customary International Humanitarian Law* in 2005, is an expression of a recent trend aiming to carry out thorough studies consisting in codifying customary standards, which have certainly gained considerable scientific popularity. William H. Boothby compared the above documents in terms of their significance to the Brussels Declaration of 1874 discussed in this work (which directly served as a model for the works of the First and Second Hague Peace Conferences in 1899 and 1907) as an expression of the useful view of experts on the current state of the law, but at the same time not being law *per se*.[168] Michael N. Schmitt, analyzing the above activity of experts, points out that the function of creating "belief in the compliance of a given procedure/practice with

166 L'Institut de Droit International, founded in 1873 in Ghent, Belgium, received the Nobel Peace Prize in 1904.

167 The International Law Association was founded in 1873 in Brussels, Belgium.

168 W.H. Boothby, *The Law of Targeting*, Oxford 2012, p. 28.

international law" has been taken over by states for the benefit of non-state entities – such as the ICRC, non-governmental organizations or *ius in bello* researchers themselves.[169] Despite the convincing nature of these studies and the fact that they are widely approved, it should be remembered that *opinio juris* is still inherently related to the behavior of states.

In 2004–2009, experts and researchers of international humanitarian law, led by Prof. Yoram Dinstein, gathered around the academic center at Harvard, prepared the Manual of International Law Applicable to Air and Missile Warfare – HPCR.[170] Among the more well-known experts participating in the work on the creation of the document, the following are worth mentioning: W. Boothby, M. Bothe, O. Bring, C.J. Dunlap, W. Heintschel von Heinegg, F. Kalshoven, W.H. Parks, M. Schmitt, Y. Sandoz, M. Sassòli, K. Watkin, N. Ronzitti – leading representatives of the doctrine of international law. A direct factor influencing the commencement of work on the review of the law of air warfare at the turn of the 21st century was the lack of a comprehensive study of the issue, the lack of ratification of AP I regulations by certain states, the need to update customary international law resulting from the contents of the Hague Rules of Air Warfare of 1923 in the light of the latest achievements of technology, in particular the emergence of rocket missile technology and unmanned aerial vehicles.[171] The gap in the doctrine of international law in this regard was revealed during the work on the so-called San Remo Manual of 1995. The preface to the document argues that, despite the existence of principles resulting from the most famous sets of international humanitarian law in the form of four Geneva Conventions of 1949 and AP I, some of which contain provisions relating to the law of air warfare, and they do not apply to many important aspects of conducting air operations.

It was pointed out that there is a similarity between the so-called San Remo Manual of 1995 and the HPCR Manual of 2009 in the context of their normative value, arguing that the sole intention of the originators was to describe the rules already existing and recognized as part of customary international law or reflected in international law treaties (*lex lata*), with all its weaknesses and ambiguities. The intention of the creators was not to make the manual an attempt to indicate the desired direction of the development of the rules of air warfare (*lex ferenda*).[172] Ian Henderson con-

169 "Instead, we simply lament the fact that States, perhaps without even realizing they have been doing so, are ceding control over the content, interpretation, and development of IHL to others. Greater sensitivity on the part of States to the centrality of expressing opinio juris to law formation and interpretation appears merited" – M.N. Schmitt, S. Watts, *The Decline of International Humanitarian Law Opinio Iuris and the Law of Cyber Warfare*, "Texas International Law Journal" 2015, vol. 50, p. 230.

170 HPCR, *Manual on International Law Applicable to Air and Missile Warfare*, The Program on Humanitarian Policy and Conflict Research at Harvard University 2009.

171 *Ibidem*, p. 51.

172 *Ibidem*, pp. 51–52.

firms that the HPCR Manual can be read only as a record of the currently functioning architecture of customary law.[173] As part of the project, the theses of the manual were consulted with representatives of science, the ICRC and states (Switzerland, Australia, Norway, Germany, Belgium and Canada), on the understanding that the opinion of the representatives of states is in no way an expression of the views of the governments that had joined the work of experts. Michael Schmitt commenting on the so-called HPCR Manual points out that it is non-binding, but nevertheless serves states and researchers as a review of the norms of customary law applicable to air warfare.[174] Similarly, C. Bruderlein argues that the rules contained in the document cannot be treated as a source of international law within the meaning of Article 38 of the Statute of the ICJ.[175] The reception of the HPCR Manual in the doctrine of international law is positive, the document is praised, among others, for its concise and logical structure.[176]

6. International standards for the protection of human rights as a source of the rules of air warfare

The validity of international protection of human rights in an armed conflict is historically a later issue in relation to international humanitarian law, which is the result of a broad discussion on human rights after World War II. The result of these activities was the adoption of many fundamental human rights documents

173 I. Henderson, *Manual of International Law Applicable to Air and Missile Warfare: A Review*, "Military Law and the Law of War Review" 2010, vol. 49, p. 170.

174 M.N. Schmitt, *Air Warfare*, p. 125.

175 "In doing so, HPCR hopes that the AMW Manual will facilitate the dissemination of an authoritative set of rules reflecting international law as perceived and discussed among these experts. It is hoped that the rules of the AMW Manual will not only find their way into national legislation and formal military codes, but also inform legal debates on the application of IHL to contemporary armed conflicts. Evidently, such an ambitious exercise is also subject to critique. The development of technical manuals restating existing norms of international law suits uneasily with the traditional sources of public international law. Neither doctrinal work, nor a proper technical assessment of general practice and opinion juris of states, the rules of the AMW Manual do not amount to a recognized source of international law as listed under the Statute of the International Court of Justice" – C. Bruderlein, *Introduction*, "Texas Journal of International Law" 2011–2012, vol. 47, p. 262.

176 C.J. Dunlap, *Law of War Manuals and Warfighting: A Perspective*, "Texas Journal of International Law" 2011–2012, vol. 47, pp. 266–267.

after 1945 in the form of the European Convention on Human Rights and Fundamental Freedoms (ECHR) of 1950, the International Covenant on Civil and Political Rights (ICCPR) of 1966, the American Convention on Human Rights (ACHR) of 1969. The foundation of these human rights treaties is the protection of the right to life as the so-called first generation right.[177] Article 2 of the ECHR states that, ultimately, it has an unlimited dimension, with the exception of acting in self-defense (Article 2 para. 2(a)), effecting a lawful arrest or preventing the escape of a person lawfully detained (Article 2 para. 2(b)), actions lawfully taken for the purpose of quelling a riot or insurrection (Article 2 para. 2(c)).[178] It should be noted that in this regard, the provision does not provide for exemption resulting from conducting warfare and possible deprivation of life due to the use of force compliant with *ius in bello.* Such a solution can be found as part of the provision of Article 15 of the ECHR, which allows one to derogate from certain obligations under the convention in a situation of war or other public danger.[179] However, the European solution is not endowed with universal applicability in other human rights documents. It should be noted that the ICCPR in Article 4 para. 2 states that even in the event of an exceptional public danger, the protection resulting from the provisions of Article 6 (stating the right to life) has an absolute dimension, i.e., is impossible to derogate from it under any circumstances. Similarly, the ACHR in Article 27 para. 2 specifies that in the event of war, public or other danger, it is not possible to exclude the application of Article 4 of the ACHR stating the right to life.

More specifically, it should be noted that Article 2 of the ECHR is not only an obligation with a negative dimension (understood as a prohibition on depriving anyone of life), but also, in the first place, a set of many duties of a positive nature. The latter include the creation of appropriate procedures and standards for the protection of life. The scope of these tasks was shaped through the jurisprudence of the European Court of Human Rights (ECtHR). It should be emphasized that in fact in the ECHR regime the use of force is subject to the so-called law enforcement paradigm, in which ultimately the act of depriving another person of life must be 1) absolutely necessary,[180] 2) "last resort",[181] 3) non-arbitrary (i.e., not the

177 H.V. Conde, *A Handbook of International Human Rights Terminology*, Lincoln 2004, p. 90.

178 H. Russell argues that it is impossible to talk about Article 2 of the ECHR as an absolute provision, because in fact there should be no deviations from the norm of this nature – H. Russell, *The Use of Force and Article 2 of the ECHR in Light of European Conflicts*, Oregon 2017, p. 16.

179 C. Droege, *The Interplay*…, p. 318.

180 "The deliberate or intended use of lethal force is only one factor, however, to be taken into account in assessing its necessity. Any use of force must be no more than 'absolutely necessary' for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c)" – ECtHR, Judgment of the ECtHR of June 27, 2000, *Ilhan v. Turkey*, ref. 22277/93, HUDOC, p. 74.

181 "Accordingly, and with reference to Article 2 § 2(b) of the Convention, the legitimate aim of effecting a lawful arrest can only justify putting human life at risk in circumstances of abso-

result of abuse).[182] In the context of an armed conflict, the premises for the use of lethal force are completely different, because they are *prima facie* based solely on the status of a given person as a combatant/person directly involved in hostilities. The application of human rights does not cease in the conditions of armed conflict. In its 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ pointed out that certain situations in the context of an armed conflict may be regulated only by human rights and international humanitarian law, or both regulations may apply.[183] In this respect, it is worth quoting the position of the Human Rights Committee as part of the so-called general commentary on Article 6 of the ICCPR, which argued that "both spheres (i.e. human rights and international humanitarian law) are complementary, not mutually exclusive". As noted at the ILC forum, the harmonization of international law is a desirable phenomenon and should be the primary way of interpreting the facts, in relation to which there is a real convergence of various assessments contained in various norms of international law, although it cannot exceed the limits of conflict of obligations.[184] This may, however, result in the existence of an obvious contradiction resulting from the absolute standard of protection of life on the basis of Article 2 of the ECHR or Article 6 of the ICCPR and Article 4 of the ACHR with the provisions of international humanitarian law, in the light of which it is considered completely legal to take the life of a combatant.[185] In

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lute necessity. The Court considers that in principle there can be no such necessity where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost" – ECtHR, Judgment of July 6, 2005, *Nachova and Others v. Bulgaria*, 43577/98 43579/98, HUDOC, p. 95.

182 "Unregulated and arbitrary action by State agents is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force" – ECtHR, Judgement of December 20, 2004, *Makaratzis v. Greece*, ref. 50385/99, HUDOC, p. 58. The opposite of the law enforcement paradigm is the hostilities paradigm. See more: E. Lieblich, *Quasi-Hostilie Acts: The Limits on Forcible Disruption Operations Under International Law*, "Boston University International Law Journal" 2014, vol. 32, pp. 111–116.

183 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, para. 106.

184 Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, International Law Commission, Fifty-eighth Session, 2007, A/CN.4/L.682, para. 42.

185 "The idea of this approach is that the two bodies of law, IHL and HRL, can apply concurrently during armed conflict, but where there is actual conflict between norms of those bodies of law, and incompatible obligations are thrust onto states, the more specific rule will prevail as the norm to be followed by the state thereby pre-empting the more general rule with regards to the specific area of conflict only" – R.E. Vorhees, *Compensating Terrorists for Torture: An Anomalous Outcome Under International Humanitarian Law*, "The Air Force Law Review" 2016, vol. 75, p. 24.

connection with the above, it seems that the complementary approach prevails in the doctrine of international law as more justified and having a foundation in the above-mentioned principle of international law harmonization.[186] The above view also appears on the basis of the jurisprudence of the ECtHR.[187]

It seems that a certain safety mechanism in this respect is, however, a reference to the view expressed against the background of ICJ jurisprudence, in the form of the adoption of the *lex specialis*[188] rule. This was confirmed for the first time by the ICJ in an advisory opinion on the legality of the use or threat of use of nuclear weapons, where it pointed out that the assessment of whether the deprivation of life is arbitrary in the light of Article 6 of the ICCPR, should be made only by reference to international humanitarian law, not the provisions of the International Covenant on Political and Civil Rights.[189] In addition, a general commentary on Article 6 of the ICCPR points out that the use of lethal force in conditions of armed conflict, following the principles set out in the provisions of international humanitarian law, does not constitute an arbitrary deprivation of life.[190] On the other hand, practices inconsistent with the provisions of *ius in bello*, such as attacks against civilians, indiscriminate attacks, and operations carried out without taking into account the precautions to exclude accidental losses among the civilian population, are simultaneously treated as contrary to Article 6 of the ICCPR. The commentary draws attention to the need to disclose the principles governing the use of force in an armed conflict, particularly the process of identifying military objectives or persons directly involved in armed combat, and to indicate the possibility of using non-lethal means to achieve the same military benefit. The Inter-American Court of Human Rights in the *Las Palmeras* case in the context of a non-international armed conflict adopted that "during an armed conflict, the enemy may be killed in a lawful way or an unlawful one […] However, the ACHR does not contain instruments to assess the above situation and it is necessary to

186 V. Koutroulis, *The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?*, "International Review of the Red Cross" 2012, vol. 94, p. 196.

187 Judgment of December 13, 2011, *Georgia v. Russia*, ref. 38263/08, para. 72.

188 "The lex specialis character of international humanitarian law is nevertheless essential. In certain circumstances human rights law cannot be considered; for example a combatant who, within the scope of a lawful act during an armed conflict, kills an enemy combatant cannot, according to jus in bello, be charged with a criminal offence" – H.J. Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law*, "International Review of the Red Cross" 2004, vol. 86, p. 797.

189 ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, para. 2.

190 "Uses of lethal force authorized and regulated by and complying with international humanitarian law are, in principle, not arbitrary" – *General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, Revised draft prepared by the Rapporteur, para. 67.

use the relevant provisions of the Geneva Convention of 1949".[191] The ACHR used a similar scheme in the context of the *Abella* case, where the circumstances of the rebels' attack on an Argentine military base were investigated.[192]

While the jurisprudence of the ICJ has fairly clear wording in the context of the negative obligation resulting from the contents of Article 2 of the ECHR, there is a problematic issue related to the application of positive obligations of the state in an armed conflict. An example of this is the assessment of whether, despite establishing that a given person may be a subject of a military attack, other obligations resulting from the proportionality or necessity of the use of lethal violence are to be activated. Despite the reasonably clear message from the advisory opinions of the ICJ, a significant "erosion" of the above view can be found in the conclusions resulting from the ECtHR's jurisprudence in a series of so-called *Chechen* cases related to the intervention of the Russian army in the brutal conflict in 1996–2000. It should be emphasized that the qualification of the so-called First War in Chechnya constituted, according to the Russian constitutional court, a non-international armed conflict within the meaning of AP II of 1977.[193]

In the case of *Isayev*, the ECtHR examined the facts related to the aerial bombardment that took place on February 4, 2000, in the town of Katyr-Yurt by Russian assault planes with the use of FAB-250 and FAB-500 bombs, which led to the death of civilians. The court discerned that the situation in Chechnya may have forced the Russian Federation to take extraordinary measures related to the repression against the rebellion, also related to the deployment of combat aviation as authorized under Article 2 para. 2 of the ECHR. The court pointed out that combat aircraft carried out an air attack using air-to-ground weapons of an unguided nature with an impact range of approx. 1000 meters – recognizing that the commanders of the operation should have anticipated the danger of using assets of this type in combat operations conducted in urbanized areas. Subsequently, the ECtHR argued that "the use of assets of this type outside the period of war, within an inhabited area and without attempting to evacuate the civilian population is unacceptable in the light of the law-enforcement standard in a democratic society", emphasizing that the use of assets capable of striking indiscriminately is

191 Inter-American Court of Human Rights, *Las Palmeras Case*, Preliminary Objections, February 4, 2000, para. 28.

192 "Specifically, when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military objectives. As such, they are subject to direct individualized attack to the same extent as combatants. Thus, by virtue of their hostile acts, the Tablada attackers lost the benefits of the above mentioned precautions in attack and against the effects of indiscriminate or disproportionate attacks pertaining to peaceable civilians" – Inter-American Commission on Human Rights, judgment of November 18, 1997, *Abella v. Argentina (Tablada Case*), CDH 3398, para. 189.

193 P. Gaeta, *The Armed Conflict in Chechnya before the Russian Constitutional Court*, "European Journal of International Law" 1996, vol. 7, pp. 567–570.

incompatible with the standards required of officers of a state party to the convention. The ECtHR's consideration of this type was also influenced by the Russian Federation's failure to submit a prior derogation according to Article 15 of the ECHR and the ECtHR's decision to "revise the case on the basis of a standard legal background" (i.e. in peacetime conditions), in which the court considered that in the case of a combat operation undertaken in Katyr-Yurt, the Russian Federation should have maintained "a balance between the objectives and the means of achieving the objective".[194]

The ruling of the Strasbourg Court seems difficult to interpret – the ECHR undoubtedly used the concepts characteristic of international humanitarian law, although it decisively refused to assess the situation in Chechnya from a perspective other than the law-enforcement paradigm, criticizing the selection of means used during the combat operation, noting that it took place "outside the time of war". This seems to be a statement without major factual and legal grounds in light of the conflict in Chechnya. The reference to the standard of the use of force in *prima facie* peace conditions causes fundamental interpretation difficulties. It is in clear opposition to the findings made by the ACHR in the *Las Palmeras* or *Abella* cases. It is also problematic not to refer to the arguments of the Russian side raising the presence of Chechen militants within the locality and thus not to refer to the rule of proportionality applicable pursuant to international humanitarian law. The second verdict in the aftermath the war in Chechnya and aerial bombardment was the ruling in the case of *Esmukhabetov v. Russia*, concerning the bombing of September 12, 1999 by SU-25 belonging to the Russian air force. The court concluded that by performing an air strike with the use of heavy munitions, grossly disproportionate assets were used, compared with the possibility of carrying out a legal arrest, and in particular, at the planning stage, due caution was not shown in assessing the effects of the attack also on the persons against whom these assets were intended.[195] Among other things, the court demanded that the government of the Russian Federation provide evidence of the detention of Chechen fighters. The above view seems to go further than in the case of the Isayeva judgment because it tends to assume that also potential legitimate military objectives in an armed conflict of a non-international nature in the form of persons directly involved in military operations may be subject to protection under Article 2 of the ECHR, which seems *prima facie* contrary to the treatment of international humanitarian law as a *lex specialis* – all the more so because in none of the *Chechen* cases did the ECtHR in any way refer to international humanitarian law.

194 ECtHR, Judgment of February 24, 2005, *Isayeva v. Russia*, ref. 57950/00, HUDOC, paras. 186–191.

195 ECtHR, Judgment of March 29, 2011, *Eskmukhambetov v. Russia*, ref. 23445/03, HUDOC, para. 146.

The ECtHR's view formed in the *Chechen* cases may indicate the emergence of a quasi-hybrid regime referring to conducting air operations in the conditions of a non-international armed conflict, which prohibits the mass use of indiscriminate missiles, thus introducing the obligation to select the correct type of weaponry.[196] Another imperative is the use of prior warning and the lack of presence of forward observers (the so-called FOC – forward air controllers), who corrected the situation on the ground on an ongoing basis.

The Inter-American Court of Human Rights in the case regarding the Colombian Air Force helicopter attack on the village of Santo Domingo, which took place on December 13, 1998, aimed to combine the standards of international humanitarian law relating to the application of precautionary measures indicated on the basis of Article 57 para. 2 of the AP I and the positive obligations of the state resulting from Article 4 of the ACHR.[197] Referring to the act of bombing itself, it emphasized that dropping a bomb on a populated area, regardless of the presence of civilians, is a violation of the precautionary principle resulting from the regulations of *ius in bello*.[198] However, the application of the proportionality rule by the Inter-American Court of Human Rights (IACHR) seems to be burdened with a fundamental error. The Court found that the arguments related to the alleged presence of FARC militias (Revolutionary Armed Forces of Colombia) within the municipality of Santo Domingo cannot justify the civilian losses incurred, because in fact "military objectives were not the object of the attack", completely ignoring the fact that the perspective of Article 51 para. 5(b) and Article 57 para. 2 of AP I requires performing a prospective analysis.[199]

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196 W. Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, "The European Journal of International Law" 2005, vol. 15, pp. 760–768. "The massive use of indiscriminate weapons stood in flagrant contrast to this aim and could not be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents" – ECtHR, Judgment of 15 October, 2015, *Abakarova v. Russia*, ref. 16664/07, HUDOC, para. 87.

197 "In this case, by using IHL as a supplementary norm of interpretation to the treaty-based provisions, the Court is not making a ranking between normative systems, because the applicability and relevance of IHL in situations of armed conflict is evident. This only means that the Court can observe the regulations of IHL, as the specific law in this area, in order to make a more specific application of the provisions of the Convention when defining the scope of the State's obligations" – Inter-American Court of Human Rights, judgment of November 30, 2012, *Santo Domingo Massacre v. Colombia*, para. 24, https://www.corteidh.or.cr/docs/casos/articulos/seriec_259_ing.pdf (accessed: 28.10.2020).

198 *Ibidem*, para. 229.

199 "Consequently, the Court considers that it is not appropriate to analyze the launch of the said device in light of the principle of proportionality, because an analysis of this type would involve determining whether the deceased and injured among the civilian population could be considered an «excessive» result in relation to the specific and direct military advantage expected if it had hit a military objective, which did not occur in the circumstances of the case" – *ibidem*, para. 215.

On the other hand, however, the Strasbourg Court in *Korbely v. Hungary* and *Hassan v. The United Kingdom* referred directly to documents of international humanitarian law. In the Hungarian case, applying directly the so-called common Article 3 for the Geneva Conventions of 1949, it assessed the correctness of the judgment of the Hungarian court regarding the finding of the petitioner guilty of a crime against humanity.[200] Important remarks related to the interconnection of *ius in bello* and human rights were made in the *Hassan v. United Kingdom* case. The Court argued that in situations where the scopes of two human rights norms intersect, they can be applied through the lens of international humanitarian law or the norms should be applied jointly, considering the reference to *lex specialis* as one "blurring" the discussion on the mutual interaction of both regimes of law. To this extent, the ECtHR considered that there is no "uniform rule" for resolving the conflict between *ius in bello* and human rights protection standards and that the impact of both regulations is fluid and dependent on the context and situation – giving the example of treating prisoners of war as essentially subject to the regime of international humanitarian law, but "without absolute subordination" to human rights.[201] In another place, the court pointed out that the circumstances of each case (presumably each case of the use of armed force in an armed conflict) should be considered from the perspective of both regimes, but indicated two fundamental boundaries of the application of human rights protection standards in an armed conflict: 1) sufficient coherence and transparency of human rights and 2) applicability in the practice of the battlefield.[202] *Hassan v. United Kingdom* judgment, although it does not resolve all issues related to possible conflicts of regimes, seems to be the most balanced voice of the Strasbourg jurisprudence to cases of the use of force in an armed conflict, which is a turn towards the standards set by the IACHR jurisprudence.[203] Looking at the *lex specialis* level should not be understood as completely eliminating one regime at the expense of another but looking for points common to both regimes within the limits provided for by the circumstances and the facts.[204] Certainly, in the assessment of classic military

200 ECtHR, Judgment of September 19, 2008, *Korbley v. Hungary*, ref. 9174/02, HUDOC, paras. 86–90.

201 ECtHR, Judgment of September 16, 2014, *Hassan v. United Kingdom*, ref. 29750/09, HUDOC, paras. 93–94.

202 *Ibidem*, para. 95.

203 M. Sassòli indicates, for example, the factual situation in which a FARC (Revolutionary Armed Forces of Colombia) trooper makes purchases in a grocery store located several hundred kilometers from the combat zone, in an area controlled by the government. M. Sassòli, L.M. Olson, *The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts*, "International Review of the Red Cross" 2008, vol. 90, p. 613.

204 "Both bodies of law must be given all due consideration: that the fullest possible effect should be given to both; that rules specifically designed for a particular subject matter or situation should be given special consideration and weight; and in the event of an actual

operations, the legal methods and means of combat specified in the norms of international humanitarian law should also be treated as acceptable in the light of human rights protection standards – as more common sense and created to apply in an armed conflict.[205] Therefore, an act of deprivation of life in an armed conflict under the provisions of international humanitarian law will also be legitimate under Article 2 of the ECHR, Article 6 of the ICCPR and Article 4 of the ACHR – a different conclusion and replacing, for example, the rule of proportionality with a paradigm applicable on the ground of human rights with the same name, but with different contents may lead to an unacceptable challenge to the legitimacy of international humanitarian law.

It should be noted that a serious issue in the field of air operations, especially performed as part of the so-called war on terror, is the issue of extraterritorial application of the ECHR outside the European legal area. A fundamental ruling on the activities of military aviation was made on the basis of the case of *Banković v. Belgium* and others. It referred directly to the incident of April 23, 1999, during which the headquarters of the RTS station (*Radio televizija Srbije*) was bombed by NATO aviation (the assessment of the legality of the attack can be found later in the work). In a ruling on the inadmissibility of the complaint, the ECtHR pointed out that the extraterritorial application of the ECHR is an exception and may occur only (by reference to the jurisprudence addressing the Turkish occupation of Cyprus) when states exercise effective control over the territory by way of occupation, invitation or consent of the state concerned and by exercising powers characteristic of the lawful government.[206] The Court shared the view of the defendant states, pointing out that the exercise of control over the airspace cannot be considered "effective control over the territory" within the meaning of previous judgments of the ECtHR and thus be the basis for the activation of the jurisdiction specified under Article 1 of the ECHR.[207]

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collision of obligation, the most specific obligation will prevail (to the extent necessary) over obligations of a more general nature, including more general obligation which are of latter origin" – T.D. Gill, *Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach*, "Yearbook of International Humanitarian Law" 2013, vol. 16, p. 258.

205 See: M.A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, "Military Law Review" 2007, vol. 194, pp. 1–65.

206 "Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration" – ECtHR, Judgment of March 23, 1995, *Loizidou v. Turkey*, ref. 15318/89, HUDOC, para. 62.

207 "As to their argument concerning the alleged control of the airspace over Belgrade by NATO forces, the Governments deny such control and, in any event, dispute that any such

It is worth noting that in later years, the court gradually added the scheme of "state agent authority control" to the model of "effective area control" in other judgments, and in the judgment in *Al-Skeini*[208] *and others v. The United Kingdom* it adopted a hybrid model by combining the above jurisdictional links (exercise control and authority over an individual) – indicating that it should have a physical dimension, also recognizing that the United Kingdom exercise governing capacity over southern Iraq.[209] In *Al-Jaloud v. the Netherlands*, however, ECtHR pointed out that the requirement to exercise certain powers characteristic of the occupying party was no longer necessary, and a sufficient jurisdictional link was the fact that a missile was fired by a soldier of the Iraqi security forces with a firearm at a checkpoint, apart from the fact that the Netherlands, unlike the United Kingdom, did not exercise any formal authority over a given area, but was only one of the contingents operating within the framework of the stabilization forces in Iraq. In this respect, it was sufficient for the court that the Netherlands was performing activities related to ensuring security in a given area.[210]

Despite the above trend in the jurisprudence of the ECtHR, aimed at constantly expanding the existing jurisdictional models, it would appear that the test of the effectiveness of airspace control as a prerequisite for the extraterritorial application of the ECHR, created on the basis of the *Banković* case, is still valid and states *per se* that being the subject of an air attack by a military aircraft belonging to a given state does not activate the provisions of the ECHR.[211] The above conclusion is considered binding by most commentators

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control could be equated with the territorial control of the nature and extent, identified in the above-cited judgments concerning northern Cyprus, which results in the exercise of effective control or of legal authority – Decision on the inadmissibility of the complaint of December 12, 2001, *Banković v. Belgium and others*, ref. 52207/99, HUDOC, paras. 44, 76.

208 Judgment of May 12, 2005, *Ocalan v. Turkey*, ref. 46221/99, HUDOC, para. 91.

209 "In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention" – ECtHR, Judgement of July 7, 2011, *Al-Skeini v. United Kingdom*, ref. 55721/07, HUDOC, para. 149; F. Naert, *The European Court of Human Rights' Al-Jedda and Al-Skeini Judgments*: *an Introduction and Some Reflections*, "Military Law and the Law of War Review" 2011, vol. 50, p. 316.

210 ECtHR, Judgement of November 20, 2014, *Jaloud v. Netherlands*, ref. 47708/08, HUDOC, para. 152. "The Court is satisfied that the respondent Party exercised its «jurisdiction» within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint".

211 "Mere fact of being the victim of an attack by bomber aircraft of a particular State did not suffice to bring a person within the jurisdiction of that State" – ECtHR, Judgement of November 20, 2014, *Jaloud v. Netherlands*, ref. 47708/08, HUDOC, para. 119. "The case dealt with NATO's bombardment of the Serbian Radio-Television station, a typical

and applies, for example, to air operations carried out by member states of the Council of Europe in the Middle East, assuming that the ground forces of these states do not exercise effective control over a given area.[212] It is worth noting that there are views that, in fact, a form of control, not only through the fact of dominance in the air, but also the use of intelligence means consisting in constant surveillance of targets, can be deemed to be effective control in some areas of airspace.[213] This is an extremely interesting view, given that the greatest problematic aspect of air warfare was the attempt to apply to it the regulations in force in warfare on land. This test does not take into account the inability of aviation to exercise control or occupation. Similar views are expressed by specialists in international law in relation to maritime operations, where the presence of warships and aviation can be treated as an extraterritorial application of the treaties on the protection of human rights at sea by implementing the premise of effective control.

The latest trends in the jurisprudence of the Strasbourg Court, especially in relation to the examination of the facts related to the course of armed conflicts, signal a certain "jurisprudential aversion" to the examination of issues related to international humanitarian law under the ECHR regime. A good example in this respect is the position of the court expressed in the judgment in *Georgia v. Russia (II)*, in which it ruled on the lack of jurisdiction in relation to the so-called active phase of hostilities during the international armed conflict that took place between Georgia and Russia in 2008.[214] On the other hand, the latest hallmark EtCHR ruling on *Ukraine and the Netherlands v. Russia* in which the Court repeated that ECHR shall be applicable even in situations of the international armed conflict and the ECHR shall be interpreted "in harmony" with international humanitarian law.[215]

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example of conduct of hostilities – as opposed to an occupation or detention situation. The Court took the view that such bombardments did not mean that the attacking states had jurisdiction within the meaning of Article 1 of the ECHR" – C. Droege, *The Interplay*…, p. 328.

212 G. Gaggioli, *Lethal Force and Drones: The Human Rights Question*, [in:] P.J. Barela (ed.), *Legitimacy and Drones: Investigating the Legality, Morality and Efficacy of UCAVs*, Burlington 2015, p. 97.

213 F. Rosen, *Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility*, "Journal of Conflict and Security Law" 2014, vol. 19, pp. 120–121.

214 "The Court therefore considers that the conditions it has applied in its case-law to determine whether there was an exercise of extraterritorial jurisdiction by a State have not been met in respect of the military operations that it is required to examine in the instant case during the active phase of hostilities in the context of an international armed conflict" – Judgement 21 January 2021, Grand Chamber EctHR *Georgia v. Russia (II)*, 38263/08, para. 138

215 ECtHR, Judgement of July 9, 2025, *Ukraine and Netherlands v. Russia*, ref. 11055/22 et all, paras. 427–428.

An important view was also presented on the basis of the African Charter on Human and Peoples' Rights, referring to autonomous combat systems (as well as autonomous aircraft), where it was considered that the use of vehicles of this type in military operations is a violation of the right to life if they are not subject to significant human control.[216]

216 "The use during hostilities of new weapons technologies such as remote controlled aircraft should only be envisaged if they strengthen the protection of the right to life of those affected. Any machine autonomy in the selection of human targets or the use of force should be subject to meaningful human control. The use of such new technologies should follow the established rules of international law" – African Commission on Human and Peoples' Rights, *General Comment No. 3 on the African Charter on Human and People's Rights: The Right to Life*, Banjul 2015, p. 15.

CHAPTER III

MATERIAL SCOPE OF THE LAW OF AIR WARFARE

1. Preliminary remarks

Belli ergo jure acturi, videndum habemus, quid bellum sit
de quo quaeritur, quid ius quod quaeritur[1]
(*When considering the laws of war, the first thing we must*
pay attention to is understanding what war is)

In his work *On the Law of War and Peace* from 1625, Hugo Grotius pointed out that any scientific treatise which includes reflections on the rights and obligations of combatants should begin with reflections on the definition of war as a key subject matter, which also determines the scope of temporal and substantive application of international law in force in the conditions of armed interaction between the conflicting parties. Air warfare – by definition, one of the possible dimensions of an armed conflict – is subject to general observation from the perspective of international humanitarian law.

2. War as an institution of international law

Ulpian noted in his work *Institutes* that the life of each nation is governed by codes and customs established within its borders and by laws common to the entire human race. The laws established by a given state (*civitas*) are civil laws, but the law

1 H. Grotius, *De Iure Belli Ac Pacis*, Leiden 1939, p. 22.

that derives from the essence of humanity, applied equally by everyone, is called the law of nations (*ius gentium*) and is applied between different nations.[2]

In the work *The History of Rome from the Founding of the City*, Livy noted several cases in which *ius gentium* was directly referred to in the context of the war.[3] Hermogenius, a Roman lawyer who carried out the codification of imperial edicts during the time of Emperor Diocletian, which subsequently became the basis of the Code of Emperor Justinian, pointed out that the term *ius gentium* primarily covered war.[4] In this way, already in the period of the late Roman Empire, a decision was made to classify war as an institution of *ius gentium* law, clearly separating it from other categories of public and private law.[5]

3. A historical look at the definition of war

In the ancient and modern period, no significant attention was paid to the formulation of the current definition of war. Cicero pointed out that the state administration should comply with the laws of war, understood as a form of verbal or forceful interaction.[6] Grotius believed that Cicero's wording describing war as a state of

2 "*Ius gentium* is the law used by the various tribes of mankind, and there is no difficulty in seeing that it falls short of natural law, as the latter is common to all animated beings, whereas the former is only common to human beings in respect of their mutual relations" – *Digest of Justinian*, Cambridge 1904, p. 3. It should be emphasized that Jeremy Bentham questioned the adequacy of the phrase "the law of nations" due to the lack of sufficient connection of the Roman concept of *ius gentium* with relations between states. *Ius gentium* also covered issues related to civil trade between Roman citizens and foreigners. In this respect, Bentham proposed the original name "international law" – J. Bentham, *An Introduction to the Principles of Morals and Legislation*, Kitcher 2000, p. 236.

3 G.E. Sherman, *Ius Gentium and International Law*, "The American Journal of International Law" 1918, vol. 12, no. 1, p. 61.

4 "It was by this same jus gentium that war was introduced, nations were distinguished, kingdoms were established, rights of ownership were ascertained, boundaries were set to domains, buildings were erected, mutual traffic, purchase and sale, letting and hiring and obligations in general were set on foot, with the exception of a few of these last which were introduced by the civil law" – *Digest of Justinian*, p. 4.

5 J. Westlake, *International Law*, vol. 1, London 1904, p. 8.

6 M.T. Cicero, *Cicero De Officiis*, Boston 1887, p. 11. Cicero described that in the Roman legal system, the right of war (understood as the right to enter into a state of war) was central to the customary law of ancient Rome, which recognized the possibility of warfare only in the event of 1) a formal demand for repair of damage or 2) an explicit and formal declaration of war. For Cicero, the expression conduct of war – that is, rules for the conduct of armed struggle – meant the conduct of war in accordance with the requirements of Roman law within the

armed interaction was too narrow and argued that the proper reference was the state of hostility between the parties, indicating the etymological origin of the word "war" (Latin *bellum*) from the older word denoting a duel (Latin *duellum*).

Samuel von Pufendorf mainly investigated the causes of a just war, both in the offensive context (execution of a just claim) and in the defensive one (defense against an unjustified invasion). The German researcher of international law paid attention to formal and informal wars that do not have the legitimacy of the highest authority in a state. He also noticed that in certain situations, fighting can be carried out without the consent of the ruler, especially when aggression occurs – then the crews of border forts can repel the enemy with violence, but they should not spread hostilities into a foreign territory.[7]

Cornelius van Bynkershoek pointed out that, in his opinion, war is a state of duel between independent persons, through the use of violence to enforce their rights. For the Dutch supporter of the principle of freedom of the seas, the word "duel" is a statement of the nature of war in itself. Not only subjects of international law can compete, but also private individuals, provided that they do not live in society. Cornelius van Bynkershoek represented a radical view of the scope of rights and obligations applicable in armed conflict, holding that any means is permissible in this regard (every force is lawful in war).[8] In turn, E. De Vattel pointed out that war is a state in which claims are enforced by force.[9]

In parallel with the development of customary and treaty law of armed conflicts, the nineteenth-century doctrine began to study the definition of war. For J.-L. Klüber, war is a clash between states, in which one uses armed force to gain a given right or territory, and the other opposes it. Public, private and domestic wars were distinguished in this respect – as *bellum civil*. Klüber was the first torecognise various types of wars due to the dimensions of their conduct, pointing to the existence of naval and land warfare at the beginning of the 19th century.[10] Importantly, the then specialists in laws of war changed the optics of looking at the phenomenon of war, recognizing it as a factual circumstance in the first place, also

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scope of the authority granted to the soldiers of the Republic by its authorities. As an example in this respect, the person of Cato the Elder is indicated, who refused to command the legions without renewing his oath of allegiance to Rome. The Romans recognized that the law of war could not be applied to barbarians (except for the Greeks). Rome's ascent to the role of world hegemon and rule over the entire civilized world during the Imperial period made the study of the law of war by lawyers irrelevant. See more: C. Phillipson, *The International Law and Custom of Ancient Greece and Rome*, London 1911, p. 195.

7 See: S. von Pufendorf, *De officio hominis et civis juxta legem naturalem libri duo 1682*, New York 1964.

8 C. van Bynkershoek, *Quaestiones Iuris Publici: A Treatise on the Law of War*, New Jersey 2008, p. 2.

9 E. de Vattel, *The Law of Nations, Applied to the Conduct and Affairs of Nations and Sovereigns*, Philadelphia 1844, p. 291.

10 J.-L. Klüber, *Droit Des Gens Moderne de l'Europe*, Stuttgart 1819, pp. 374–375.

ceasing to investigate the causes of war *per se* (H.W. Halleck, E. Creasy, G.B. Davis).[11] The above characteristics of armed conflict were confirmed by T.J. Lawrence and L. Freiherr von Neuman, who was the first to make a clear distinction between war as a fact and war as a legal concept (expanded in this sense by F. von Liszt).[12] The importance of declaring war as an act of constitutive nature began to decisively decrease, which was confirmed by the judicial jurisprudence of the second half of the 19th century. In the context of the prizes of war arising from the Civil War in connection with the blockade of the ports belonging to the Confederate States of America by the Union fleet, in 1861 the District Court in New York rejected the accusations of the claimants questioning whether the United States had entered the state of war due to the lack of appropriate notification, indicating by the words of Judge Betts:

> […] that no one could claim that there was a right to launch a public declaration of war […] it served only one's own citizens or subjects. The declaration by manifestoes, heralds, or nuncios does not constitute war, and the omission of the declaration can in no way impair its justness or efficacy, especially in a case of defensive war.[13]

A similar factual situation occurred in connection with the dispute over the Prussian ship "Teutonia" – intending to deliver certain goods to the port of Dunkirk in France on the eve of the war – detained by the British authorities due to incorrect information about the commencement of hostilities between France and Prussia on July 16, 1870 (formal declarations were made on July 19, 1870). Against the background of this case before the House of Lords, the possibility of a state of war of a *de facto* nature related to the actual circumstance of conducting military operations without the existence of a declaration of war was found.[14]

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11 H.W. Halleck, *International Law or Rules Regulating the Intercourse of States in Peace and War*, San Francisco 1861, p. 328; W. Manning, *Commentaries on the Law of Nations*, London 1839, p. 96; E. Creasy, *First Platform of International Law*, London 1876, p. 360; G.B. Davis, *The Elements of International Law, With An Account of its Origin Sources and Historical Development*, New York 1908, pp. 271–272.

12 T.J. Lawrence, *The Principles of International Law*, Boston 1900, pp. 290 ff.; L. Freiherr von Neuman, *Grundriss des heutigen europäischen Völkerrechts*, Wien 1887; "Krieg ist der mit Waffengewalt geführte Kampf zweier oder mehrerer Staaten. Subjekte des Krieges und der dadurch begründeten Rechts-Verhältnisse können mithin nur souveräne Staaten als die selbständigen Träger völkerrechtlicher Berechtigungen und Verpflichtungen sein" – F. von Liszt, *Das Völkerrecht*, Berlin 1898, p. 207.

13 The United States and Others vs. The Bark Hiawatha, Tackle and Cargo, as Prize of War, U.S. Reports: Prize Cases, 67 U.S. (2 Black) 635 (1863).

14 Duncan v. Koster, The Teutonia (1872) LR 4 PC 171; D. Wetzel, *A Duel of Giants: Bismarck, Napoleon III, and the Origins of the Franco-Prussian War*, Madison 2001, p. 179; J. Risley, *The Law of War*, London 1897, p. 81.

The legal consequence of the outbreak of war for nineteenth-century international law doctrine is the emergence of two major categories of parties to this particular dispute in international relations in the form of belligerents and neutrals. When a state of war occurs, a special regime is established between the belligerents regulating the scope of permissible damage to the enemy, which are the norms and customs of the *ius in bello* type. In this respect, the belligerent parties receive a certain set of rights characteristic of armed conflicts – called the belligerent privilege. The second element is the emergence of a special relationship between warring and neutral states.[15] Johann C. Bluntschli recognized that the state of war affects the legal order between combatants and their allies, the status of neutral states, as well as the duties and rights of personnel of the armed forces and the population remaining in the area engulfed by the war.[16] It should be noted that in the light of the opinions of ancient and modern lawyers and nineteenth-century doctrine, war was generally classified as a state of hostility only between states, i.e., a war of an international nature. This definition excluded all manifestations of disobedience towards the ruler or nations remaining under occupation. The only exception in this respect was the recognition of belligerency, which gained some popularity in the second half of the nineteenth century.

4. From "war" to "armed conflict"

It is worth noting that by the end of the nineteenth century and the first half of the twentieth century, three circumstances in the history of the international relations that created objective difficulties in determining the state of war in the classical approach came into existence.

The first issue was examined by W. Manning, who in 1839 stated that there are situations in international relations in which relations of an entirely peaceful nature cease, but at the same time these situations do not qualify as an element of an ongoing war[17]. As an example, he pointed to various types of reprisals, short-term temporary measures of an armed nature, when force is used for a specific purpose and under special conditions, where there is no state of permanent hostility, but there is a temporary state of violence.[18] The first circumstance was the practice of states in the colonial period, which occurred on a large scale in

15 T.A. Walker, *The Science of International Law*, Boston 1893, p. 243.
16 J.C. Bluntschli, *Das moderne Kriegsrecht der zivilisierten Staaten*, Nordlingen 1878, pp. 510 ff.
17 W. Manning, *Commentaries*…, p. 94.
18 *Ibidem*, p. 95.

the years 1870–1914. In this respect, it was a common practice for the contemporary powers to enforce reprisals of an armed nature, which cannot be treated as an element of an ongoing war. An example of such a situation was the intervention of France in the Far East in 1884–1885, where the French government recognized that the threat to its interests in Indochina and the Middle Kingdom was the so-called state of reprisals, which included regular military operations linked to blockades and bombing of cities. In 1882, the British fleet bombed Alexandria, indicating officially that it was not waging war against Egypt. A notorious image of international policy in the mid-nineteenth century was the imposition of a maritime blockade by maritime powers against weaker states (Argentina, Greece, Venezuela).[19] An outstanding researcher of this phenomenon was F. Martens, as well as J. Westlake, who pointed out that this allowed for treating as a war step only an act considered as such in a subjective way.[20] It should be noted that referring to obvious wars by other terms such as "skirmish", "intervention" or "order enforcement actions", became a particularly disturbing phenomenon in the period preceding the outbreak of World War II. An example of the abovementioned events can be a series of clashes on the Japanese-Russian border, culminating in the Battle of Khalkhin-Gol in 1939, where the losses of both sides amounted to approx. 30,000 killed and wounded, and both states remained in diplomatic relations with each other, recognizing this circumstance as a border "incident".[21] In turn, an example of a "humanitarian intervention" was the Japanese military expedition in China in the 1930s. The Italian invasion of Ethiopia in 1935 undertaken in order to "fulfil the obligation to abolish slavery" or the aggression of the USSR against Poland on September 17, 1939 under the false pretext of "taking over the protection of the civilian population of Western Ukraine and Belarus against the effects of the collapse of the Polish State".[22] The above circumstances clearly indicate the tendencies of some states to subjectively look at what war is and the consequences resulting from it, including those in relation to *ius in bello* norms.

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19 At the end of the 19th century, the Venezuelan government refused to pay its debts to third states and to compensate European citizens. As a result, British and German fleets blocked ports and began shelling coastal ports. The incident led to the adoption of the so-called Drago – Porter Convention of 1907 (II Hague Convention on the Limitation of the Employment of Force for Recovery of Contract Debts). La Plata Gulf was repeatedly blocked in the 19th century by the combined British and French fleets.

20 See: F. Martens, *Traité de Droit International*, Paris 1883; J. Westlake, *International Law*, Cambridge 1913, p. 2.

21 E. Goldstein, *Wars and Peace Treaties 1816–1991*, New York 1992, pp. 66–67. The incident was important for the fate of World War II, as it influenced the decisions of the political and military leadership of Japan on the need to change the direction of expansion from the north to the south.

22 S. Murphy, *Humanitarian Intervention – The United Nations in and Evolving World Order*, Philadelphia 1996, pp. 60–62.

The next problematic (second issue) factual situation was the practice of some states remaining at war only formally, without simultaneously conducting hostilities. The issue was examined as early as in the 17th century by T. Hobbes, who considered war as a state not always based on actual "struggle", but "on visible readiness to do so".[23] During the First and Second World Wars, this problem concerned the states of Latin and Central America, which officially declared war on the central states and members of the Axis, but there was no active military action between these states.[24] Commenting on the above facts, B. Singer considered that the war should also be perceived as a state of hostility *per se*, which may not be inherently related to actual military operations (similarly, W. Manning, who pointed out that the lack of military activity does not make it possible to resume peaceful relations between states).[25] In addition, some of the actual military measures may be treated as an act of war, which, however, is not a war.[26] In turn, Y. Dinstein considered the above situation as a war in the "technical" sense, in which the state of hostility is only *de jure* but is in no way related to the actual situation in which the armed forces carry out specific military measures.[27] Robert Kolb considered that the existence of a formal declaration without the fact of actual combat operations removes doubts as to the application of *ius in bello* provisions but may affect the non-application of certain rules resulting from them.[28]

The third factor was the fact related to the widely commented course of the Spanish Civil War in 1936–1939, which made the international community aware of the need to gradually reduce the perception of the rights of a given government

23 "Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man. For war consisteth not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known: and therefore the notion of time is to be considered in the nature of war, as it is in the nature of weather. For as the nature of foul weather lieth not in a shower or two of rain, but in an inclination thereto of many days together: so the nature of war consisteth not in actual fighting, but in the known disposition thereto during all the time there is no assurance to the contraty. All other time is peace" – T. Hobbes, *Leviathan or the Matter, Forme, and Power of a Common-wealth Ecclesiasticall and Civil*, London 1651, p. 76.

24 In the years 1917–1918, Brazil, Panama, Haiti, Honduras, Nicaragua, Costa Rica and Guatemala declared war on the Central Powers. During the Second World War, on the basis of the United Nations Declaration of January 1, 1942 (also called the Washington Declaration), the condition for joining the United Nations was, among others, the declaration of war on the Axis powers. R. Bartels, *From Ius in Bello to Ius Post Bellum: When do Non-International Armed Conflict End?*, [in:] C. Stahn, J.S. Easterday, J. Iverson (eds.), *Ius Post Bellum: Mapping the Normative Foundations*, Oxford 2014, p. 301.

25 W. Manning, *Commentaries*…, p. 122.

26 B. Singer, *International Law*, Chicago 1918, pp. 109–110.

27 Y. Dinstein, *War, Aggression and Self-Defence*, Cambridge 2011, p. 9.

28 R. Kolb, *Advanced Introduction to International Humanitarian Law*, Cheltenham 2014, pp. 100–101.

to suppress manifestations of rebellion or disobedience by all possible means as purely discretionary.[29] As indicated earlier, *ius in bello* was considered relevant and applicable only in cases of conflicts of an international nature, or in circumstances related to aspects of recognition of a party to the conflict. Traces of this inference can be found in Article 20 of the so-called Instructions for the Government of the Armies of the United States in the Field from 1863 (commonly known as the Lieber Code from the name of the author).[30]

The above set of circumstances resulting from the need to 1) objectify the term "war" as, in the first place, a factual event, 2) cover the meaning of military activities to the widest extent possible, 3) as well as activities aimed at regulating the course of internal conflicts led directly to the formulation of a new concept that is a substitute for the word "war" in the form of the phrase "armed conflict" under the so-called common Article 2 for the Geneva Conventions of 1949. It should be noted, however, that apart from the use of the phrase itself, no definition of it can be found in the text of the convention, which means that the determination of the exact scope of meaning has been entrusted to international jurisprudence and doctrine.[31] Representatives of Polish doctrine, including R. Bierzanek, T. Leśko and A. Szpak jointly point to the basic element in the form of the existing armed involvement of the parties, which is a *sine qua non* condition for determining the existence of an international armed conflict in a given configuration. This interaction must take place through the armed forces of the parties involved in the conflict.[32] Dinstein added a new "material" premise to the aforementioned "technical" definition of war, stating that "the state of war is *de facto* irrelevant – the most important fact is the one of conducting warfare", indicating that at least one of the parties took war measures using significant, convincing force.[33]

A natural source of interpretation of the provisions of the 1949 Convention is the commentary of J.S. Pictet, in which the concept of international armed conflict is understood as "any difference between two states leading to the intervention of their armed forces"; this is independent of "the denial of a state of war

29 K. Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict*, Oxford 2016, p. 105.

30 "Public war is a state of armed hostility between sovereign nations or governments", Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863.

31 O. Durr, *Humanitarian Law of Armed Conflict: Problems of Applicability*, "Journal of Peace Research" 1987, vol. 24, p. 265.

32 R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne* [*Public International Law*], Warszawa 1998, p. 379; T. Leśko, *Międzynarodowe prawo konfliktów zbrojnych* [*International Law of Armed Conflicts*], Warszawa 1982, pp. 9–10; A. Szpak, *Bezpośredni udział w działaniach zbrojnych w świetle międzynarodowego prawa humanitarnego* [*Direct participation in hostilities in light of international humanitarian law*], Toruń 2013, p. 24.

33 Y. Dinstein, *War, Aggression*…, p. 15.

by one of the states" and "the *slaughter* taking place".[34] The second definition of armed conflict, widely recognized as a legal definition, was formulated on the basis of the ICTY ruling in the case of Duško Tadić.[35] It does not explicitly expand the concept of an armed conflict between states, limiting itself to pointing out that this is "a clash between the armed forces of two states". The proposed wording in fact opens a discussion on controversial issues related to possible situations, located on the border of "armed conflict" and "incidents which are not an armed conflict", which P. Bordwell defined as incidents short of war, i.e. the phenomenon of the use of force, which, however, does not have the full dimension of war, aimed at enforcing an expected position or attitude.[36] This applied in particular to factual situations related to the lack of will to consider a given incident as a war measure on both sides of the conflict and the issue of the intensity of the conflict.

5. Air raid and its role in defining the boundaries of the temporal applicability of international humanitarian law

The term "air raid" defines a situation in which military aviation is used to perform a surprise air strike, which is also usually an opening act of military action. It should be noted that since the existence of military aircraft with the ability to perform effective bombing, armed conflicts have generally started from military aviation. In the declaration of war made by the German ambassador to France on August 3, 1914, the official pretext was indicated to be in the first place "the

34 J.S. Pictet, *The Geneva Conventions of 12 August 1949. Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva 1952, p. 32.

35 "On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there" – ICTY, *The Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1-A, 2 October 1995, para. 70.

36 P. Bordwell, *The Law of War between Belligerents: A History and Commentary*, Chicago 1908, p. 197.

execution of a number of hostile enemy acts carried out by French military pilots against German territory" and "a blatant violation of the neutrality of Belgian airspace".[37] On the morning of September 1, 1939, the Luftwaffe attacked the railway bridge in Tczew and destroyed Wieluń.[38] On December 7, 1941, carrier-based aviation, taking off from the decks of Japanese aircraft carriers, began military operations in the Pacific with the attack on Pearl Harbor. After 1945, the vast majority of conflicts began with an air attack, and since 1991 all international armed conflicts have started with an air strike (see the most recent Operation "Rising Lion" in 2025 between Israel and Iran). These conclusions justify the need to analyze the issue of the temporal applicability of the rules of air warfare – international humanitarian law – which was pointed out by the Italian researcher of the rules of air warfare, R. Sandiford, just before the outbreak of World War II.[39] In recent years, the use of air force as a tool of states used in unilateral armed incidents, whose legal classification is more difficult due to the general reluctance of states to create a state of armed conflict.

6. Examples of unilateral armed incidents involving aviation

6.1. Shooting down U2 on May 1, 1960

On May 1, 1960, an American U-2 strategic reconnaissance aircraft was shot down by USSR anti-aircraft defense during a reconnaissance flight. One of the most significant incidents of the Cold War period caused numerous legal controversies

37 *Declaration of War Against France, 6.45 p.m., August 3, 1914, International Law Studies*, International Law Documents Neutrality Breaking of Diplomatice Relations War With Notes, Washington 1918, p. 103.

38 The time of the attack against the town of Wieluń, assumed to be 4.40 a.m., is questioned as a possible result of a mistake related to the erroneous determination of different time zones existing in Poland and in the Third Reich (see: G. Bębnik, *Wieluń. 1 września 1939 r.* [*Wieluń – 1 September 1939*], [in:] J. Wróbel (ed.), *Wieluń był pierwszy. Bombardowania lotnicze miast regionu łódzkiego we wrześniu 1939 r.* [*Wieluń was first. Air Bombing of the Łódzkie Province in September 1939*], Łódź 2009). Currently, it is believed that the first attack of the armed forces of the Third Reich in World War II was a raid on the Polish positions defending the bridge in Tczew, which was carried by three Ju-87 aircraft belonging to the Sturzkampfgeschwader 1 (StG 1 – Dive Bomber Wing 1), in order to protect it against possible destruction and disruption of communication between the Third Reich and East Prussia. Despite the surprise, the attack failed, and the bridge was blown up.

39 R. Sandiford, *Diritto Aeronautico di Guerra*, Rome 1937, p. 23.

regarding the issue of reconnaissance flights, the principle of state sovereignty in airspace, as well as espionage in international relations.[40] From the perspective of this work, it is worth noting that the U-2 did not bear any national emblem when it was shot down, and the pilot was not uniformed (the pilot F.G. Powers was not a member of the USAF, but a civilian CIA contractor). At the time, this incident was not qualified as an act of armed conflict, but from a modern perspective such a classification would be possible.[41] In the conditions of armed conflict, the lack of markings on the surface of the U-2 aircraft could lead to the pilot being deprived of the status of a prisoner of war in the event of capture.

6.2. Indian intervention in Bangladesh

Even before the official start of the Indian-Pakistani conflict in eastern Pakistan (today Bangladesh), on November 23, 1971, an F-86 Sabre aircraft, piloted by a Pakistani pilot (Pervaiz Qureshi – the later commander of the Pakistani air force), of American production was shot down during a flight over the border of eastern Pakistan and India by Indian anti-aircraft artillery. The pilot bailed out with a parachute. He was captured by Indian soldiers and then subjected to interrogation, during which it was stated that he "is a prisoner of war and will be treated in accordance with the Geneva Convention".[42] Modelled on the pre-emptive attack carried out by Israel in 1967, the Pakistani Air Force, launched a strike against Indian air bases, attacking radar installations and runways on December 3, 1971. For the Prime Minister of India, Indira Gandhi, the attack was the beginning of the Pakistani-Indian war.

6.3. Libya 1981–1989

As part of the enforcement by the United States of the so-called FON (Freedom of Navigation) doctrine, in protest against unlawful recognition of the Great Sirte Bay as part of its internal maritime waters by Libya, in August 1981 an American group of aircraft carriers entered the disputed waters.[43] The presence of the US

40 I. Brownlie recognized that while the incident itself cannot be classified as an act of force, it can be treated as "acting in the foreground of aggressive action" – I. Brownlie, *International Law and The Use of Force by States*, Oxford 1963, pp. 363–364.

41 Q. Wright, *Legal Aspects of the U-2 Incident*, "The American Journal of International Law" 1960, vol. 54, p. 846.

42 "I told him that he was now a prisoner of war (POW) and would be treated as per Geneva Conventions" – H. Panag, *When I captured the man who would be Pakistan's Air Chief*, Newslaundry, June 8, 2016.

43 K.I. Matar, R.W. Thabit, *Lockerbie and Libya: A Study in International Relations*, Jefferson 2004, pp. 59–60.

fleet was treated as an enemy and on August 19, 1981 there was an incident involving two Libyan Su-22 fighters and an American F-14 Tomcat, resulting in the shooting down of the Soviet-made aircraft.

On April 15, 1986, as part of the "El Dorado Canyon" operation, the American carrier-based aviation taking off from the decks of 3 aircraft carriers and F-111 bombers attacking from USAF bases in the United Kingdom bombed two airports, barracks and anti-aircraft defense batteries in Tripoli.[44] The action was carried out as part of a retaliatory action related to the participation of Libyan intelligence in the attack on American soldiers in West Berlin on April 5, 1985.[45] As a result of the attack, approx. 60 people died, some of them civilians. An F-111 returning from a bombing raid, was shot down by Libyan anti-aircraft defense and the pilots perished.[46]

A similar incident as in 1981 occurred on January 4, 1989, when two Libyan MiG-23s tried to intercept the aircraft carrier USS "John Kennedy" sailing to Israel. In this case, both planes belonging to the aggressors were shot down by American F-14 Tomcat aircrafts. Both incidents were perceived as an act of legitimate self-defense.

6.4. Lebanon 1984

In December 1984, American aircraft patrolling the airspace over Lebanon were shelled by Syrian anti-aircraft artillery. On December 4, 1984, during a retaliatory strike, SAM missiles shot down an A-6 Intruder aircraft of the US Navy, and its pilot, Lt. Robert O. Goodman fell into Syrian captivity (the incident, due to its legal implications, is described in more detail later in this work).

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44 "From the list of possible targets, the National Security Council, with President Reagan's approval, selected five; four were linked to Qadhafi's terrorist-training infrastructure and the fifth dealt with the enemy defensive threat. The Bab al-Aziziyah barracks in Tripoli was the command center of the Libyan terrorist network. The complex included a billeting area for Qadhafi's personal Jamahiriyah guards and, at times, Qadhafi's own residential compound. The Murat Sidi Bilal training camp, near Tripoli, trained naval commandos and terrorist frogmen. The military side of the Tripoli Airport held Soviet-built IL-76 Candid aircraft that had been used in support of terrorist activities. The Benghazi Jamahiriyah military barracks served as an alternate terrorist command center and included a storage and assembly facility for MiG aircraft. The fifth target, Benghazi's Benina fighter base, housed night-capable MiG-23 Flogger E interceptors that posed a threat to the attacking force" – J.G. Endicott, *Raid on Libya, Operation Eldorado Canyon*, n.d., p. 149, https://media.defense.gov/2012/Aug/23/2001330097/-1/-1/0/Op%20El%20Dorado%20Canyon.pdf (accessed: 10.11.2020).

45 See more: G. Intoccia, *American Bombing of Libya: An International Legal Analysis*, "Case Western Reserve Journal of International Law" 1987, vol. 19.

46 J. McCredie, *The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?*, "Case Western Reserve Journal of International Law" 1987, vol. 19, p. 215.

6.5. Persian Gulf 1987

On May 17, 1987, an American frigate of Oliver Hazard Perry class, USS "Stark" was attacked and severely damaged by two Exocet missiles launched by the Iraqi fighter plane Dassault *Mirage* F-1.[47]

6.6. Kashmir Conflict of 1999

During the conflict in Kashmir, field conditions limited the operations of air forces. On August 10, 1999, there was an incident involving a transport aircraft of the Pakistani Navy, Breguet Atlantic, which was shot down by two MiG-21 aircrafts of the Indian Air Force as a result of the violation of Indian airspace and lack of response to Indian calls to cease violations. In 1991, India and Pakistan concluded an agreement to prevent violations of airspace by overflights of military aircrafts, establishing the so-called separation area of 10 km from the border (for combat aircrafts) and 1 km (for unarmed military aircraft).[48] In the lawsuit filed before the International Court of Justice (ICJ), Pakistan argued that the attack by Indian aviation was: 1) a violation of the Article 2 para. 4 of the UN Charter (Charter of the United Nations) – the prohibition of the use of force in international relations, 2) a violation of the 1991 agreement between states, 3) a violation of the customary nature of the norm of the prohibition of the use of force, 4) a violation of the sovereignty of another state by the entry of Indian aviation into the airspace of Pakistan. The Indian party raised arguments related to the lack of jurisdiction, which the ICJ acknowledged as justified.[49]

6.7. Operation "Orchard"

In the summer of 2007, the Israeli side received information about the possibility of Syria obtaining radioactive materials and constructing a nuclear reactor with the help of specialists from North Korea. On September 6, 2007, the Israeli Air Force carried out operation "Orchard", which was a complete success. During the operation, electronic warfare assets were used on a large scale, which effectively jammed Syrian anti-aircraft defenses and allowed for an undetected approach to

47 S. Greffenius, *The Logic of Conflict: Marking War and Peace in the Middle East*, New York 1993, p. 134.

48 Agreement on prevention of air space violations and for per mitting over flights and landings by military aircraft (with appendix). Signed at New Delhi on April 6, 1991.

49 ICJ, *Aerial Incident of 10 August 1999 (Pakistan v. India), Jurisdiction of the Court, Judgment*, I.C.J. Reports 2000.

the target and the retreat of Israeli F-16 and F-15 formations. In an official letter to the Secretary-General of the United Nations, President Hafez al-Assad called the incident "a violation of Syrian airspace".[50]

6.8. Interstate incidents during the conflict in Syria

On March 23, 2014, a Turkish F-16 shot down a Syrian MiG-23 as a result of violating Turkish airspace – the pilot managed to reach his own lines. On September 23, 2014, Israeli air defenses shot down a Syrian Su-24 as a result of a violation of the armistice line between Israel and Syria. On December 24, 2014, a Jordanian F-16 crashed during a flight over Raqqa. The pilot captured by the so-called Islamic State was cruelly murdered. On March 17, 2015, an American Predator drone was shot down by Syrian anti-aircraft defense. On May 16, 2015, Turkish F-16s shot down a Syrian drone that had violated Turkish airspace for 5 minutes. On November 24, 2015, a Russian Su-24 was shot down by a Turkish F-16, and one of the crew members was killed by rebels. On June 18, 2017, an American F-18 Super Hornet shot down a Syrian Su-22 over Eastern Syria. On March 4, 2017, a Syrian MiG-21 shot down by rebels who had crashed on Turkish territory. The pilot was captured and given medical assistance in a Turkish hospital.[51] During 2017, there were also reports of Israeli air force strikes on targets in Syria in connection with provocations by Syrian anti-aircraft artillery. On February 3, 2018, a Russian Su-24 was shot down by rebels, and the pilot was most likely killed after landing.[52] On February 10, 2018, as a result of the violation of Israeli airspace by an Iranian unmanned aircraft, an Israeli F-16 aircraft carrying out a retaliatory strike against the Syrian air base in the south of the state was shot down by anti-aircraft weapons – the pilots ejected over Israeli territory. A day later, the Israeli Air Force attacked many targets in Syria associated with the air defense system.[53]

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50 "In flagrant defiance of international law, the United Nations Charter and the resolutions of the Security Council, the Israeli air force, after midnight on 6 September 2007, committed a breach of the airspace of the Syrian Arab Republic crossing its northern frontier from the direction of the Mediterranean, flying towards the north-east and breaking the sound barrier. As the Israeli aircraft were departing they dropped some munitions but without managing to cause any human casualties or material damage" – Annex to the identical letters dated 9 September 2007 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, A/61/1031, S/2007/537.

51 S. Osborne, C. Mortimer, *Syrian pilot whose plane crashed in Turkey says aircraft was shot down*, 2017, http://www.independent.co.uk/news/world/middle-east/syria-mig-plane-crash-turkey-shot-down-idlib-hatay-ahrar-al-sham-a7612836.html (accessed: 10.11.2020).

52 R. Muczyński, *Rosyjski szturmowiec Su-25 zestrzelony przez syryjskich rebeliantów [WIDEO]* [*Russian Su-25 destroyed by the Syrian rebels*], 2018, http://www.nowastrategia.org.pl/rosyjski-szturmowiec-su-25-zestrzelony-przez-syryjskich-rebeliantow-wideo/ (accessed: 10.11.2020).

53 *Israeli air strikes against Syria 'biggest since 1982'*, 2018, http://www.bbc.com/news/world-middle-east-43019682 (accessed: 10.11.2020).

6.9. Air duel between India and Pakistan in 2019

On February 26, 2019, the Indian Air Force carried out air strikes against targets located on the territory of Pakistan (camps of Jaish-e-Mohammed's extremist groups). The next day, retaliatory strikes were launched by the Pakistani air force, during which there was air combat between an Indian MiG-21 and a Pakistani F-16. As a result of the duel the Indian aircraft was shot down and the Pakistani armed forces captured Col. A. Varthaman. After a few days, Pakistan repatriated the Indian pilot, citing the Geneva Conventions as the basis for Pakistan's attitude to the incident and the pilot's legal situation.

7. Subjective theory of armed conflict

Lassa Oppenheim, creating his classic, commonly known definition of an armed conflict, claimed that war is a state of rivalry between two states through the deployment of their armed forces, whose goal is to defeat the enemy and achieve victory.[54] The author pointed out that the prerequisite for the above statement is an armed clash between the armed forces of two states, recognizing that unilateral action of one of the parties may constitute the premises of an armed conflict only if the other responds with military action or a declaration of war, arguing that not all action taken by armed forces must constitute a state of war.[55] The existence of a subjective element was of particular interest to H. Kelsen, who considered taking military steps in the form of actions of the armed forces of a given state as the basic prerequisite for the existence of a state of war. The author rejected the view that the very declaration of the commencement of hostile steps, without simultaneously taking military action, constituted a state only legally similar to war. He also identified that the subjective element in the form of *animus belligerendi* must include not only the intention to wage war, but also, above all, the will to use armed forces for this purpose. He also pointed out that in the case of unilateral armed action of one state against another, the decision to recognize such an action as a state of war depends on the behavior of the participating states. According to H. Kelsen, a state of war may theoretically

54 "War is the contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases" – L. Oppenheim, *International Law: A Treatise. Vol. II: War and Neutrality*, New York 1906, p. 56.

55 *Ibidem*, p. 57.

also arise if the defending party does not decide to repel the attack militarily but considers that it is at war with a given state, even if the aggressor refrains from notifying such action accordingly. In this situation, the author associated the above factual situation with a tort of international law in the form of aggression, which constitutes a state of war regardless of whether the assaulted party puts up active defense against the assailant.[56]

Long-standing ICJ judge, Lord Arnold McNair, pointed out that a state of war begins by announcing a declaration of war or performing an act of war with an appropriate intention referred to as *animus belligerendi* or with the intention of military action in the form of reprisals (*sine animus belligerendi*) understood by the state receiving these actions as a war step, or by repelling actions of armed forces with a similar action – the state of war then occurs with the first act of violence (it is retroactive in nature).[57]

Grotius, describing the issue of a ceasefire between the combatants, noticed that often such agreements were only temporary, and after the lapse of their duration, the fighting began anew. To this matter, Grotius posed a research question about the continuity of the state of war, concluding that "between peace and war there is no medium", and that war as a legal act still continues until an agreement is reached between the states and creates specific obligations towards the parties to the conflict.[58] Lord Edward MacNaghten spoke in a similar tone during the hearing of the dispute regarding the United Kingdom's seizure of a gold transport belonging to a company based in Transvaal (South African Republic) in connection with the ongoing Boer War.[59] Contrary to this, P.C. Jessup, calling the period between peaceful conditions and the full-scale military activities intermediacy, proposes placing it as a third, separate construction of international law, alongside war and peace. The author describes it as:

1) a time of hostility and negative relations between states,
2) a conflict deeply rooted and insoluble in the course of a single action,
3) deprived of the final decision to take military measures (steps which are not peaceful but cannot have the prospect of total war are permissible).[60]

Gregor Schwarzenberger, who studied the topic, indicated the lack of adaptation of international law to the state referred to as *casus mixtus* between war and peace, at the same time criticizing the definition of war proposed by L. Op-

56 H. Kelsen, *The Principles of International Law*, New Jersey 2003, pp. 27–28.
57 A. McNair, *The Legal Meaning of War, and the Relation of War to Reprisals*, "The Grotius Society. Problems of War and Peace: Papers Read Before the Society in the Year" 1925, vol. 11, pp. 44–45.
58 H. Grotius, *His Three Books Treating of the Rights of War and Peace*, London 1682, p. 577.
59 House of Lords, *Janson v. Driefontein Consolidated Mines Limited*, 1902.
60 P.C. Jessup, *Should International Law Recognize an Intermediate Status between Peace and War?*, "The American Journal of International Law" 1954, vol. 1, pp. 98–103.

penheim and arguing that the state of formal war does not always have to be manifested by the use of military measures (he gave the attitude of the states of Central and South America during World War I as an example).[61] Schwarzenberger argued that the subjective element of conducting military operations in the form of the existing *animus belligerendi* is not sufficiently acceptable in every situation, because the practice of states in the 20th century shows that it was repeatedly negated in this form, and the parties involved in the so-called border incidents (e.g. the USSR and Japan in the 1930s) did not recognize the military operations taking place there as acts of war ("status mixtus which is determined by intentions rather than acts").[62] The author pointed out that declaring war in a formal manner will always be binding in relations with other states, while in a situation of undeclared conflict at least one of the parties must consider such a situation as a war step. In the absence of an appropriate declaration, third states do not have to apply the laws of neutrality in their contacts with the parties to the conflict.

The definitions above introduced the concept of *animus belligerendi* into the language of the doctrine. This is an exemplification of the subjective will of states to treat certain steps as acts of war – defensive or offensive.[63] In other words, a state, in addition to the act itself, must also identify it in its external narrative – for instance, through a declaration of war or another message stating the emergence of a state of war between the parties (C. Greenwood indicates that it should be presumed that states do not want to create a state of war between themselves).[64] Declarations or other implicit acts of states, in this respect, should be a clear message that states treat given armed acts as an element of an armed conflict. Such an act of an implied type may be, for example, the use of a weapon arsenal in order to respond to an armed attack, the application of a blockade, breaking diplomatic relations, etc. – a set of these elements may lead to the adoption of a subjective conviction of the state about the classification of certain events as elements of an armed conflict.[65]

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61 G. Schwarzenberger, *Jus Pacis ac Belli?*, "The American Journal of International Law" 1943, vol. 460, p. 494.

62 *Ibidem*, p. 495.

63 Y. Dinstein, *War, Aggression*…, pp. 14–15.

64 C. Greenwood, *Scope of Application*, [in:] D. Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, Oxford 1995, p. 43.

65 "War existed if, and only if, one of the parties chose to regard the situation as war. This animus belligerendi could be manifested by a declaration of war or some other formal pronouncement, or might be inferred from the circumstances. The rival school propounded an objective definition of war in which the views of the parties were not conclusive and a conflict was characterised as war if certain objective criteria were satisfied" – C. Greenwood, *The Concept of War in Modern International Law*, "International and Comparative Law Quarterly" 1987, vol. 36, p. 286.

8. Objective theory of armed conflict Controversies related to the moment of its establishment and the criterion of intensity

In the period preceding the outbreak of World War II, it had already been pointed out that the use of *ius in bello* cannot be based only on the subjective will of states.[66] The above-quoted commentary to the Geneva Conventions of 1949 by J.S. Pictet indicates that the degree of intensity of the international armed conflict is extremely low.[67] This position is completely reproduced by the ICRC in many opinions and documents.[68] The doctrine indicates that the above position was aimed primarily at protecting the premise of humanitarianism in order to guard against the perfidy of some parties to the conflict who consider their actions to be police operations or an act of necessary defense.[69] A conclusion which goes further is indicated by R. Kolb, who recognizes that the threshold of applicability of international humanitarian law in the event of an armed conflict of an international nature is zero – it includes every case of the use of force and, in fact, even an isolated armed incident becomes a "microscopic" armed conflict with the entire conglomerate of consequences associated with it.[70] Noam Lubell indicates that the actual state of the so-called first strike is entirely regulated by the provisions of *ius*

66 See: H. Rumpf, *Is a Definition of War Necessary?*, "Boston University Law Review" 1938, vol. 18, p. 687 ff.

67 J.S. Pictet, *The Geneva Conventions of 12 August 1949. Commentary: IV Geneva Convention: Relative to the Protection of Civilian Person in Time of War*, Geneva 1958, p. 20.

68 "An IAC occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation. Relevant rules of IHL may be applicable even in the absence of open hostilities. Moreover, no formal declaration of war or recognition of the situation is required. The existence of an IAC, and as a consequence, the possibility to apply International Humanitarian Law to this situation, depends on what actually happens on the ground" – *How is the Term "Armed Conflict" Defined in International Humanitarian Law? International Committee of the Red Cross (ICRC*), Opinion Paper, March 2008. The above is confirmed by the position of the commentators and the Protocol Additional I: "Thus, as will most often be the case in practice, humanitarian law also covers any dispute between two States involving the use of their armed forces. Neither the duration of the conflict, nor its intensity, play a role: the law must be applied to the fullest extent required by the situation of the persons and the objects protected by it" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva 1987, para. 62, p. 40; L.R. Blank, B.R. Farley, *Identifying the Start of Conflict: Conflict Recognition, Operational Realities and Accountablity in the Post-9/11 World*, "Michigan Journal of International Law" 2014, vol. 36, p. 474.

69 C. Stahn, J.S. Easterday, J. Iverson (eds.), *Ius Post Bellum: Mapping the Normative Foundations*, Oxford 2014, p. 261.

70 R. Kolb, *Advanced Introduction*…, pp. 98–99.

in bello, even if this clash is only one-sided.[71] Patrycja Grzebyk pointed out that in fact the only circumstance in which the use of armed forces would not initiate a state of hostility pursuant to *ius in bello* are completely accidental situations, provided there are no victims.[72] William H. Boothby included situations such as incidental bombing.[73] Sylvain Vité also argues that the non-application of the convention can only be applied to a situation in which the party has no intention of harming the enemy.[74] Dapo Akande is critical of the adoption of the intensity criterion as a necessary premise to consider a given factual situation as an element of an international armed conflict. In his opinion, this argumentation is an erroneous attempt at implementing solutions which are in force to regulate a non-international armed conflict (where the scale of the intensity of internal unrest is a prerequisite for the material application of Common Article 3 of the Geneva Conventions and AP II). The author argues that accepting the above argument would lead to a situation in which a unilateral armed attack carried out below the intensity threshold would take place in circumstances of a complete legal vacuum.[75] Similarly, Marco Roscini considers that the interpretation proposed by the ICRC is the only reasonable model in the context of unilateral armed incidents.[76] Masahiko Asasda points out that an important difference between the definition of a non-international and an international armed conflict is the fact that in the latter case, "there occur no considerations related to the sovereignty of the state, which allow for the recognition of certain internal riots as a proprietary matter of the state".[77] Other authors also set the threshold of the applicability of *ius in bello* at a very low level (*per analogiam* the argument regarding the application of the provisions Geneva Conventions under military occupation regardless of whether it occurred as a result of an armed conflict between either party).[78]

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71 N. Lubell, *Extraterritorial Use of Force Against Non-State Actors*, Oxford 2010, p. 89.

72 P. Grzebyk, *Zestrzelenie rosyjskiego samolotu przez Turcję – aspekty prawne* [*Shootdown of the Russian aircraft by Turkey – legal analysis*], 2015, http://przegladpm.blogspot.com/2015/11/zestrzelenie-rosyjskiego-samolotu-przez.html (accessed: 10.11.2020).

73 W.H. Boothby, *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors*, The Hague 2014, p. 23.

74 S. Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, "International Review of the Red Cross" 2009, vol. 91, pp. 72–73.

75 D. Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, [in:] E. Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford 2012, pp. 41–43.

76 M. Roscini, *Cyber Operations and the Use of Force in International Law*, Oxford 2014, p. 134.

77 M. Asada, *The Concept of "Armed Conflict" in International Armed Conflict*, [in:] M.E. O'Connell (ed.), *What is War?: An Investigation in the Wake of 9/11*, Leiden 2012, pp. 66–67.

78 G. Porretto, S. Vité, *The Application of International Humanitarian Law and Human Rights Law to International Organisations*, Geneva 2006, p. 32; D. Jinks, *The Temporal Scope of Application International Humanitarian Law in Contemporary Conflicts*, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, January 27–29, Cambridge 2003, p. 3; J. Bialke, *United Nations Peace Operations: Applicable Norm and the Application of Law of Armed Conflict*, "Air Force

A conclusion being more difficult to accept in the conditions of air warfare was formulated by H.-P. Gasser, who indicated that the applicability of the convention "takes place as soon as the armed forces of one state find themselves in front of wounded or surrendering members of the armed forces of another state, or when civilians of another state are under their control […], they exercise effective control over part of the territory of the enemy state".[79] Then, the issue arises related to the potential possibility of performing air operations with a horizontal dimension, which, due to the essence of aerial operations, cannot lead to the control of a specific territory. Natalino Ronzitti, describing the cases of sinking a neutral ship without any reason and the seizure of a merchant ship by irregular armed groups not subordinated to any state, considers the above situation to be a violation of the laws and customs (as an example of unlawful belligerency) of war – which speaks in favor of recognizing a given armed act as an element of an armed conflict.[80]

At what point are the norms of international humanitarian law activated? Quincy Wright pointed out that war begins with the first act of open hostility.[81] Noam Lubell highlighted that the first attack is already part of an armed conflict, even if it is of an isolated nature.[82] Also, J. Kleffner notes that if sufficient conditions are met to determine the actual state of warfare, the law of armed conflicts is immediately activated in its entirety as soon as the first act of war (the so-called first shot theory) occurs.[83] For example, the air attack of March 20, 2003 "open-

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Law Review" 2001, vol. 50, p. 53; W.H. Boothby, *The Law of Targeting*, Oxford 2012, p. 45; L. Moir, *'It's a bird! It's a plane! It's a non-international armed conflict!': Cross-Border Hostilities Between States and Non-State Actors*, [in:] C. Harvey, J. Summers, N.D. White (eds.), *Contemporary Challenges to The Laws of War: Essays in Honour of Professor Peter Rowe*, Cambridge 2014, p. 76; *The Max Planck Encyclopedia of Public International Law. The Law of Armed Conflict and the Use of Force*, Oxford 2017, p. 1309; D. Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford 2016, p. 42.

79 H.-P. Gasser, *Międzynarodowe prawo humanitarne. Wprowadzenie* [*International Humanitarian Law: An Introduction*], Haupt 1993, pp. 24–25.

80 N. Ronzitti, *The Law of the Sea and the Use of Force Against Terrorist Activities*, [in:] *idem* (ed.), *Maritime Terrorism and International Law*, Dordrecht 1990, p. 4.

81 Q. Wright, *Changes in the Conception of War*, "American Journal of International Law" 1924, vol. 18, p. 759.

82 N. Lubell, *Extraterritorial*…, p. 89; Proceeding of the Bruges Colloquium, *Scope of Application of International Humanitarian Law*, 13th Bruges Colloquium 18–19 October 2012, College of Europe 2012, p. 20.

83 J. Kleffner, *Scope of Application of International Humanitarian Law*, [in:] D. Fleck (ed.), *Handbook of International Humanitarian Law*, Oxford 2013, p. 60. "Whether or not a situation is an 'armed conflict' will depend largely on whether it is considered international or non-international. For instance, even a minor use of force between sovereign states may be considered an armed conflict. This is because «[t]he magnitude of the use of force is irrelevant; international humanitarian law, and thus the law of war crimes, is applicable even to minor skirmishes ('first shot')»" – J. Odermat, *Between Law and Reality: 'New Wars' and Internationalised Armed Conflict*, "Amsterdam Law Forum" 2013, vol. 5(13), p. 21.

ing" the invasion of Iraq is considered the beginning of an international armed conflict, assessed from the perspective of *ius in bello*.[84] In the latest edition of the ICRC *Commentary to the First Geneva Convention* of 1949, it was argued that even the smallest clash between the armed forces of states through land, air or sea operations is sufficient to initiate the applicability of international humanitarian law.[85] This view seems to be partially accepted within the jurisprudence of the ICTY.[86]

However, it should be noted that there is a fairly strong and grounded view related to the existence of the intensity criterion also in relation to armed conflicts of an international nature. The first indication of the above position is the statement, expressed on the basis of the ICTY ruling in the *Duško Tadić* case, that the clashes within various groups in the former Yugoslavia exceeded "the intensity requirements applicable to both international and internal armed conflicts".[87] According to D. Kristiotis, in its assumption, the decision of the Appeal Chamber of the ICTY was to indicate that it is not every manifestation of the use of force by one of the parties to the conflict, in any factual situation, that always leads (in accordance with the common Article 2 for the Geneva Conventions) to the emergence of an armed conflict.[88] Part of the voices from the doctrine camp (C. Greenwood, E. Kwakwa, N.T. Balendra, A.P.V. Rogers, L. Arimatsu, M. Choudhury, L. Moir) supports considering the premise of intensity as one of the criteria for assessing whether a given clash takes the form of an armed conflict (and thus constitutes the moment of activating the norms of international humanitarian law).[89] A similar position was

84 K. Dormann, L. Colassis, *International Humanitarian Law in the Iraq Conflict*, "German Yearbook of International Law" 2004, vol. 47, p. 295.

85 "Even minor skirmishes between the armed forces, be they land, air or naval forces, would spark an international armed conflict and lead to the applicability of humanitarian law" – First Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, *Commentary of 2016, Article 2: Application of the Convention*, para. 237.

86 "The existence of armed force between States is sufficient of itself to trigger the application of international humanitarian law" – *Prosecutor v. Delaic*, Trial Chamber Judgment, IT-96-21-T, para. 184.

87 ICTY, *Prosecutor v. Duško Tadić*, Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction, 2nd October 1995, IT-94-1-AR72, para. 70.

88 "The Court, therefore, did not seem to hold to the view that the use of force would in all circumstances create an international armed conflict; it intimated the need to distinguish between those uses of force which would amount to an international armed conflict and those which would not" – D. Kritsiotis, *The Tremors of Tadić*, "Israel Law Review" 2010, vol. 43, p. 279.

89 A.P.V. Rogers, *Law on the Battlefield*, Manchester 1965, p. 218; N.T. Balendra, *Defining Armed Conflict*, "Cardozo Law Review" 2008, vol. 29, p. 2471; E. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application*, Dordrecht 1992, p. 46; C. Greenwood, *Scope*…, p. 42; "That said, state practice suggests that the threshold at which a violent exchange between states is regarded as amounting to an armed conflict rather than merely a series of armed 'incidents' may be relatively high" – L. Arimatsu, M. Choudhury, *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya*, "International Law PP" 2014, vol. 1, p. 2; L. Moir, *'It's a bird!*…, pp. 73–74.

taken in the 2010 report of the International Law Association on the use of force in international relations. It is worth noting that the report analyzed the case of a North Korean submarine sinking the South Korean warship "Cheonan", which resulted in the loss of lives. In this case, experts emphasized that despite the serious consequences of the attack, the basis for disqualifying this incident as an element of an armed conflict was the lack of armed response (lack of exchange fire).[90] The International Law Association (ILA) experts took the position that the observation of the practice of states leads to the adoption of the conclusion that the intensity criterion exists as a condition of intensity to classify a given factual situation as part of the conflict than in the case of the thesis indicated in the ICRC Commentary by J.S. Pictet from 1952.[91] The report emphasized the need to apply the criteria of "organized nature" and "intensity". According to the authors of the report, the exchange of fire between individuals in a minor border incident is insufficient to meet this prerequisite. An interesting concept of identifying the state of war was proposed by M. Small and J.D. Singer, arguing that inter-state wars take place when a state being a member of the international system is involved in a fight with another, equivalent party. Additional criteria, according to the authors, include a specific state of armed interaction with a certain level of specified intensity between regular armed forces, in which both sides suffer losses numbering 1,000 wounded and killed. In turn, each state can be considered a party to such a conflict when it actively engages at least 1,000 soldiers in hostilities and has suffered losses of more than 100 casualties.[92] Similar numerical standards are adopted as part of the Joint Project of the Uppsala Department of Peace and Conflict Research, where a situation in which 25 people are killed within the year as a result of the use of armed force is considered a state of armed conflict.[93] The

90 ILA, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague Conference, Use of Force, The Hague 2010, p. 31. In this regard, the report uses the example of the sinking of the Republic of Korea's ship "Cheonan" during the patrol of the disputed maritime areas within the 38th parallel. On March 26, 2010, the ship was sunk as a result of a torpedo attack by a North Korean submarine. South Korea did not respond militarily to this move by the DPRK. However, according to Seunghyun Sally Nam, this step fulfilled the intensity requirement due to its scale and the object of the attack, which was a warship weighing nearly 1,200 tons. S. Sally Nam, *War on the Korean Peninsula? Application of Jus in Bello in the Cheonan and Yeonpyeong Island Attacks*, "University of Pennsylvania East Asia Law Review" 2013, vol. 45, p. 79.

91 "In other words, the ICRC position is based on policy rather than, perhaps, its view of what the Conventions require as a matter of law. In fact, as the Initial Report indicates, there are few if any examples of states treating minor engagements with other states as armed conflict. The evidence supports a higher threshold" – M.E. O'Connell, *Defining Armed Conflict*, "Journal of Conflict and Security Law" 2009, vol. 13, p. 397.

92 M. Small, J.D. Singer, *Resort to Arms: International and Civil Wars, 1816–1980*, Beverly Hills 1977, p. 56.

93 For example, according to the reports of the Institute, activities in which the level of losses did not exceed 25 people per year and 1,000 killed throughout the conflict were considered a small armed conflict. A state in which more than 1,000 people are killed

International Dispute Adjudication Commission, assessing the conflict between Ethiopia and Eritrea, indicated that isolated armed clashes of a border incident nature, even despite the casualties and material losses, do not constitute an element of armed attack pursuant to Article 51 the UN Charter.[94] The gradability and intensity criterion is supposed to lead to a distinction between the concepts of armed aggression or the use of force and is also important in the context of recognizing a given use of armed force as a manifestation of aggression.[95] Although this remark took place in the context of *ius ad bellum*, some authors consider it relevant also in the light of the emergence of a state of armed conflict.[96]

9. Subjective and objective elements of an armed conflict

Objective elements of an armed conflict are all circumstances related to facts directly related to warfare. Among them, the intensity and bilateral nature of the clashes should be mentioned. These include the range of forces and assets used, the scale of fire exchange, as well as human and material losses resulting from the clash.[97] Similar criteria can also be found on the basis of ICTY

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within a year was considered a war. N.P. Gleditsch, P. Wallenstein, M. Eriksson, M. Sollenberg, H. Strand, *Armed Conflict 1946–2001: A New Dataset*, "Journal of Peace Research" 2002, vol. 39, p. 619. "An armed conflict is a contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle related deaths" – P. Wallenstein, M. Sollenberg, *Armed Conflict*, *1989–99*, "Journal of Peace Research" 2000, vol. 37(5), p. 648.

94 "Localised border encounters between small infantry units with loss of life, not considered as an armed attack opening right to self-defence under the United Nations Charter" – *Reports of International Arbitral Awards, Eritrea-Ethiopia Claims Commission*, Partial Award: Jus ad bellum, 2005.

95 M. Piątkowski, *Analiza amerykańskiego ataku rakietowego z dnia 7 kwietnia 2017 roku z perspektywy materialnego zakresu stosowania międzynarodowego prawa humanitarnego – konflikt zbrojny czy incydent?* [*Analysis of the US attack of April 7.2017 in the light of international humanitarian law – armed conflict or incident?*], "Wojskowy Przegląd Prawniczy" 2017, no. 3, p. 53.

96 M.E. O'Connell, A Krivtus, *United Nations Peacekeeping and the Meaning of Armed Conflict*, [in:] M.E. O'Connell (ed.), *What is War?: An Investigation in the Wake of 9/11*, Leiden 2012, p. 115.

97 M. Ibanga, *Concept of Armed Conflict in Public International Law: Some Reflections*, "Sri Lanka Journal of International Law" 2002, vol. 14, p. 115.

jurisprudence.[98] It is possible to imagine factual states in which unilateral armed acts meet the appropriate intensity criterion – especially conflict-initiating air attacks (e.g., Pearl Harbor in 1941 – assuming that it would be a one-sided incident).

At the opposite end, an example of an incident with an unobvious nature was the attack of Israeli aviation on a nuclear reactor in Syria in 2007, resulting in the destruction of production infrastructure, as well as the incident of April 17, 2017, when the United States attacked a Syrian air base.[99] In this case, the scale of the attack, and, above all, the consequences related to the attack on a critical element of the functioning of the state, allow us to assume that the intensity criterion has been met. In this respect, G.D. Solis and Y. Dinstein see another aspect related to the assessment of unilateral actions of Israeli combat aviation against Iraqi and Syrian nuclear installations. In their opinion, not every armed step taken through military force in all circumstances constitutes the emergence of an armed conflict state with all its consequences.[100] Yoram Dinstein directly recognizes that, for example, it is possible to classify some cases of short-term armed incidents as so-called incidents short of war, classifying in this regard, for example, the shooting down of a fighter aircraft as an air skirmish. In this regard, it is important to take into account the will of the parties to the incidents to treat them as an act of war, which is the essence of whether open military action is taken or not. In this case, it is worth bearing in mind the previous theory of the subjective action of the party with the intention of taking steps of a military nature – that is, the concept of H. Kelsen based on the need to recognize a specific *animus belligerendi* in combatants as actions with the intention of conducting operations of an armed nature against each other. The above picture is confirmed in the practice of states that often did not consider certain specific conflicts as well as border incidents or singular events as an element of an armed conflict – which, therefore, should not lead to the application of *ius in bello* norms in these "events in international relations" *per se*.[101]

98 "Trial Chambers have also taken into account in this respect the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads" – *Prosecutor v. Boskovski, Tarculoski*, Trial Chamber II Judgement, IT-04-82, para. 177.

99 E. Louka, *Nuclear Weapons, Justice and the Law*, Northampton 2011, p. 380.

100 G.D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge 2010, p. 185; Y. Dinstein, *War, Aggression*…, p. 13.

101 R. Bierzanek, *Wojna a prawo międzynarodowe* [*War and International Law*], Warszawa 1982, p. 15.

All circumstances that may signal the existence of *animus belligerendi* – the subjective conviction of the state that a given offensive or defensive step is part of an armed conflict – remain subjective elements. These include the official external attitude of the state, its position in the forum of international organizations, the recognition of a given situation as an armed conflict on the basis of norms of internal law (e.g., the introduction of martial law).[102] In some situations, indicating the subjective element seems unnecessary – if the factual circumstances do not indicate any doubts as to the intentions of the hostile parties.[103]

Which criteria should be considered first? It seems (as previously indicated) that there is no major doubt that the state of the armed conflict is an objective category in the first place. However, the discrepancies relate to the issue of intensity. According to one view, the achievement of an appropriate intensity level by the armed clashes is a sufficient basis for determining the existence of an armed conflict. Another view centered around the ICRC, indicates that the mere fact of armed interaction is sufficient to trigger the application of the norms of international humanitarian law. In the practice of international relations, the above issues become much more complicated in the case of unilateral incidents or armed clashes of a geographically and scope-limited scale. The objective criterion in this respect still retains the highest privilege – as incidents such as the shooting down of a Russian military aircraft over Syria in November 2015 clearly do not meet the intensity criterion (as well as reciprocal character).[104] However, subjective elements are of some importance in this respect, at least auxiliary, because the position of the states allows for greater clarification of the existing factual situation and its proper assessment.[105] Nevertheless, this solution may lead to some "normative confusion" when both sides of the conflict deny that they are in a state of armed conflict: such a situation took place on January 16–18, 2024, when Iranian and Pakistani aviation carried out a series of strikes on neighboring territory with the intention of destroying targets related to separatist movements in Baluchistan. Both Karachi and Tehran have stated that mutual strikes are not aimed at states and soon normalized diplomatic dialogue.[106]

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102 M. Piątkowski, *Analiza amerykańskiego*…, pp. 59–60.

103 M. Milanovic, *The End of Application of International Humanitarian Law*, "The International Review of the Red Cross" 2014, vol. 96, p. 166.

104 M. Piątkowski, *Zestrzelenie rosyjskiego samolotu wojskowego a międzynarodowe prawo konfliktów zbrojnych* [*Shootdown of the Russian military aircraft and the international humanitarian law*], "Biuletyn Analiz Centrum Inicjatyw Międzynarodowych" 2016, no. 8, pp. 23–37.

105 "Moreover, the subjective approach helped to create an artificial separation between the «state of war» as a legal concept and the fact of war in the sense of actual fighting. Hostilities could exist without a state of war, if the parties to the conflict so elected. Conversely, a state of war could be in existence between two States even though no fighting took place" – C. Greenwood, *The Concept of War*…, p. 286; M. Piątkowski, *Analiza amerykańskiego*…, p. 60.

106 Ministry of Foreign Affairs, Government of Pakistan, *Operation Marg Bar Sarmachar*, n.d., https://mofa.gov.pk/press-releases/operation-marg-bar-sarmachar (accessed: 9.06.2025).

The above-quoted position of the ICRC of 1952 assumed the existence of armed interaction between the armed forces of states for the occurrence of the legal status of an armed conflict. It should be noted that further conclusions were adopted in the revised ICRC Commentary to the Geneva Conventions of 1949. It indicates that any use of force by one state on the territory of another state without its consent creates a legal status of an international armed conflict between the state and the intervening state.[107] The content of the commentary indicates that the basic assumption in favor of adopting the above conclusion is to increase the protection of civilians and non-military infrastructure.[108] It is argued that the circumstances related to the reception of an armed act by an adversary are irrelevant in this respect, rejecting the thesis of the necessary reciprocal character for the creation of a constitutive element of an armed conflict.[109] In this case, one can imagine the factual situation in which the subject of an armed attack is civilian and non-combatant infrastructure – such a situation (as in the case of the Luftwaffe air attack on Wieluń on September 1, 1939) is outside the literal context of the common Article 2 for the Geneva Conventions of 1949 – which assumes the emergence of a state of hostility between states (implicitly between the armed forces).[110] However, the adoption of the above position still has serious consequences and evokes serious controversy.[111]

Nevertheless, this ICRC approach guarantees the most far-reaching objective application of the international humanitarian law. Despite the above-mentioned reservations, it also seems to be gaining recognition in the doctrine of international law. In November 2018, the Russian navy fired on Ukrainian naval ships whose crewmen were arrested as a result of this military incidence in the Kerch Strait. The position of the Ukrainian side emphasizes that the provisions of the Third Geneva Convention of 1949 should be applied to detainees, treating the clash as part of the Russian-Ukrainian armed conflict in the meaning of *ius in bello* or an isolated incident with the characteristics of an international armed conflict.[112] A similar position was adopted by the Parliamentary Assembly of the

107 "Should the third State's intervention be carried out without the consent of the territorial State, it would amount to an international armed conflict between the intervening State and the territorial State" – First Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, August 12, 1949, *Commentary of 2016, Article 2: Application of the convention*, para. 260.

108 A.A. Haque, *The United States is at War with Syria (according to the ICRC's New Geneva Convention Commentary)*, 2016, https://www.ejiltalk.org/the-united-states-is-at-war-with-syria-according-to-the-icrcs-new-geneva-convention-commentary/ (accessed: 12.11.2020).

109 M. Brehm, *Defending the Boundary: Constraints and Requirements on the Use of Autonomous Weapon Systems Under International Humanitarian and Human Rights Law*, Geneva 2017.

110 See further explanation: M. Piątkowski, *Analiza amerykańskiego*…, pp. 62–63.

111 T. Gill, *Classifying the Conflict in Syria*, "International Law Studies" 2016, vol. 92, p. 367.

112 J. Kraska, *The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?*, 2018, https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/ (accessed: 12.11.2020). "Consequently, the qualification of an act as aggression would make

Council of Europe.[113] On the other hand, the Russian Federation disagrees with this view, recognizing the incident as an "illegal crossing of its sea border".[114] During the above-described Pakistani-Indian air incident in 2019, Pakistan treated the Indian pilot as a prisoner of war, which also, despite the isolated character of the clash, signals that a state of short-term international armed conflict arose between India and Pakistan.[115] In turn, evaluating the situation of June 20, 2019 (when Iranian anti-aircraft defense shot down the American MQ-4 Triton drone), M.N Schmitt pointed out that the very shooting down of the American military aircraft caused a state of international armed conflict between Iran and the United States. Similar observations were formulated by the Polish experts on hypothetical involvement of the Polish air defense in eliminating Russian aerial threats over western Ukraine.[116]

9.1. Case of Robert O. Goodman and the application of international humanitarian law outside of armed conflict

On December 4, 1983, U.S. Navy pilot R.O. Goodman, flying an A-6 Intruder, was shot down during an air operation over Lebanese territory by Syrian anti-aircraft defense. The actions of the American forces took place as part of the international stabilization mission in Lebanon, a consequence of the ongoing civil war (during which Syria and Israel intervened), the culmination of which was a bomb attack on the US Marine barracks in October 1983. As a result of this attack, the US air force began intensive patrolling of the airspace over Lebanon, which was met with a reaction of an extensive Syrian anti-aircraft defense, actively hindering the flights of the US Navy air forces. On December 4, 1983, in order to destroy

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sense, first and foremost, in the context of the first use of force by a State, from which an international armed conflict would result" – S. Sayapin, *The End of Russia's Hybrid War against Ukraine?*, 2019, http://opiniojuris.org/2019/01/04/the-end-of-russias-hybrid-war-against-ukraine/ (accessed: 12.11.2020).

113 "Immediately release the Ukrainian servicemen and ensure they are granted the necessary medical, legal and/or consular assistance in accordance with relevant provisions of international humanitarian law such as the Geneva Conventions" – Resolution 2259(2019) Parlimentary Assembly of Council of Europe, 24 January 2019.

114 H. Kerringan, *Historic Documents of 2018*, Thousand Oaks 2018, p. 660.

115 *Abhinandan's return announcement in consonance with Geneva conventions: IAF*, 2019, https://indianexpress.com/article/india/indian-armed-forces-show-evidence-to-prove-pakistan-targeted-military-installations-balakot-ai-strike-f16-abhinandan-5605538/ (accessed: 9.06.2025).

116 "Irrespective of the legality of the planned U.S. strikes under the jus ad bellum, the Iranian downing of the drone initiated an international armed conflict between the United States and Iran to which IHL applied" – M. Schmitt, *Top Expert Backgrounder: Aborted U.S. Strike, Cyber Operation Against Iran and International Law*, 2019, https://www.justsecurity.org/64669/top-expert-backgrounder-on-aborted-u-s-strike-and-cyber-operation-against-iran-and-international-law/ (accessed: 9.06.2025).

anti-aircraft stations, approx. 20 A-6E Intruder aircraft with the task of incapacitating Syrian positions were located near the Syrian-Lebanese border. As a result of the operation, the plane of Lt. Goodman, who fell into Syrian captivity and was imprisoned in Damascus, was shot down. The issue from the point of view of the application of international humanitarian law was to consider whether the provisions on prisoners of war of the Third Geneva Convention of 1949 should be applied to the detention, survival, and release of the American pilot. In order to apply the convention, it would be necessary to demonstrate whether the scope of military operations carried out by US and Syrian forces was sufficient to confirm the existence of an armed conflict. On December 20, 1983, during a press conference, US President Ronald Reagan expressed the position that the US was not in a state of armed conflict between the United States and Syria, hence Lt. Goodman cannot be spoken of as a prisoner of war.[117] The assessment expressed by the ICRC indicated that the American pilot had the status of a prisoner of war, despite the lack of a formal state of war between the US and Syria.[118] This means that according to Red Cross experts, the shooting down of an American aircraft by Syrian anti-aircraft defense was an incident of armed conflict scale between the two states. A similar position was taken by the United States Department of State, stating that "armed conflict occurs in any situation of armed action between opposing armed forces, regardless of the duration, length and intensity of clashes".[119] In turn, according to W.H. Parks, an hour-long air attack cannot be considered sufficient to meet criteria of war, but sufficient to trigger the provisions of the 1949 Conven-

117 "And Ambassador Rumsfeld has been in Damascus. He has met with the Syrians. Certainly, that is very high on the agenda. The Syrians claim that he's a prisoner of war. Well, I don't know how you have a prisoner of war when there is no declared war between nations. I don't think that makes you eligible for the Geneva accords" – G. Peters, J.T. Woolley, *Ronald Reagan, The President's News Conference*, n.d., https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-944 (accessed: 12.11.2020).

118 "President Reagan said Dec. 20 that he did not see how Syria could treat the American flier captured by Syrians as a prisoner of war under the Geneva Convention «when you have no declared war between nations». Article 2 states that the convention applies «to all cases of declared war or of any other armed conflict which may arise» between two or more nations, «even if the state of war is not recognized by one of them». Experts, including a representative of the International Committee of the Red Cross, have said the flier, Lieut. Robert O. Goodman Jr., is a prisoner of war under terms of the convention, although the United States has said it is not at war with Syria and neither nation has formally declared war. He was captured when his jet was shot down on a raid against Syrian positions in Lebanon. It is debatable whether «active hostilities» have ceased, as provided for in Article 118. If so, Syria would be obliged to repatriate Lieutenant Goodman under the convention" – *Geneva convention on prisoners of war*, "The New York Times", December 30, 1983, http://www.nytimes.com/1983/12/30/world/geneva-convention-on-prisoners-of-war.html (accessed: 12.11.2020).

119 C. Greenwood, *Protection of Peacekeepers: The Legal Regime*, "Duke Journal of Comparative and International Law" 1996, vol. 7, pp. 200–201.

tion towards the shot-down airman.[120] Christopher Greenwood considered the above incident to be proof of the acceptance of the "low threshold of applicability" of the convention[121] by some states.

Using the objective elements of the armed conflict, it is worth paying attention to the activities of the American aviation, namely an air attack using ground-to-air munitions on a significant scale (28 A-6 and A-7 combat aircraft) against the positions of the Syrian anti-aircraft defense.[122] The scale of the strike was therefore undoubtedly serious, and the reaction of the air defense showed a clear intention to inflict losses on the enemy (two American combat aircraft were shot down).[123] The intensity of the attack should therefore be considered significant, also the context of the operation indicated the active involvement of the parties in the mutual process of destroying military ground and air facilities, casualties and material losses were also recorded on both sides.[124] To this extent, it seems that despite the attitude of both states – treating the air raid of American aircraft and the counterattack of Syrian air defense as a kind of incident rather than a full-scale conflict – under the common Article 2 for the Geneva Conventions of 1949, it should be recognized that on December 4, 1983, the exchange of fire between the warring parties was the basis for assuming that there was a short-term, but intense armed conflict between the USA and Syria, to which the norms of international humanitarian law applied, both in the context of the conduct of hostilities itself and the issue of treating the American pilot as a prisoner of war.[125] Subjective

120 "The one-hour air strike probably did not meet the general criteria for a war, but it did cross the threshold for application of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. Similarly, during the 1999 NATO Kosovo air operations, Serbian forces captured three US Army soldiers. The initial response of the Secretary of State was that these men were not prisoners of war, a point with which every member of the Department of Defense Law of War Working Group strongly disagreed. The Secretary of State subsequently agreed that the men were prisoners of war, another indication that there is more than one threshold" – W.H. Parks, *Special Forces' Wear of Non-Standard Uniform*, "Chicago Journal of International Law" 2003, vol. 4, no. 2, p. 500. For the author of this work, the distinction between the states of war (*general criteria of a war*) and the so-called common Article 2 for the Geneva Conventions of 1949. Presumably, W.H. Parks meant war in the sense of an armed conflict on a larger scale than an aviation incident.

121 C. Greenwood, *The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia*, "Max Planck Yearbook of United Nations Law" 1998, vol. 2, pp. 114–115.

122 M. Lanchin, *Jesse Jackson and the US airman shot down by Syria*, 2013, http://www.bbc.com/news/magazine-24081498 (accessed: 12.11.2020); B. Kaplan Gubert, M. Sawyer, C.M. Fannin, *Distinguished African-Americans in Aviation and Space Science*, London 2002, p. 137.

123 D.E. Kyvig, *Reagan and the World*, New York 1990, p. 82.

124 D. Sylvan, S. Majeski, *U.S. Foreign Policy in Perspective: Clients, Enemies and Empire*, New York 2009, p. 152.

125 "The engagement between Syria and the United States was extraordinarily brief, but nonetheless qualified as an international armed conflict so as to trigger the application of LOAC" – L.R. Blank, B.R. Farley, *Identifying*…, p. 475.

elements deny the existence of a state of armed conflict – especially the United States was of the opinion that the operation was not of a military nature and did not constitute an international armed conflict. This event was isolated and, what is important, also short-lived, but at the same time fulfilling the criteria of intensity and reciprocal character. The final conclusions are dependent on the acceptance of the subjective or objective theory of armed conflict. In this respect, it is worth noting a remark by F. Kalshoven, who indicates that in the conflict between the Netherlands and Indonesia over New Guinea in the 1950s both parties agreed that the Geneva Conventions did not apply due to the "lack of a state of armed conflict".[126] The assessment of the current practice of the United States Armed Forces by G.S. Corn indicates that the United States Department of Defense accepts that any case of armed involvement should be governed by *ius in bello*[127] standards. The above position is confirmed by the contents of the US Armed Forces' *Law of Armed Conflict Manual*.[128] In 2007, 8 British sailors and 7 British Marines were detained by the Iranian Navy on charges of illegally crossing the maritime border between Iran and Iraq (then under partial occupation by British troops).[129] As in the context of the 1983 incident, assessments of this event may vary.[130] However, this does not change the possibility of protecting victims of short-term armed incidents under international humanitarian law, but on other grounds than in a state of armed conflict.

The normative basis for the application of the provisions of international humanitarian law – for example, towards prisoners of war in situations of unilateral use of force with a low level of intensity (e.g. air operations) – should result not so much from the existence of an armed conflict, but more from taking into account the fact that any use of force in international relations should be subject to two basic rigors – necessity and proportionality, as well as the general principles of international law.[131] These two paradigms also determine the scope and dimen-

126 F. Kalshoven, F. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Cambridge 2011, p. 27.

127 G.S. Corn, R.E. VanLandingham, S.R. Reeves, *U.S. Military Operations: Law, Policy and Practice*, Oxford 2016, p. 81.

128 "The United States has interpreted «armed conflict» in Common Article 2 of the 1949 Geneva Conventions to include «any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity or scope of the fighting»" – The Department of Defense, *Law of War Manual*, June 2015 (Updated December 2016), p. 82.

129 M. Asada, *The Concept of "Armed Conflict"*…, p. 66.

130 "The fact that neither the United Kingdom nor Iran recognized a state of war or the existence of an armed conflict had no bearing on the application of LOAC. The Commentary clarifies that even if both states deny the existence of an armed conflict, the Geneva Conventions still apply based objectively on the de facto situation" – L.R. Blank, B.R. Farley, *Indentifying*…, p. 475.

131 Y. Dinstein, *War, Aggression*…, p. 20; E. Cannizzaro, *Proportionality in the Law of Armed Conflict*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 345.

sion of the currently used force.[132] This results in limiting its use only to the extent necessary (indispensable) – directly related to the implementation of a specific goal such as one related to the prevention of a humanitarian tragedy or acting in self-defense and in a proportional dimension, for example directed only against military objectives.[133] As the author of this work pointed out, "the above restrictions operate both ways – both against a state which, for example, carries out unilateral military strikes to prevent violation of international law during a humanitarian intervention, and against the other party which, when repelling an act of using force, should at least comply with the minimum humanitarian standards (as stated in *Corfu Channel* case) – not be guided, for example, by repression against military personnel who, for example, due to the failure of a combat aircraft, would be captured by the opposite party".[134] Such a possibility was indicated, among others, by H. Levie, according to whom "occasional incidents do not build a state of armed conflict, but this does not mean depriving persons in the power of the other party of the protection resulting from the provisions of international law".[135] The above indications can also be found in the contents of the treaty solution in the form of Article 1, para. 4 of the AP I (which is in fact an exemplification of the Martens clause), which also covers the facts outside the scope of the protocol and related to the protection of persons with a special status (protected persons).[136]

132 M. Piątkowski, *Analiza amerykańskiego*…, p. 72.

133 Quotation after: *ibidem*, p. 73. "In the view of the Court, if the provision of «humanitarian assistance» is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely «to prevent and alleviate human suffering» and «to protect life and health and to ensure respect for the human being»" – ICJ, *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America Merits*, Judgment, I.C.J. Reports 1986, para. 243; D. Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, "The European Journal of International Law" 2013, vol. 24, p. 237.

134 "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war" – ICJ, *Corfu Channel case, Judgment*, I.C.J. Reports 1949, p. 22.

135 H. Levie, *The Status of Belligerent Personnel "Splashed" and Rescued by a Neutral in the Persian Gulf Area*, "International Law Studies" 1990, vol. 70, pp. 242–243.

136 Quotation after: M. Piątkowski, *Analiza amerykańskiego*…, p. 73. D. Fleck, *Humanitarian Protection in Non-International Armed Conflicts: The New Research Project of the International Institute of Humanitarian Law*, "Israel Yearbook on Human Rights" 2000, vol. 30, p. 2. "Now, of course, if a conflict does not meet the definitions in the Geneva Conventions or Protocols, then those treaties do not govern the conflict. Where the Conventions do not apply, international humanitarian law derived from «established custom, principles of humanity, and the dictates of public conscience» can serve as a place holder. I take that language from Additional Protocol I of 1977. Such language is not mere rhetoric" – S. Ratner, *The War on Terrorism*

On this basis, certain concerns related to the phenomenon of unlimited use of armed force can be removed in a situation in which it cannot be stated with certainty that it can be qualified as an act of armed conflict.[137] On the other hand, the above considerations confirm the usefulness of the ICRC's view of the lack of an intensity threshold in the conditions of an international armed conflict as the most transparent model to avoid any legal vacuum related to armed interaction.

10. Conclusions

Summing up the above considerations, it should be noted that based on the findings of doctrine, jurisprudence and the positions of representative international organizations, it is permissible to make the following classification of armed conflicts considering the moment of their origin and the simultaneous basis for applying international law of armed conflicts within its temporal boundaries. The following states can be distinguished:

1) formal – related to the declaration of war;
2) material:
   a) a state of armed conflict arises when the first armed actions are taken – the so-called first shot theory,
   b) a state of armed conflict arises when the other party counterattacks – the so-called theory of armed interaction,
   c) a state of armed conflict arises when the intensity of hostilities is adequate, the so-called theory of appropriate intensity.

Undoubtedly, the previously presented position of the ICRC with a low threshold of applicability of the international humanitarian law is fundamentally justi-

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and International Humanitarian Law, "Michigan State Journal of International Law" 2006, vol. 19, p. 20; N. Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars*, Northampton 2017, p. 5. See also the discussion on the 2007 incident: "«There is no state of armed conflict between Iran and the U.K., hence no violation of the Geneva Conventions (is committed by) broadcasting of the images», Crane said in an e-mail. «Technically, if found to have violated Iranian domestic law, e.g. entering the state illegally, they could be tried for that entry». However, Crane noted, if Iran crossed into Iraqi waters to seize the British troops – as Britain insists and the Iranians deny – that trespass and capture might represent a de facto act of war, automatically activating the conventions. And some legal experts said Britain can and should make that case" – M.B. Stannard, *What law did Tehran break? / Capture of British sailors a gray area in application of Geneva Conventions*, 2007, https://www.sfgate.com/news/article/What-law-did-Tehran-break-Capture-of-British-2576880.php (accessed: 12.11.2020).

137 K. Watkin, *Fighting*…, p. 57.

fied. It unequivocally eliminates any doubts related to the classification of a given incident as an element of an ongoing armed conflict. While one cannot lose sight of the perspective according to which, in fact, many events of a purely armed nature are in various configurations often treated by states as activities outside the limits of an armed conflict (especially if they are unilateral, short combat operations (in the form of border incidents or aerial bombardments, not followed by subsequent reaction), the need to protect victims of armed conflicts should prevail over the subjective approach of states, which can often be dictated by political reasons. At the same time, a special category of incidents with erroneous intent, which are characterized by lack of deliberation, should also be distinguished. A good example in this respect is the event in Przewodów in Poland, where on November 15, 2022, a rocket launched by the armed forces of Ukraine caused losses among civilians in Poland. This incident cannot be treated as an element of armed conflict, as the missile was launched with the intention of intercepting a Russian missile flying across western Ukraine, and not causing damage on the Polish territory.

11. Temporal scope of international humanitarian law

11.1. Historical overview

Since ancient times, it has been held that a state of war may arise only after the occurrence of a certain formal act, a kind of authorization possessing a public character. In Roman times, an important part of the law of war was the so-called *ius fetiale*, a set of activities with magical and religious significance, during which priests performed the official introduction of the Roman state into the state of war. The key person in this respect was *pater patratus* – a special herald of the republic, performing the ritual of *rerum repetitio* – the official presentation of the claims and demands of Rome towards a neighboring state or city.[138] *Pater patratus* declared war within 33 days and then returned to Rome, awaiting the senate's decision. Violation of these customs was treated as a bad omen and spelled lack of favor from the gods. Moreover, a declaration of war was also the moment to

138 In addition to declaring war, *Pater Patratus* served the Senate in peacetime as a special diplomatic envoy, who was granted powers to make alliances with other states. See the description of the agreement between the Alba Longa people and the Romans in: Livy, *History of Rome*…, p. 24.

activate special laws of an internal nature, which determined the possibility of additional mobilization and command appointments. In the course of these rituals, the question of how the Roman army should wage war was not raised. Thus, in ancient Rome, a declaration of war clearly had the status of a constitutive act, similar in its dimension to the enforcement of benefits in Roman private law.[139]

In the medieval period, more doctrinal emphasis was placed on the reasons why the parties in question found themselves at war than on the mere fact of official notification that hostile steps would be taken. Hence, as J.M. Mattox pointed out, Christian philosophical thought based on the theory of just war generally did not indicate a clear point at which a state of peace transitioned to a state of war.[140] However, it can be presumed after St. Augustine and St. Thomas Aquinas that one of the elements of a just war was – in addition to a just cause (defense against aggression, reversal of the outcome of lawlessness, aiding one's ally, offense to treaties) and a just will (war as an attempt to restore peace)[141] – also the existence of authorization by a competent sovereign authority. The existence of an official act notifying the steps of war should be seen in this premise.[142] However, as S.C. Neff pointed out, medieval history shows that at that time, there was no clear concept of a state of war as a category of international law, which also resulted in relatively rare situations associated with formal declarations on the initiation of hostilities.[143] An example of such a situation can be seen in the Great War with the Teutonic Order in 1409–1411, when on August 6, 1409, the Order's Grand Master Ulrich von Jungingen decided to formally inform the Polish side of the existence of a state of war, as a result of receiving information about the durability of the Polish-Lithuanian alliance.[144]

Grotius argued that a necessary element of a just war is a formal declaration of war, which should be communicated to all combatants.[145] He did not require

139 C. Phillipson, *The International Law and Custom*…, pp. 200–201.

140 J.M. Mattox, *Saint Augustine and the Theory of Just War*, New York 2006, p. 78.

141 "For you don't seek peace in order to stir up war; no – war is waged in order to obtain peace. Be a peacemaker, therefore, even in war, so that by conquering them you bring the benefit of peace even to those you defeat" – *Letter 189 Ad Boniface* (417 r.). Quot. after: A.D. Lee, *War in Late Antiquity: A Social History*, Singapore 2007, p. 187.

142 W. Ballis, *The Legal Position of War: Changes in Its Practice and Theory from Plato to Vattel*, The Hague 1937, p. 43; St. Thomas Aquinas, *Summa Theologica, Part II, Question 40 "War"*, https://www3.nd.edu/~afreddos/summa-translation/Part%202-2/st2-2-ques40.pdf (accessed: 9.06.2025).

143 S.C. Neff, *War and the Law of Nations: A General History*, Cambridge 2005, p. 103.

144 A. Nowak, *Polska wielka księga historii* [*Great Book of Polish History*], Ożarów Mazowiecki 2016, p. 160.

145 "But to make a war just, according to this meaning, it must not only be carried on by the sovereign authority on both sides, but it must also be duly and formally declared, and declared in such a manner, as to be known to each of the belligerent powers" – H. Grotius, *The Rights of War and Peace, Vol. III*, London 1814, p. 166.

such notification in the event of a defensive war. The Dutch scholar considered this declaration to be an obligation in situations of illegal annexation of territory or hostile aggression as a formal requirement for the legality of the return of the subject of claims. Grotius pointed out that there are two types of notifications: conditional ones, which demand specific reparations, restitution or capitulation; and absolute ones, which are declaratory in nature and constitute confirmation of armed operations being already underway.[146] The declarations take the form of a visible sign of conducting warfare by the sovereign subjects of international law of each party, creating certain rights and obligations to the subjects of those states, unlike wars against pirates or rebels.

Alberico Gentili was an advocate of the necessity to find the obligation to declare war in the norms of the law of nations, for whom the declaration was a kind of "call for rendering a benefit" by the debtor; in a situation of war it was the position of the creditor (the enforcing state) against the debtor (the state subject to enforcement). Gentili further required that a period of 30 days elapse between the declaration of war and the commencement of hostilities, which was to be considered a mandatory grace period and a final attempt to prevent war. There was no obligation to declare war in the event of a defensive war of a short-term nature or war against rebels.[147] Theodor Meron, a judge of the International Criminal Tribunal for the former Yugoslavia (ICTY), in the analysis of legal and international elements of Shakespeare's works on the basis of the drama *King Henry*, related to the intervention of Henry V in France in 1415 as part of the so-called Hundred Years' War, pointed out that in the late Middle Ages and the early Renaissance, the practice of declaring wars was rare, but still an honorable one and at least theoretically mandatory.[148]

Emmerich de Vattel considered a declaration of war as part of a noble and just policy aiming to avoid conflict, pointing out that in the case of the fulfillment of just demands after the declaration of war, there was an obligation to refrain from initiating conflict. For the 18th-century author, this declaration was an element of natural law, which finds application as long "as custom enjoys general public approval". De Vattel was also the first scholar of international law to draw attention to the legal aspect of the declaration, as a temporal moment necessary for determining what rights of nations apply or cease to apply in wartime. In his opinion: "If there were no declaration of war, the peace treaty will not be able to resolve which of the armed acts were acts of war and which were acts for which each state is to demand compensation".

146 "An absolute declaration of war is issued, where any power has already begun hostilities, or committed acts which call for exemplary punishment. Sometimes indeed a conditional, is followed by an absolute war, though in such a case the latter is not actually necessary, but only a confirmation of the former" – *ibidem*, p. 172.

147 W.G. Grewe, *The Epochs of International Law*, New York 2000, p. 212.

148 T. Meron, *Shakespeare's Henry the Fifth and the Law of War*, "The American Journal of International Law" 1992, vol. 86, pp. 14–15.

The declaration is also relevant for neutral states.[149] According to the author, there is no obligation to allow the enemy to prepare unjustified defense by declaring war, even before entering the enemy's territory, but it should absolutely be delivered before commencing hostilities.[150] Jean-Jacques Rousseau stated explicitly in the *Social Contract* that conducting warfare without declaring war is an "act of banditry".[151]

Kornelius van Bynkershoek was the first of the fathers of international law to explicitly reject viewing a declaration of war as a *sine qua non* condition for the existence of a state of war, recognizing that its absence cannot question the fact of the existence of war. In this regard, he pointed to the fact of the 1648 hostilities between Spain and the United Republics of the Netherlands, which began without any prior notification.[152] In the 19th century, scholars of international law recognized that contemporary customs and relations had long rejected the legal requirement for a prior declaration of war.[153] In addition, it was explicitly argued that the lack of a formal notification of hostilities does not affect the recognition of a given factual situation as a state of war, which is solely dependent on the actually existing mutual armed clashes – although some authors considered this a good practice.[154] According to R. Wildman, since 1763 (the Treaty of Versailles), the practice of declaring war in the form of an armed declaration has completely disappeared, and the mere undertaking of armed operations is a sufficient manifestation on the part of a state.[155] Another date was indicated by W. Manning, who claimed that the last declaration of war (until 1839) with the herald function took place in 1635.[156] Most of the conflicts of the second half of the 18th century and the early 19th century, such as the war between the United States and Great Britain in 1812, took place without any official declaration of war.[157] A more accurate statistic indicated that

149 E. de Vattel, *The Law of Nations*, London 1797, pp. 502–505.

150 J. Kent, *Commentary on International Law*, Toronto 1878, pp. 169–170.

151 J.-J. Rousseau, *The Social Contract: Or Principles of Political Right*, London 1762, p. 8.

152 C. van Bynkershoek, *Quaestiones Iuris Publici*…, p. 11.

153 R. Wildman, *Institutes of International Law, Vol II: War*, Philadelphia 1849, p. 5.

154 T.J. Lawrence, *The Principles*…, p. 301.

155 The so-called Treaty of Paris, which ended the so-called Seven Years' War between France, Great Britain and Spain, as a result of which France lost almost all its properties in North America. The war reaffirmed British naval supremacy and made Great Britain a hegemon on a global scale. R. Wildman, *Institutes*…, p. 8.

156 W. Manning, *Commentaries*…, p. 119.

157 The American-British War took place in the years 1812–1815. One of the direct causes of the conflict was the blockade of American exports to Napoleonic France, as well as the fear of a rebellion of Native Americans initiated by Great Britain. This war did not bring a change in the existing *status quo* in North America; in the course of one of the raids the White House and Congress building were destroyed for the only time in the history of the United States. In the treaty ending the war, it was decided to adopt the *status quo ante bellum* rules and leave the previous borders between the United States and Great Britain.

from 1700 until 1900, only 11 times did states officially declare war on each other, despite nearly 60 different wars and conflicts.[158] The art of declaring war returned on the occasion of the Crimean War (1854), the Austro-Italian War (1866), the Franco-Prussian War (1870) and the Turkish-Russian War (1877).

At the beginning of the 20th century, it was emphasized that the necessity of declaring war was an element of the past. George Davis pointed out that official notification (but not as a constitutive declaration) is required for the needs of neutral states and their own citizens.[159] William E. Hall emphasized that, in his opinion, the first armed act will always be a full confirmation of the attacker's intention and no notification of the commencement of armed steps is required. Undertaking the first military action was a temporal moment of the applicability of law of war and the introduction of states into a war relationship. The only negative circumstance in this respect could be the recognition of a given circumstance not as an act of war, but, for example, as an act of armed reprisal.[160] A similar position was taken by Prof. J. Westlake, who also questioned the need to submit a formal declaration of war before military operations begin. Westlake pointed out that incidents related to the lack of prior notification – such as the operations of the Japanese fleet in 1904 – were preceded by formal communication, which could constitute a surrogate for a declaration of war (breaking diplomatic relations, sending official demands, etc.).[161] Thomas Joseph Lawrence observed that the legal effects of war will always occur at the moment of the first armed act – except for a situation in which a formal declaration of war is issued.[162] A similar position was taken by J.C. Bluntschli.[163]

11.2. Returning to the declaration of war. The 1905 Russo-Japanese War

At the end of the 19th century, Japan entered the arena of international relations with the intention of ascending to the role of a power in Southeast Asia. After a series of successful conflicts with China, Japan seized control of the Korean Peninsula. The Land of Rising Sun's offensive coincided with Russia's expansionism in the Pacific, whose main sign of presence in the region was the Port Arthur naval base, the operational base of the Russian Pacific Fleet. The conflicting interests of

158 T.J. Lawrence, *The Principles*…, p. 300.
159 G.B. Davis, *The Elements of International Law, With An Account*…, p. 281.
160 W.E. Hall, *A Treatise on International Law*, Oxford 1904; L. Oppenheim, *International Law: A Treatise*, p. 392.
161 J. Westlake, *International Law: Part II: War*, Cambridge 1913, pp. 20–26.
162 T.J. Lawrence, *The Principles*…, p. 302.
163 J.C. Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten als Rechtsbuch dargestellt*, Nordlingen 187, p. 4.

the powers, related to the division of influence zones in China, Manchuria and Korea, led to a confrontation. On February 6, 1904, diplomatic relations between the feuding states were formally severed. On the same day, Vice Admiral Alekseyev, commanding the Russian fleet, received a warning about the possibility of an imminent outbreak of war. Meanwhile, on the night of 8 and 9 February, 1904, a Japanese squadron approached Port Arthur imperceptibly and launched an attack with an unannounced torpedo salvo. The official declaration of war reached Moscow the next day. The unexpected strike on the fleet caused a general shock in Russia. The defeat in the land battles at Mukden and the great victory of the Japanese fleet at Tsushima, as well as the revolt in Russia itself, led the parties to the peace table in Portsmouth in 1905, which ended with the division of the zones of influence in the Far East.[164]

This war, in addition to its development (as the first "modern" armed conflict), also aroused serious interest in the domain of international law. Events related to the Dogger Bank incident, for example, gave impetus to talks on international regulations relating to the possibility of a peaceful settlement of international disputes.[165] Tsar Nicholas II could not get over the fact that the Japanese side had begun hostilities without issuing an appropriate declaration of war, and for this reason (partly in order to distract public attention from the disastrous state of the Russian army and fleet, which had been the main cause of the defeat at Port Arthur), on 22 February, 1904, he dispatched a diplomatic note to neutral states, in which he considered the Japanese attack to have been a violation of international law and a treacherous act in international relations.[166]

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164 In the Battle of Tsushima, the Baltic Fleet, sailing as a relief force, was almost completely destroyed. Its voyage covered ca. 30,000 km. In the land war, the Russian side was accused of crimes committed against the local civilian population, who were accused of favoring the enemy. At that time, many later senior officers of the Polish Army served in the Tsarist army, including the commander of the "Piotrków" Operational Group and the defense of Modlin in 1939, Gen. Wictor Thommée, the first commander of the reborn navy Adm. Kazimierz Porębski, as well as Gen. Lucjan Żeligowski. Particularly interesting is the story of Gen. Jerzy Wołkowicki, who was in the service in the Tsarist fleet and as a junior officer opposed the surrender of his ship at Tsushima in 1905, as a result of which he became a hero in the Russian Empire. In September 1939, commanding an improvised unit in the Lublin region, he fell into Soviet captivity. He avoided the fate of the Polish officers in Katyn, probably as a result of his attitude during the Russo-Japanese war.

165 When examining the incident between the United Kingdom and the Russian Empire, it was decided to establish an International Commission of Inquiry, which recognized the responsibility of the Russian side for the attacks on British fishing boats and awarded appropriate compensation. The above circumstances contributed to further development of the solutions for peaceful settlement of international disputes, through, among others, the adoption of the Convention for the Pacific Settlement of International Disputes in 1907.

166 S. Lee, H.E. Lee, *The Making of International Law in Korea: From Colony to Asian Power*, Leiden 2016, pp. 32–33.

At this point, it is worth reminding an earlier incident from the period of 1895–1896 concerning the Sino-Japanese war over Korea. On July 25, 1894, during a patrol in the Yellow Sea, a Japanese cruiser sank a British merchant ship "Kowshing", which was transporting Chinese military units with equipment to Korea. In addition to a Chinese crew, there were many Europeans on the ship. The transport was intercepted by the Japanese navy, which demanded the detention of the ship and the transfer of the crew on board the Japanese ships, as a result of which a revolt broke out among the Chinese soldiers, resulting in the torpedoing of the ship. In the meantime, the first clashes between the Japanese and Chinese fleets had already taken place. It was not until August 1, 1894, that Japan declared war on China. The problem of the responsibility of the Japanese side was related to the issue of viewing the incident from the perspective of the laws of war (as an attack on a neutral unit but transporting Chinese military personnel) or from the perspective of the law in force during peacetime, in which a British ship had been sunk in the high seas. For this reason, a diplomatic dispute flared up between the United Kingdom and Japan over the determination of the scope of responsibility for the sinking of the ship borne by the belligerent party. Meanwhile, the vast majority of the representatives of the British doctrine of international law emphasized that the act of the Japanese authorities had been undertaken in the conditions of a *de facto* war and was, from the perspective of *ius in bello*, authorized – the ship was subject to control and seizure, or it could have been destroyed as a hostile military personnel transport.[167]

However, this view was not upheld in its entirety in this respect, and some continental authors (mainly French), inspired by the position of the Russian scholar, the previously quoted Friedrich Martens, before the 1907 Second Peace Conference in the Hague, opted for the existence of an explicit requirement to give prior notification of hostile actions.[168] This was strongly opposed by representatives of the Anglo-Saxon doctrine and Japanese lawyers, pointing to the lack of practice of states and the irrelevance of the existence of a prior war declaration for its actual occurrence.[169] Sakuye Takahashi, who was a legal advisor to the Japanese Navy during the conflict, presented an interesting argument on the legitimacy of submitting a prior declaration of war, taking into account historical analysis, as he proved – also on the basis of the practice pursued by the Russian Empire in the nineteenth century – the practical disappearance of opening military operations with an appropriate declaration of commencing hostilities. At the same time, he pointed to four temporal points marking the beginning of the military operations

167 T.E. Holland, *Letters to "The Times" upon War and Neutrality (1881–1909)*, London 1909, pp. 34–37.

168 D. Howland, *International Law and Japanese Sovereignty: The Emerging Global Order in the 19th Century*, New York 2016, p. 110.

169 *Ibidem*, pp. 109–111.

between Russia and Japan in 1904. The first was diplomatic notes, which were in fact an ultimatum to the Empire, the second was the departure of the Japanese fleet from the base with the intention of attacking Port Arthur, the third was the formal declaration of war – as a *de iure* element, the fourth was the actual attack on Port Arthur – as a *de facto* element. The author argued that the first step in the war was the seizure of a Russian volunteer navy vessel a few hours before the attack on Port Arthur.[170] Thus, Takahashi took a position that coincided with the view of the Anglo-Saxon understanding of the declaration of war as an unnecessary step.

Despite these doubts, the Institute of International Law at the session in Ghent in 1906 took the opposite position and adopted the requirement to issue a prior declaration of war.[171] It was deemed that the Crimean War, which began with the declaration of war on Russia by Turkey, was a fundamental turning point in the practice of states, in parallel with the notifications in the Franco-Prussian conflict of 1870, and is evidence of the return of civilized states to old customs (the Japanese stance was explained by the "newcomer standing" of this state among the states observing international law).[172] The importance (despite the lack of convincing practice) of Russia's protest against the operation of the Japanese fleet operating without delivering a prior declaration of war to the Russian side was raised.[173] Not all participants agreed with the position of the Institute's rapporteur (Alberic Ronin), including Gen. den Beer Poortugael.[174] During the discussion, representatives of the Anglo-Saxon doctrine (Thomas Barclay) strongly argued that in today's conditions, a declaration of war is rarely a surprise for the party under attack. As a rule, this act is accompanied by significant tension in external relations, combined with the mobilization of armed forces, the activity of intelligence services, the freezing of diplomatic relations and the concentration of troops on the borders.[175] The opposite argument (Baron Deschamps) was the need to clearly separate the time of war and peace, which is in the interest of neutral states and the entire international community.[176] A fragment of the discussion (Paul Fauchille) also concerned the issue of separating the postulates related to the proposals for the emergence of positive law (*de lege ferenda*) rather than decoding existing customs

170 S. Takayashi, *International Law, Applied to the Russo-Japanese War, With the Decisions of the Japanese Prize Courts*, New York 1908, pp. 20–25.

171 "C'est que d'après le dernier état du droit international, d'après les usages internationaux, les hostilités doivent être précédées ou d'une déclaration de guerre expresse ou d'un acte équivalent. Ce qui est d'usage généralement sui vien tre nations respectueuses du droit international devient règle. Les règles de ce droit n'ont pas d'autre base positive. Et, au point de vue du droit positif, les écrits des auteurs n'ont d'importance qu'en tant qu'ils relèvent et constatent les usages" – *Annuaire de l'Institut de Droit International*, vol. XXI, p. 33.

172 *Ibidem*, p. 34.

173 *Ibidem*, p. 39.

174 *Ibidem*, p. 72.

175 *Ibidem*, p. 272.

176 *Ibidem*, p. 276.

(*de lege lata*). Finally, with votes opposing the Anglo-Saxon doctrine, and votes of continental lawyers, the Institute adopted the following resolution:

1) in the spirit of the requirements of international law and the principles of mutual trust in international relations, it is desirable not to take military actions before issuing an explicit warning;
2) the warning may take the form of a simple and legible declaration of war or an ultimatum to be served on the opposing party;
3) military actions should not be taken with a delay that may suggest the disappearance of the grounds for the original warning.[177]

11.3. Third Hague Convention of 1907

Consequently, at the Second Peace Conference in the Hague in 1907 (hosted by Tsar Nicholas II, with Friedrich Martens as the chief diplomatic representative of the Russian court), the Third Hague Convention on the Opening of Hostilities was adopted following the position of the International Law Institute.[178] Article 1 of the Convention states that hostilities cannot begin "without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war". Article 2 imposed the obligation to notify neutral states and only when a relevant notification was served, did the state of war have effect in regard to them. The text of the 1907 Third Hague Convention aimed at recognizing the declaration of war as an act with constitutive effects by prohibiting military actions without its submission. It directly aimed at the possibility of limiting the possibility of an unannounced assault, to deprive a possible adversary of a strategic and tactical advantage resulting from the failure to submit a prior notification.[179] According to the preamble and Article 1, the Convention was ultimately supposed to refer to all "hostilities", including cases of using force, e.g., in the form of reprisals.[180]

This document, which is related to the regulations of the *ius ad bellum* type, also referred in a significant manner to the issue of the temporal application of *ius in bello*, indicating the declaration of war as the initial moment of a state of war and thus the first moment of the applicability of the law of armed conflicts, aimed, in a sense, at "coupling" both concepts.[181] However, the discussion on its

177 *Ibidem*, p. 292.
178 Convention of October 18, 1907, on the Opening of Hostilities (the Third Hague Convention) (Journal of Laws of 1927 No. 21, item 159).
179 N. Schrijver, *The Ban on the Use of Force in the UN Charter*, [in:] M. Weller (ed.), *The Use of Force in International Law*, Oxford 2015, p. 467.
180 D.W. Bowett, *Self-Defense in International Law*, New Jersey 2009, p. 121.
181 C. Eagleton, *The Form and Function of the Declaration of War*, "American Journal of International Law" 1938, vol. 32, p. 21.

normative value in the doctrine of international law has a very limited dimension and it could be doubted whether the regulation of the Third Hague Convention of 1907 is relevant also in the context of *ius ad bellum*.[182] The above was primarily influenced by the practice of states. While in the case of the First World War, both Austria-Hungary and Germany began hostilities by submitting appropriate notifications, during the Second World War, the last declaration of a constitutive nature was the declaration of war on the Third Reich by France and Great Britain of September 3, 1939. After World War II, a declaration of war became an exclusively historical fact and the practice of declaring it was completely abandoned. One of its surrogates is the emergence of all kinds of authorizations to take military actions in a national dimension (such as in the United States) or, for example, the UN Security Council resolution issued in the mode of action taken pursuant to Chapter VII of the UN Charter.

11.4. The crime of an unannounced air attack?

During the work of the Tokyo Tribunal, the prosecutors from the Allied states tried to create a term for a new crime of international law in the form of a crime of undeclared war, classified as part of the crime against peace – i.e., the crime of planning, preparing, starting and conducting a war in violation of international law treaties and the crime of a surprise attack resulting from it, which, according to the prosecution, led to the murder of Allied sailors as a result of the air attack on Pearl Harbor on December 7, 1941.[183] One should emphasize here the doubts regarding the adopted concept of accusing the Japanese military and political leadership of failing to pay attention to the principle of *lex consumens derogat legi consumptae*, due to the overlapping of the crime of an unannounced attack and the crime of an undeclared war. It cannot be overlooked that, in principle, waging war without a prior declaration was irrelevant in the light of the fact that Japanese actions in December 1941 were an aggressive war *per se*. The considerations of the International Military Tribunal for the Far East (IMTFE) confirmed only the "technical" nature of the provisions of the Third Hague Convention of 1907, which is more the evidence of the general direction of the Japanese military and political leadership, which was to enter the war contrary to the principles and

182 A. Clapham, P. Gaeta, M. Sassòli, *The Concept of International Armed Conflict*, [in:] *eidem*, *The 1949 Geneva Conventions: A Commentary*, Oxford 2016, p. 4 ff.

183 "The facts which have been made official indicate that a diplomatic impasse was reached between the United States and Japan during the month of November, 1941. Both governments realized by that time that war was unavoidable, but neither dispatched a bona fide ultimatum" – N. Hill, *Was There an Ultimatum Before Pearl Harbor?*, "American Journal of International Law" 1948, vol. 42, p. 367.

requirements resulting from the *ius ad bellum*.[184] It was also a mistake to confuse the concept of a crime against peace – understood as the crime of an undeclared war or the accusation of waging a war in violation of international law and the unknown category of the crime of an unannounced attack as a crime against humanity.[185] In the context of *ius ad bellum,* one cannot agree with the opinion presented by J.J. Robinson that the failure to include charges referring only to the violation of the Third Hague Convention of 1907 in the indictment is not evidence of depreciating the normative value of the declaration of war.[186]

12. Non-International Air Warfare

It should be emphasized that by military definition, aircraft can only be used by a national air force. The existing instruments relating to air warfare, both in the form of the 1923 Hague Rules of Air Warfare and the 1977 AP I, do not refer in any way to the possibility of a non-state participant of an armed conflict having the right to own military aircraft, which *ex definitione* seems to be excluded. This is confirmed by the contents of the commentary to the 2009 Manual of International Law Applicable to Air and Missile Warfare – HPCR – which clearly states that aircraft belonging to parties to the conflict other than states cannot be qualified as military aircraft but may become legal military objectives due to their intended purpose.[187] Despite the clear wording of the above provision, it should be noted that in the history of air operations, there are situations in which a non-state

184 "For reasons which are discussed elsewhere we have decided that it is unnecessary to deal with these charges. In the case of counts of the indictment which charge conspiracy to wage aggressive wars and wars in violation of international law, treaties, agreements or assurances we have come to the conclusion that the charge of conspiracy to wage aggressive wars has been made out, that these acts are already criminal in the highest degree, and that it is unnecessary to consider whether the charge has also been established in respect of the list of treaties, agreements and assurances – including Hague Convention III – which the indictment alleges to have been broken" – International Military Tribunal for the Far East, *Judgment of 12 November 1948*, [in:] J. Pritchard, S.M. Zaide (eds.), *The Tokyo War Crimes Trial, Vol. 22*, New York 1981, pp. 575–576.

185 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Law of War*, Washington 1948, p. 258.

186 J.J. Robinson, *Surprise Attack: Crime at Pearl Harbor and Now (Part II)*, "American Bar Association Journal" 1960, vol. 46, p. 1088.

187 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge 2013, p. 38.

entity marked its aircraft in a manner specific for a military air force. As a rule, these concerned entities, aspiring to achieve recognition of the state on the international forum, e.g., air force formations, were created in 1960 by the rebellious province of Congo-Katanga.[188] Another example is the situation of the Rhodesian Republic, whose unilateral secession from the British Commonwealth was recognized only by the South African Republic and Portugal.[189] "Legalization" of the status of the above-mentioned air forces is achieved by recognizing a given party as combatants (recognition of belligerency) or submitting – in the mode of Article 96, para. 3 of AP I – a statement on being bound by the provisions of the Protocol.[190]

Contemporary combat operations carried out with the use of aviation over the last two decades are primarily used in military operations and non-international conflicts.

13. Non-international armed conflict

Regulations concerning non-international armed conflicts refer primarily to the post-war codification of international humanitarian law made first in Geneva in 1949 and then in 1977 through the adoption of two Protocols Additional to the Geneva Conventions. As the doctrine of international law indicates, armed conflicts without an international character do not have their legal definition. Sandesh Sivakumaran argues that this was a deliberate procedure, intended to leave determination of the correct interpretation of the provision to practice.[191] The so-called common Article 3 for the 1949 Geneva Conventions covers all conflicts that do not take place exclusively between the contracting parties. The common Article 3 includes considerations for a state of internal conflict between the government side and insurrectionist groups, as well as the situation in which conflicts between insurrectionist groups occurs. What is the threshold for the application of the common Article 3 and in what situations is its application justified? The ICRC commentary, edited by J.S. Pictet, indicates the need to determine the

188 The organizer of the Katanga Air Force was the well-known Polish fighter ace from the period of World War II, Jan Zumbach. This unit operated a handful of Fouga CM.170 Magister aircrafts.

189 The Rhodesian Air Force had significant aviation potential, including modern Canberra bombers and Hawker, Hunter, B. Salt, *Pride of Eagles: A History of the Rhodesian Air Force*, Durban 2000.

190 In 2015, a statement of this type was made by Polisario: Popular Front for the Liberation of Saguia el-Hamra and Río de Oro.

191 S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford 2012, pp. 161–162.

geographical scope of action of one of the parties to the conflict and the existence of a front, in this case, pointing to analogies related to the classic armed conflict between states.[192] Natasha T. Balendra refers to the fact that this provision is binding for all parties to the conflict, also for the so-called non-state entity in the form of a non-state actor. This results from the provisions of the common Article 3, which indicates only the moment and geographical area where a state of armed conflict arises – it must be a territory of one of the contracting parties. The author points out that commonly occurring additional criteria for the application of the so-called common Article 3 of the Geneva Conventions is the demonstration of the existence of the so-called organized armed group by a non-state entity of an appropriate degree of organization, which allows for acquiring an attribute of a party to an armed conflict by a given non-state entity.[193] Jan K. Kleffner argues that the reasons why an organized armed group is considered to be a party to an armed conflict are unclear and difficult to describe in detail. These result partly from the actual exercise of some of the competences of a legitimate government by a given group or the limited capability of such a group to enter into agreements (e.g., on the issue of a ceasefire) or on elements of customary humanitarian law.[194] The degree of a group's organization has not been clearly defined. Jelena Pejic recognizes the need to meet certain characteristic conditions that allow for assuming that a given group has a sufficient level of organization in the form of its own headquarters, specific subordination hierarchy, ability to plan and conduct combat operations, discipline and internal organization.[195] These conditions are not easy to meet in a practical way. When analyzing the circumstances of the Syrian conflict, it should be noted that, in addition to the governmental party, it is debatable whether specific civil war entities, such as self-defense units or subunits of the Free Syrian Army were sufficiently centralized and unified to demonstrate an adequate degree of combat organization.

Article 1, para. 1 of AP II is a regulation that was supposed to cover the states of armed conflicts with the intensity and characteristics which are most similar to an international armed conflict, displaying the features of a civil war. Such a conflict

192 "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single state. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front" – J.S. Pictet, *The Geneva Conventions*…, p. 36.

193 N.T. Balendra, *Defining Armed*…, p. 2470.

194 J.K. Kleffner, *The Applicability of International Humanitarian Law to Organized Armed Groups*, "International Review of the Red Cross" 2011, vol. 93, p. 460.

195 J. Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, "International Review of the Red Cross" 2011, vol. 93, no. 881, p. 192; A. Clapham, *Focusing on Armed Non-State Actors*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 785.

may only occur in the conditions of armed interaction between the government forces and an insurrectionist group or another organized armed groups.[196] Linguistically, Article of 1 AP II is meant to supplement and expand the common Article 3 of the Geneva Conventions. It is worth noting that the essence of the application of AP II is to indicate a higher degree of organization of such a structure, which is *de facto* a separate unit of the executive power, equipped with appropriate prerogatives and the ability to conduct large-scale military operations.[197] The rules applicable in non-international conflicts have a limited treaty framework when comparing to international armed conflicts.[198] Both the common Article 3 of the Geneva Conventions of 1949 and AP II of 1977 contain only basic regulations related to conducting military operations. The contents of provisions referring to methods and means of conducting armed combat are scanty. This is due to the fact that developing states have secured their interests as part of the provisions contained in Article 1 of the AP I (by the extension of the scope of its application – Article 1, para. 4 of AP I).[199] As a consequence, many provisions with instructions analogous to AP I, relating to the manner of conducting military operations, the definition of military objectives and the proportionality principle were deleted from the AP II draft, in which only an article of a general nature was left.[200]

The complement of the modest treaty dimension of international humanitarian law is the role of international custom, which was particularly emphasized in the work of the ICTY. Its jurisprudence recognized many of the norms specified on the basis of AP I and II as having the aforementioned character and, consequently, applicable without restrictions to all parties to a non-international armed conflict.[201] The rules which are customary and are therefore applicable in military operations of an internal nature were reviewed with the adoption of the customary study of international humanitarian law by the ICRC in 2005. With respect to the scope of this work, special attention should be paid to the following rules:

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196 A. Dahl, M. Sandbu, *The Threshold of Armed Conflict*, "Military Law and Law of War Review" 2006, vol. 45, p. 371.

197 T. Fleiner-Gerster, *New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty*, "International Law and Comparative Law Quarterly" 1985, vol. 34, p. 276.

198 G. Rona, *Is There a Way Out of the Non-International Detention Dilemma*, "International Law Studies" 2015, vol. 91, p. 36.

199 M. Bothe, *The International Conference of the Red Cross and the Additional Protocols of 1977*, [in:] R. Geiss, A. Zimmermannn, S. Haumer (eds.), *Humanizing the Laws of War: The Red Cross and the Development of International Humanitarian Law*, Cambridge 2017, p. 69.

200 N. Melzer, *The Principle of Distinction Between Civilians and Combatants*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 319.

201 *Prosecutor v. Duško Tadić*, Decision on The Defence Motion for Interlocutory Appeal on Jurisdiction, 2nd October 1995, IT-94-1-AR72, para. 117.

1) rule No. 8 stating that the definition of military objectives adopted under Article 52 para. 2 of AP I applies in a non-international conflict due to the "lack of contrary practice";[202]
2) rules No. 11 and 12 prohibiting indiscriminate attacks, indicating the elements of these attacks as an example of recognizing Article 13 para. 2 of AP I as a customary one and recognition of the standard as a customary one too by the ICJ in the advisory opinion on the legality of the threat or use of nuclear weapons as well as the jurisprudence of the ICTY and the "lack of contrary practice";[203]
3) rule No. 13 prohibiting zone bombing as resulting from the prohibition of indiscriminate attacks and thus applicable in armed conflicts of a non-international nature;[204]
4) rules No. 14 and 15–18 defining the rule of proportionality and the obligation to apply the precautions as applicable in a non-international armed conflict, because of international jurisprudence, the provisions of UN Resolution 2675/1970 and the "lack of contrary practice";[205]
5) rule No. 48 prohibiting attacks on persons evacuating from aircraft in a forced situation, as resulting from the assumption that persons in such a state are treated as *hors de combat* and are thus under the protection of the common Article 3 of the Geneva Conventions of 1949;[206]
6) rule No. 62 prohibiting the improper use of the adversary's flags or military emblems, insignia or uniforms;[207]
7) rule No. 70 prohibiting the deployment of weapons that may cause "superfluous injury or unnecessary suffering" due to the "inadmissibility of the deployment of inhumane weapons in any armed conflict".[208]

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202 "No contrary practice was found with respect to either international or noninternational armed conflicts in the sense that no other definition of a military objective has officially been advanced" – J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules*, Cambridge 2005, p. 31.

203 *Ibidem*, pp. 39, 42.

204 *Ibidem*, pp. 43–45.

205 *Ibidem*, pp. 48–49, 51–59.

206 "The prohibition on attacking persons parachuting from an aircraft in distress is also applicable in non-international armed conflicts on the basis of common Article 3 of the Geneva Conventions, which protects persons placed hors de combat by «any» cause" – *ibidem*, pp. 171–172. "But this rule is deemed to be a reflection of international humanitarian customary law applicable to non-international armed conflicts by the ICRC as well as by the Manual on International Law Applicable to Air and Missile Warfare" – E. Henry, *The Sukhoi Su-24 Incident Between Russia and Turkey*, "Russia Law Journal" 2016, vol. 4, p. 20.

207 J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*…, pp. 212–213; Y. Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge 2014, pp. 216–217.

208 J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*…, p. 240.

It should be noted that the rules adopted as part of the ICRC study may significantly expand (if approved as a real reflection of the lawful practice of states) the scope of regulations relating to methods and means of conducting armed combat.[209] Some authors argue that the normative network applicable in international and non-international armed conflicts is in fact unified (regarding the conduct of hostilities), with the exception of several rules in which the customary status in relation to AP I is questioned (e.g., standards for the protection of the natural environment in an armed conflict).[210] The reception of the above rules in the form proposed by the ICRC study also took place in relation to the HPCR Manual of 2009, which recognized most of the proposed solutions indicated on the basis of the draft law of air and missile warfare as relevant in the conditions of air war (rules No. 11–14).[211] The issue of the obligation to use markings on the external surface of military aircraft in a non-international armed conflict remains controversial. According to I. Henderson, no such obligation exists.[212] On the other hand, however, the practice of states indicates that military aircraft also have markings in this type of conflicts (Afghanistan, Syria).

14. The status of the crew of a military aircraft in a non-international armed conflict

An important consequence and fundamental difference in relation to the normative network regulating international armed conflicts is the lack of the legal status

209 "The report found that the «gaps» in the regulation of the conduct of hostilities «have largely been filled through state practice» More specifically, «[s]tate practice has gone beyond existing treaty law and expanded the rules applicable to [internal] armed conflicts». Therefore, the legal framework for internal armed conflict is extended by customary law" – O.M. Buckley, *Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara*, "North Caroline Journal of International and Comparative Regulation" 2011–2012, vol. 47, p. 816.

210 S. Sivakumaran, *The Law of Non-International*…, p. 65.

211 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary*…, p. 50 ff.

212 "In a noninternational armed conflict, there is no customary international law requiring the marking of military aircraft. As long as the government forces operate within the other rules of international law applicable during a non-international armed conflict, the government forces may use any type of aircraft with or without markings – noting that misuse of symbols of protection" – I. Henderson, *International Law Concerning the Status and Marking of Remotely Piloted Aircraft*, "Denver Journal of International Law and Policy" 2011, vol. 39, p. 625.

of a combatant in non-international armed conflict.[213] Troops of irregular armed groups only have the status of *de facto* combatants, not *de iure*.[214] The consequence of this is the inability of these persons to benefit from the prisoner of war status (such detainees remain under the protection of the common Article 3 for the Geneva Conventions of 1949).[215] This applies in particular to aircraft operators belonging to irregular armed groups, and to aircrews of the regular armed forces. However, a more nuanced situation may arise when the members of the regular armed forces are deployed in the UN activities. Such a circumstance came to light in the context of the US Operation "Restore Hope", conducted in 1992–1993, when, on October 3, 1993, one of the pilots of a Black Hawk helicopter was detained by rebel units belonging to the local police. His status raised doubts, and the initial US demand to treat Sergeant Mike Durant as a prisoner of war was withdrawn due to the possibility of holding a prisoner of war captive until the end of military operations.[216] Other reasons included the failure of the armed conflict in Somalia to reach a level characteristic of an international armed conflict and thus the unwillingness to legitimize the actions of the Somali militia as having the authority characteristic of organized armed forces.[217] The solution in this situation was to recognize the American pilot as an expert performing UN-mandated tasks, who is entitled to privileges and immunities during the mission, in the form of freedom from detention (Article 22(a) of the 1946 Convention on the Privileges and Immunities of the United Nations).[218] Marco Sassòli pointed out that, from a practical point of view, the above legal concept was ineffective, especially if it assumed the necessity to immediately release the person concerned. In this regard, he referred to, for example, the actions taken by the French side in connection with the shooting down of one of the combat aircraft during flights over Bosnia in 1994, which demanded that the captured pilots be

213 S. Sivakumaran, *The Law of Non-International*…, p. 521; M. Janaby, *The Legal Regime Applicable to Private Military and Security Company Personnel in Armed Conflicts*, Zurich 2016, p. 138; M. Roscini, *Cyber Operations*…, p. 192.

214 D. Fleck, *International Humanitarian Law after September 11: Challenges and the Need to Respond*, "Yearbook of International Humanitarian Law" 2003, vol. 6, p. 56.

215 M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, "The Journal of Criminal Law and Criminology" 2008, vol. 98, pp. 728–729.

216 O. Engdahl, *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' against the Background of General International Law*, Leiden 2007, p. 273.

217 S. Lepper, *The Legal Status of Military Personnel in United Nations Peace Operations: One Delegate's Analysis*, "Houston Journal of International Law" 1996, vol. 18, pp. 361–365.

218 Convention on the Privileges and Immunities of the United Nations confirmed by the United Nations General Assembly on February 13, 1946 r. (Journal of Laws of 1948 No. 39, item 286). L.L. Turner, *Civilians At the Tip of the Spear*, "The Air Force Law Review" 2001, vol. 51, pp. 74–75; W.G. Sharp, *Revoking an Aggressor's License to Kill Military Forces Serving the United Nations: Making Deterrence Personal*, "Maryland Journal of International Law" 1998, vol. 22, p. 17.

treated as prisoners of war.[219] The situation of capturing members of regular armed forces performing missions as part of UN-authorized activities indirectly necessitated the preparation of a new regulation on the international forum, allowing for an increase in the level of protection for peacekeepers, in the form of the 1994 Convention on the Safety of UN and Associated Personnel.[220] The protection under the provisions of the Convention is broad and also includes the so-called "accompanying personnel", which refers to persons delegated by a given state based on a relevant UN mandate. On this basis, C. Greenwood pointed out that the military aircraft personnel performing combat tasks for the UN peacekeeping forces as part of the "Deny Flight" mission were protected by the relevant provisions of the 1994 Convention.[221] Article 2 para. 2 of the Convention provided that it did not apply to actions taken on the basis of Chapter VII of the UN Charter if UN personnel were fighting against organized armed forces to which international humanitarian law, applicable in an armed conflict of an international nature, applied.[222] The doctrine reveals the problematic nature of the provision, causing significant consequences, especially in the case of the detention of a soldier acting as part of a peacekeeping mission, the detention of whom is generally unacceptable, and a situation in which, as part of a peace-enforcement mission (carried out under the authority of the UN Security Council in Iraq or Libya), a member of the armed forces of a state fulfilling the UN mandate becomes a combatant.[223] In other situations, Article 8 of the Convention provided that captured military personnel performing military tasks under the UN mandate should be immediately released and repatriated, and until then they would remain under the protection of the 1949 Geneva Conventions. However, it should be noted that activities undertaken outside the mandate of the UN peacekeepers captured airmen by the non-state party are protected under common Article 3 of the 1949 Geneva Conventions).[224]

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219 M. Sassòli, *Ius ad Bellum and Ius in Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?*, [in:] M. Schmitt, J. Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultines: Essays in Honour of Yoram Dinstein*, Leiden 2007, p. 260.

220 Convention drawn up at New York on December 9,1994 on the Safety of United Nations and Associated Personnel (2003 Journal of Laws No. 172, item 1671).

221 C. Greenwood, *Protection of Peacekeppers*…, p. 197.

222 See doubts regarding the application of the 1994 Convention in the case of operations carried out on the basis of the UNSC authorization granted on the basis of Chapter VII of the UN Charter in: A. Bouvier, *Convention on the Safety of United Nations and Associated Personnel: Presentation and analysis*, "International Review of the Red Cross" 1995, vol. 309.

223 S. Wills, *The Need for Effective Protection of United Nations Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, "Human Rights Brief" 2003, vol. 10, pp. 28–29; D. Fleck, *The Legal Status of Personnel Involved in United Nations Peace Operations*, "International Review of the Red Cross" 2013, vol. 95, pp. 624–625.

224 United States Congress House Committee on Foreign Affairs Subcommittee on Asia and the Pacific, POW/MIA: Hearing before the Subcommittee on Asia and the Pacific of the Com-

15. Geographical scope of application of the law of air warfare

It should be noted that the boundaries of the air warfare area have been determined by observing the practices of states. Joseph Kroell pointed out that the boundaries of the air warfare theater should be determined by the principle resulting from international aviation law which provides for the state's sovereignty in the airspace, recognizing that geographically, air warfare will be fought within an air column extending over the territory of the fighting states.[225] Roberto Sandiford pointed to the practice of states, which also extended the border of airspace into the territorial sea.[226] This was due to the traditional belief that combatants could carry out military operations over their territory (land area) and sea (territorial sea).[227] Amos S. Hersey pointed out that, in the absence of convention-based solutions in this respect, based on an analogy with solutions occurring pursuant to the law of the sea, military aircraft can perform military acts over the high seas.[228] The above theses resulted from the provisions of Article 1 of the 1919 Paris Convention, which defined the territory of a state.

The 1982 Convention on the Law of the Sea also allows states to exercise limited jurisdiction in the contiguous zone, the exclusive economic zone/exclusive fishery zone, or the continental shelf zone. However, these areas do not constitute a state's territory, and ships as well as aircraft benefit in these zones from the freedom of the high seas in the form of freedom of navigation and overflight (Article 58 of the 1982 Convention on the Law of the Sea). *Per analogiam*, since the practice of states, especially during World War II, fully allowed for air operations over the high seas, by the same token, the zones with limited coastal state jurisdiction are also locations available for armed combat in the air. The subsequent practice of states confirmed this rule, contrary to the provisions of Article 88 of the 1982 Convention on the Law of the Sea. Many air operations have been carried out within the exclusive economic zone or the high seas: an example is the Vietnam War (the so-called Yankee Station), the so-called Six-Day War (Operation "Focus"), the Iraqi-Iranian War, the First Gulf War or the war in Afghanistan (the first phase of the conflict in 2001). The course of the Ukrainian-Russian war in 2022 confirms the possibility of using the high seas and the exclusive economic zone for air operations in conditions of armed conflict. The above conclusions

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mittee on Foreign Affairs, House of Representatives, One Hundred Third Congress, second session, February 10, 1994, Washington 1994, p. 106.

225 J. Kroell, *Traité de Droit international public aérien: L'Aéronautique en temps de guerre*, vol. II, Paris 1936, pp. 34–35.

226 R. Sandiford, *Diritto Aeronautico*…, pp. 38–40.

227 L. Oppenheim, H. Lauterpacht, *International Law: A Treatise*, London 1952, p. 238.

228 A.S. Hershey, *The Essentials of International Law and Organization*, New York 1927, p. 661.

are confirmed by rule No. 10 of the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea.

Neutrality considerations do not allow combatants to conduct military operations on the territories of neutral states. However, the contiguous zone, the exclusive economic zone, and the continental shelf is not part of the territory of a coastal state (a neutral one in this context); hence, these areas are part of the theatre of war, with respect for the sovereign rights of a given coastal state. For practical reasons, any restrictions on military actions will not apply to air operations, but in particular to naval or submarine operations. But what if an air duel between conflicting parties were to occur on the territory of a neutral state, in its airspace? Would such a clash be subject to international humanitarian law? One must fully agree with the stance taken by M. *Sassòli*, who stated that *ius in bello* when opposing State forces exercise belligerent activity against each other irrespective of whether or not this activity occurs on their territories.[229]

Pursuant to Article 49 para. 3 of API, this provision applies "all attacks in whatever territory conducted […]". American instruction AFP 110-31 of 1976 indicated that, in the event of an armed conflict, enemy military aircraft and missiles can be destroyed in any place located outside the jurisdiction of a neutral state.[230] The commentary to the HPCR Manual of 2009 indicated that, according to the same principle, this also applied to the exclusive economic zone, as well as the continental shelf.[231] It should be emphasized that the principle of exclusive state sovereignty in airspace also applies to the territorial sea, where, unlike warships, no aircraft is entitled to exercise the right of innocent passage.[232] This is due to practical reasons related to the possibility of an effective interception of an intruder.

However, a question arises about the applicability of the scope of the law of air warfare (as well as international humanitarian law) regarding situations related to the geographical nature of an isolated conflict. As mentioned earlier, there are well-known situations in the history of wars in which states formally at war did not actually participate in military operations. However, the current scope of combat operations does not have to coincide with the state and administrative borders of particular regions or states and may, for example, cover only part of the territory of a given state (Ukraine 2014–2015) or include fragments

229 M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Northampton 2019.

230 AFP 110-31, *International Law-The Conduct of Armed Conflict and Air Operations*, pp. 4–1.

231 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary*…, p. 9.

232 This was linked to an incident involving the landing of a German seaplane on the high seas, which, by means of sea currents, found itself in the territorial waters of the Netherlands, which did not recognize it as a warship and interned it. B. Cheng, *The Right to Fly*, "The Grotius Society: Problems of Public and Private International Law" 1956, vol. 42, p. 101.

of several states (Afghanistan – Pakistan, Syria – Iraq). In connection with this, a question arises as to the geographical scope of the law of armed conflict, as well as the air warfare legal regime. It should be noted that the conventions of international humanitarian law do not provide an unambiguous answer to the question of the actual territorial scope of applying the standards contained therein. Article 29 of the VCLT provides that, in the absence of an appropriate reservation, international treaties shall be binding in respect of the entire territory of a state party. In the *Duško Tadić* case, the ICTY stated that at least part of the provisions of international humanitarian law apply to the entire territory and a certain scope only to where hostilities actually take place.[233] It also has a strong pragmatic justification. The parties to the conflict being aware of the territorially limited scope of the impact of the international humanitarian law standards could thus transfer, for example, downed pilots to territories located outside the zone of actual warfare and recognize that their status as *hors de combat* does not apply outside the place of the currently ongoing military operations.[234] This creates an obvious risk of a certain legal fiction that could completely render certain norms of international law of armed conflicts ineffective, especially regarding the status of prisoners of war. In another part of the judgment in the *Duško Tadić* case, the ICTY also pointed out that the common Article 3 for the Geneva Conventions of 1949, in the case of non-international conflicts, has a broader context and cannot be limited only to the actual limits of current armed combat.[235] Violations of the *ius in bello* standards must actually be related to the ongoing armed conflict, but violations of these provisions do not have to take place directly within the geographical boundaries of the currently ongoing armed conflict (the case of Tihomir Blaškić).[236]

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233 "Although the Geneva Conventions are silent as to the geographical scope of international «armed conflicts», the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited" – *Prosecutor v. Duško Tadić*, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, 2nd October 1995, IT-94-1-AR72, para. 68.

234 L. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, "Georgia Journal of International and Comparative Law" 2010, vol. 39, p. 14.

235 "This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations" – *Prosecutor v. Duško Tadić*, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, 2nd October 1995, IT-94-1-AR72, para. 69.

236 "In addition to the existence of an armed conflict, it is imperative to find an evident nexus between the alleged crimes and the armed conflict as a whole. This does not mean that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment. To show that a link exists, it is sufficient that: the alleged

Adopting the assumption of the validity of international humanitarian law in the entire territory of the state allows the possibility of attacking members of the personnel of the armed forces or combatants without meeting additional conditions. Tristan Ferraro points out that, in the case of armed conflicts of an international nature, the provisions of international humanitarian law allow attacking military objectives all over the territory of a state, and the territorial scope of international law of armed conflicts includes the territory, internal waters, territorial, exclusive economic zones and airspace over a given area, including the high seas s and airspace above them.[237] The author upholds the ICRC's position on the application of *ius in bello* norms and customs throughout the state, within the borders of which an armed conflict of a non-international nature occurs; however, not every case of armed violence in a state not engulfed in armed operations causes the activation of norms occurring on the battlefield.[238]

In the context of air warfare carried out in international space, it is worth referring to the case related to one of the first examples of targeted killing during World War II, i.e., the attack of the American military aviation on Japanese military aircraft, which were carrying the supreme commander of the Imperial Navy Adm. Isoroku Yamamoto on April 18, 1943. Mary E. O'Connell pointed out that the attack on the architect of the Japanese attack on Pearl Harbor would be inconsistent with the provisions of the Geneva Convention of 1949 because it took place due to distance between the incident and battlefield.[239] From the point of view of the law of air warfare, in principle, the legality of an attack should not be questioned, not only as to the classification of the target, but also the geographical location of the target – the attack took place in international waters, and in an international armed conflict, the border of military activities

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crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict" – *Prosecutor v. Tihomir Blaškić*, Trial Chamber Decision, 3rd March 2000, IT-95-14, para. 69.

237 "It is clearly confirmed by many provisions of IHL as well as by a host of international tribunals' decisions. These territories include all land areas, internal waters, archipelagic water, territorial sea, the subsoil and submarine areas underneath these expanses of land and water, the continental shelf as well as exclusive economic zones and territorial airspace. It is now also well recognised that the high seas (including the airspace above and the sea floor) are also included in the IHL scope of application when a situation of IAC has been determined" – T. Ferraro, *The Geographic Reach of the IHL: The Law and Current Challenges*, [in:] *Scope of Application of International Humanitarian Law 13th Bruges Colloquium 18–19 October 2012*, Brugge 2012, p. 107.

238 T. Ferraro, *The Geographic Reach of the IHL…*, p. 111.

239 "Finally, the Yamamoto case was not uncontroversial at the time, 94 and today it would be in conflict with the basic treaties that form the law on the use of force, namely the 1945 U.N. Charter and the 1949 Geneva Conventions. These treaties provide little or no right to use military force against individuals far from battlefields" – M.E. O'Connell, *The Choice of Law Against Terrorism*, "Scholarly Works Paper" 2010, vol. 749, p. 361.

carried out in a geographical context is generally limited only by the territory of neutral states.[240]

The horizontal boundary of the law of air warfare is defined in parallel with the boundary of airspace (atmosphere) and outer space. A clear definition of the demarcation line, determined on the basis of altitude criteria, is still the subject of numerous and divergent interpretations and definitions.[241]

240 "Any claim that shooting down a military aircraft flown by military pilots carrying a senior military officer would be considered illegal under international law today because the fighter aircraft involved in the mission had to fly approximately 450 miles from its base to complete the mission is wholly without support" – M. Lewis, *Drones and the Boundaries of the Battlefield*, "Texas International Law Journal" 2011, vol. 47, p. 304.

241 M. Lachs, *The International Law of Outer Space*, "Recueil des cours" 1964, vol. 113, p. 35.

CHAPTER IV

DEVELOPMENT OF THE LAW OF AIR WARFARE

1. The law of air warfare as part of the so-called Hague law. Preliminary remarks

In modern times, the internal division of international humanitarian law into the so-called Hague law and Geneva law has been established. The so-called Geneva law is an older field, a set of standards of positive law and customs, referring (in principle) to the treatment of wounded, shipwrecked and prisoners of war. One can point to certain sources of this law of a customary nature and records of state practice in the doctrine of international law in the 16th–19th centuries and various types of universals and military instructions from the Middle Ages and modern times. In the Golden Bull of Emperor Charles IV of Luxembourg from 1356, in addition to the provisions regulating the manner of election of future emperors of the Holy Roman Empire, there were also provisions regarding the penalization of many behaviors related to the conduct of wars in the form of unjustified arson, theft, plunder and unlawful land seizure under the guise of claims resulting from the law of war.[1] Another source of laws of war and customs in force in the late Middle Ages is the play *Henry V* by William Shakespeare, commonly cited by modern lawyers, written at the end of the 16th century, describing the period of Henry V's intervention in France during the Hundred Years' War, the culmination of which was the victory of English archers over French cavalry at the Battle of Agincourt in 1415. According to historical records, during the battle itself, at a critical moment for the English, the French prisoners of war were massacred. The king's decision arouses controversy to this day, considering it an act unworthy in the light of the principles of nobility and

1 "We prohibit also each and every unjust war and feud, and all unjust burnings, spoliations and rapines, unlawful and unusual tolls and escorts, and the exactions usually extorted for such escorts," – *The Golden Bull of the Emperor Charles IV 1356 A.D.*, January 10, 1356, https://avalon.law.yale.edu/medieval/golden.asp (accessed: 9.06.2025).

chivalry or justified by war necessity (French knights could be recaptured and immediately joined the fight against the English).[2]

The development of The Hague law was related to the regulation of methods and means of conducting armed conflict, which has been shaped throughout history. Analyzing the course of history, it should be noted that one of the first wars of total nature, which shook modern Europe, was the Thirty Years' War (1618–1648), in which warfare conducted over large areas greatly affected the civilian population.[3] The cause of the great losses suffered by the population of northern and central Europe were mass rapes and murders, peasant uprisings and famine caused by climate change (the period of the so-called Little Ice Age, as a result of which the Baltic Sea was frozen in its entirety).[4] The Swedish Deluge of 1655–1660 also had a similar course, which led to the demographic collapse of the Polish-Lithuanian Commonwealth and the huge plunder of property and cultural goods. At the same time, in 1621, King Gustav II Adolf of Sweden (dubbed the "Lion of the North" due to his extraordinary acumen in military command[5]) issued the so-called Articles of War (*Krigsartiklar*), which also contained fragments related to the law of armed conflicts. Articles 88–91 and 99–100 prohibited rape, arson of cities and villages owned by the king, as well as enemy cities and villages without an express order of the commander. Commanders, moreover, should not issue such orders without the king's authorization. The culprits were to be tried if the arson had brought benefits to the enemy. It was forbidden to make churches and hospitals the target of attack unless they were occupied by the enemy who was firing from there. It was forbidden to destroy certain types of buildings (churches, hospitals, mills), as well as to abuse clergy, the elderly, children and women unless they raised their weapons.[6] It can be seen that this document contains many observations on key issues of how wars are conducted, mainly against the civilian population, the issue of determining the legitimate object of a military assault, the moment of the civilian population's losing a special status or changing the

2 L.C. Green, *The Role of Law in Establishing Norms of International Behaviour*, "Israel Yearbook on Human Rights" 1987, vol. XVII, p. 169.

3 P.H. Wilson, *Was The Thirty Years War a 'Total War'?*, Liverpool 2012, pp. 25–26. Population losses in Germany could have amounted to approx. 20% of the population (5 million), as a result of the Thirty Years War Sweden lost approx. 30% of its entire male population.

4 P. Daudin, *The Thirty Years' War: The First Modern War?*, 2017, http://blogs.icrc.org/law-and-policy/2017/05/23/thirty-years-war-first-modern-war/ (accessed: 27.11.2020). The consequences of the Thirty Years' War had a significant impact on the scientific work of Hugo Grotius. G. Grafton Wilson, *Grotius: Law of War and Peace*, "American Journal of International Law" 1941, vol. 35, pp. 2–5.

5 The troops of Gustav II Adolf were the only ones in the 17th century who were able to stop the winged hussar cavalry during the Polish-Swedish war in Prussia in the years 1626–1629 (see the Battle of Tczew in 1627).

6 K. Ogren, *Humanitarian law in the Articles of War decreed in 1621 by King Gustavus II Adolphus of Sweden*, "International Review of the Red Cross" 1996, vol. 313.

status of buildings considered to be protected. The Swedish ruler also noticed that certain practices deemed to be mandatory at that time – e.g., the rule allowing unlimited looting of a town captured by storming the walls – should be discontinued due to the lack of a military advantage, which would be achieved, for example, in the pursuit of the enemy. In this respect, it is worth emphasizing that even in the mid-19th century, there was no strong voice against this practice, described as essentially legal.[7] In 1642, during the English Civil War, Lord Oliver Cromwell's army issued military legislation relating to the discipline and conduct of hostilities (*Laws and Ordinances of War established for the better conduct of the Army*). The regulations imposed penalties on the perpetrators of rape, plunder, and unjustified destruction of private property, as well as forbade the killing of the enemy who indicated the intention to surrender, with the simultaneous order to combat an opponent who does not demonstrate such an intention.[8]

In the 17th and 18th century, the concept of war gradually changed. The Thirty Years' War was the last conflict of a "private" clash of rulers deriving their legitimacy from the feudal period. Battlefields became a clash of nations waging war through their governments. The views of the lawyers of the Enlightenment period had a great impact on the change in the perception of war, especially the view on the changes taking place in societies and the comments on the background of the modern view on the issues of law and the coexistence of nations. In his *Social Contract*, Jean-Jacques Rousseau rejected the medieval view of the unlimited power of the victor over the loser in the war, recognizing that the element of a state of hostility cannot be the killing of the losing side. He derived this from the fact "that people are not enemies to each other", and war is a state between social structures such as states, towards which individuals are enemies as soldiers, not as people or citizens *per se*.[9] It is only states that can be the enemy in the conflict between states; the goal of the war is to defeat the other social structure to achieve it; it is permissible to fight its defenders, but once the weapons are laid down and the soldiers surrender, the status of ordinary individuals, who are not in a state of hostility with the enemy, is restored.[10] These views were confirmed by Jean-Étienne-Marie Portalis, the president of the prize court in the times of Emperor Napoleon I Bonaparte, who, in 1804, stated that war "is a relationship

7 H.W. Halleck, *International Law or Rules Regulating the Intercourse of States in Peace and War*, San Francisco 1861, p. 462.

8 B. Heuser, *Ordinances and Articles of War Before the Lieber Code, 866–1863: The Long Pre-History of International Humanitarian Law*, "Yearbook of International Humanitarian Law" 2018, vol. 21, p. 157.

9 "But this supposed right to kill the loser is clearly not an upshot of the state of war. Men are not naturally one anothers' enemies […] War is constituted by a relation between things, not between persons" – J.-J. Rousseau, *The Social Contract: Or Principles of Political Right*, London 1762, p. 40.

10 *Ibidem*.

between states and not between people who are enemies only as soldiers and not as citizens".[11] A more complicated theory of war can be found in Thomas Hobbes, who argued in *Leviathan* that the lack of statehood or other substitute for the superior structure leads to a state of war "everyone with everyone in whom nothing is unjustified […] there is no law and no justice".[12]

During the Franco-Prussian War on August 11, 1870, the King of Prussia and later Emperor of Germany William I announced that the war that German soldiers were waging on French soil was a war directed only against soldiers, and not the civilian population, which would be protected along with material goods as long as the inhabitants did not undertake hostile action against the German soldiers.[13] Meanwhile, it is difficult to conclude that the practice of the German (and also partly French) side during this conflict at least partially met the assumptions of positive international law of that period, regarding the treatment of prisoners, wounded, civilians and sieges of cities and settlements. Henry S. Edwards pointed out that during a conflict there were no – apart from the 1864 Geneva Convention and the standards of the 1868 St. Petersburg Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight. – explicit provisions regulating the manner of waging war by troops in the field. His analysis, however, points to several indisputable principles of customary international law that were in force in that conflict, in the form of a ban on attacking surrendering enemy soldiers and parlimentaires, the use of small-caliber exploding bullets, as well as the protection of medical personnel.[14] The status of civilians, who decided to openly resist the approaching army, seemed disputable, as a certain part of the states treated such a category of persons as being able to benefit from the prisoner of war status in the event of capture. This problem was an extremely serious issue of international law at that time and was associated with the mass movement of the so-called free shooters (*francs-tireurs*), who, without having the uniforms of the French army, organized themselves into various types of groups or units and conducted regular combat with the advancing enemy army. To this extent, the Prussians treated

11 E. Creasy, *First Platform of International Law*, London 1876, p. 360; G.B. Davis, *The Elements of International Law, With An Account of its Origin Sources and Historical Development*, New York 1908, p. 382.

12 T. Hobbes, *Leviathan or the Matter, Forme, and Power of a Common-wealth Ecclesiasticall and Civill*, London 1651, p. 63.

13 "We, William, King of Prussia, make known Hobbes the following to all the inhabitants of the French territories occupied by the German armies: «The Emperor Napoleon having attacked by land and by sea the German nation, which desired and desires to live in peace with the French people, I have taken the command of the German armies, and have been led by military events to pass the frontiers of France. I make war upon French soldiers, not upon French citizens«" – M. Hewitson, *The People's War: Histories of Violence in the German Land 1820–1888*, Oxford 2017, p. 442.

14 H.S. Edwards, *The Germans in France. Notes on The Method And Conduct of the Invasion The Relation Between Invaders and Invaded and the Modern Usages of War*, London 1874, p. 6.

members of the resistance movement as persons deprived of the status of prisoners of war, applying extensive repression towards captured partisans and civilians suspected of cooperation. The above circumstances led to the concept formulation of "unlawful combatant", whose legal status has been controversial to this day (this issue will be discussed in another chapter).

Another, third type of standard (after the Geneva Law and The Hague Law), which is also included in the catalog of international humanitarian law, are regulations and customs determining the admissibility of the use of a certain type of armament (disarmament law). Some of these standards will be of a mixed nature because, in parallel with the provisions prohibiting or limiting the possibility of using selected means of combat on the battlefield; there are also elements related to methods of combat, characteristic of the "Hague" type regulations. As a rule, this applies to international treaties that do not introduce a total ban on certain means of warfare. The best example of such a standard is the provisions of the III Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons to the 1980 CCW Convention.

2. Otto von Bismarck's dispatch of November 18, 1870

During the siege of Paris in 1870–1871, the Minister President of Prussia, through the ambassador of the United States in Paris, sent a letter to the French government on November 19, 1870 regarding air transport carried out by balloons from the surrounded city to the area under French control ("toutes les personnes qui prendront cette voie pour franchir nos lignes sans autorisation ou pour entretenir des correspondances au prejudice de nos troupes s 'exoiserint, si elles tombes en notre pouwvoir, au meme traitement, qui leur est ainsi applicable, que ceux qui ferait des tentaives semblalbles par le voie ordinaire").[15]

In this document, it was mentioned that in the event of a possible landing of the aerostats behind German lines, all crew members would be treated as persons operating behind enemy lines (it boiled down to a statement that captured crew members of the French balloons would be treated as spies).[16] Erik Castrén objected to the

15 P.B. Larsen, J.C. Sweeney, J. Gillick, *Aviation Law: Cases, Laws and Related Sources: Second Edition*, Leiden 2012, p. 2; A. Merignhac, F. Martens, *Les Lois et Coutumes de la Guerre Sur Terre d'après le Droit International Moderne et la Codification de la Conférence de la Haye de 1899*, Paris 1903, pp. 193–194.

16 As an interesting fact, it should be noted that in order to track the balloons used by the French side, units of Prussian uhlans were sent, which to a large extent consisted of recruits from the Grand Duchy of Poznań. G. Tissandier, *Souvenirs et récits d'un aérostier militaire de*

above interpretation, pointing out that it was the result of a distorted reception by the French side and arguing that the original dispatch did not explicitly refer to the treatment of crew members as spies.[17] During the conflict, there were two cases of the arrest and imprisonment of French balloon crews who landed in an area under German control. One of the crewmen, M. Verrecke, was captured and imprisoned after landing – he was released only two months after the peace treaty was signed.[18] The second commander of the balloon, A. Nobécourt, also landed outside the lines and was then sentenced to death after having been captured (the sentence was later converted into life imprisonment).[19] The French side rejected this view, recognizing that there was no possibility of exercising any jurisdiction in airspace, as in the case of the principle of freedom of the seas, which could not be seized.[20] This issue caused a lot of controversy in the research community.[21] For the then doctrine of international law, the action of the German side was also considered erroneous for another reason – it was believed that the actions of aircraft crews behind enemy lines could not be classified as acts of espionage, but rather as legal combatant acts, so the captured crewmen should be treated as prisoners of war.[22] Johann C. Bluntschli stated in this respect that, since an army exercising effective control over an occupied territory has the right to control the airspace within the effective range of its cannons, the use of balloons is prohibited in this respect. At the same time, objects flying above a certain height avoid both "sovereignty" and "rights" of the occupier, and it should be assumed that they only intend to fly over a given area.[23] Joseph Lefebvre argued that the personnel of aerostats tasked with observing the enemy's movements perform purely military actions and behave similarly to ships and vessels belonging to belligerents who intend to break the naval blockade of the enemy (and these crews have combatant rights).[24] The transparency of balloon missions and their similar nature to the activities of messengers or military couriers were emphasized.[25]

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l'armée de La Loire 1870–1871, Paris 1891, p. 248; P. Morin, *Les lois relatives à la guerre selon le droit des gens modernes*, Paris 1872, p. 146; P. Fauchille, H. Bonfils, *Traité de Droit International Public*, Paris 1921, pp. 628–629.

17 E. Castrén, *Ilmasota – kansainvälisoikeudellinen tutkimus*, Helsinki 1938, p. 164.

18 P.H. Windfield, *Aircraft Attacks*, "The Law Magazine and Review" 1915, vol. 257, p. 260.

19 J.M. Spaight, *War Rights on Land*, London 1911, p. 208.

20 M. Schladebach, *Lufthoheit: Kontinuität und Wandel*, Tübingen 2014, p. 18 ff.

21 P. Bordwell, *The Law of War between Belligerents: A History and Commentary*, Chicago 1908, p. 96; J. Vieillard-Baron, *Les Prisonniers De Guerre*, Paris 1902, p. 149; E. Acollas, *Le Droit De La Guerre*, Paris 1888, p. 59.

22 P.H. Windfield, *Aircraft*…, p. 270; G. Davis, *The Elements of International Law*, London 1900, p. 299; J. Guelle, *Précis des Lois de la Guerre sur Terre; Commentaire Pratique à l'usage Des Officiers de l'Armée Active, de la Réserve et de la Territoriale*, Paris 1884, pp. 187–188.

23 J.C. Bluntschli, *Le Droit International Codifie*, Paris 1895, p. 632.

24 J. Lefebvre, *Le droit des gens moderne dans la guerre continentale*, Paris 1886, p. 72.

25 P. Fiore, *Nouveau Droit International Public, Suivant les Besoins de la civilisation modern*, Paris 1885, p. 171.

3. The law of artillery bombardment

Emmerich de Vattel pointed out in the *Law of Nations* that the destruction of a city as a result of artillery bombardment is a last resort, which should be justified by specific reasons.[26] James A. Farrer highlighted that the views expressed by lawyers and fortification builders (Sébastien le Prestre de Vauban), expressing the view that objects and towns should be spared from artillery attacks, lost their importance as a result of the opposite practice of states in the 19th century.[27] For J.C. Bluntschli, a circumstance in which the assailant forces prevent urban population from leaving a besieged location due to a military necessity to force the other side to surrender earlier was a solution of extreme nature but still compliant with international law. In the case of artillery bombardment, it would be honorable to issue an appropriate warning to protect non-combatants; at the same time, in certain situations, military necessity justifies taking military action without notification.[28] The Swiss author also emphasized the problem related to the presence of various types of fortifications and fortresses within many urban centers, recognizing that, in this situation, a given place cannot be treated as "open and undefended".[29] Johann C. Bluntschli was the first to clearly articulate the existence of an old military rule prohibiting attacks on unfortified and undefended cities. In 1864, during the Prussian-Danish War over Schleswig and Holstein, German artillery destroyed the city of Sonderborg behind the Danish lines which the contemporary press claimed to be exclusively civilian and unfortified.[30] Analyzing the siege of Metz, Strasbourg (where mortars using plunging fire destroyed some valuable monuments of the city), Verona (destruction of the cathedral), and Paris during the Prussian-French war, H.S. Edwards pointed out that both sides assumed that fortified urban areas can be attacked irrespective of the presence of civilian objects or military objectives in city centers. During the warfare conducted in 17th and 18th centuries, artillery attacks generally did not cause more damage than those limited to fortifications – but the development of the artillery significantly change it.[31] During this conflict, there appeared voices clearly critical of

26 E. de Vattel, *Law of the Nations*, Philadelphia 1852, p. 368.

27 "Regular and simple bombardment that is, of a town indiscrimantly an merely its fortess, has now become the esthablished practice" – J.A. Farrer, *Military Manners and Customs*, London 1885, p. 15.

28 J.C. Bluntschli, *Das moderne Kriegsrecht der zivilisierten Staaten*, Nordlingen 1878, p. 10.

29 *Ibidem*.

30 F. Narjoux, *Notes and Sketches of An Architect Taken During a Journey in the Northwest of Europe, 1877*, "The Times", April 9, 1864, p. 24.

31 "The reason why formerly the civil population of fortified towns was often spared the terror and torture of a bombardment, was not because the warriors of the seventeenth and eighteenth centuries were more humane than those of the present day, but because their guns were less powerful" – H.S. Edwards, *The Germans in France*…, p. 173.

the practice of "shelling cities which are not used in the enemy's defense plan and whose bombing does not facilitate its seizure by eliminating defenders".[32]

It is difficult to verify J.C. Bluntschli's assumptions about the existence of an old artillery rule which prohibited attacking unfortified urban areas.[33] Fjodor Martens pointed to the illegal bombing of open cities on the Black Sea coast by the Turkish fleet during the Russo-Turkish war (1877–1878).[34] The war guidelines of the German General Staff from the period before World War I (1902) indicate that placing this principle in the form of positive law should be treated as a kind of *superfluum*, recognizing that the modern war doctrine does not know opposite cases.[35]

Another situation, in the opinion of German staff, was to attack defended cities in relation to which military logic required not only fighting the fortifications themselves but also the remaining urban area, which could be used by the enemy e.g. to transfer reserves to the threatened section of the front – also allowing the bombardment of areas that serve as sites for transferring military units or having a stopover.[36] This is confirmed by the reading of F. von Liszt's textbook, although he presents the above views as controversial.[37] By adopting the above-mentioned view, the scope of artillery shelling was significantly extended to include towns that could potentially be used by the enemy in the course of military operations. In this regard, the bombing of the town of Kehl (declared an open city) in the initial phase of the siege of Strasbourg by French troops was assessed, despite the German protests claiming that the attack was

32 "Setting aside this barbarous method of coercion, the utter uselessness of the bombardments of Strassburg and Paris will make them an everlasting disgrace to the German name. And here again we must go back to the Danish wars, in which acts, almost overlooked through smallness of the victimized towns, acquire a new significance by repetition on a larger scale. In 1864 the town of Sunderborg was bombarded and almost entirely destroyed, though it was situated on an island far behind the Danish positions, so that the Prussians could not obtain possession of it. The only result, besides the ruin of the inhabitants, was that the hospitals established there had to be removed, and that the Danish soldiers found their quarters less comfortable on their return […]. To suppose that the Prussian staff-officers experted the shelling of the town to have any influence on the issue of the siege would be a bad compliment to their military judgment" – "Quarterly Review" 1871, vol. 130, p. 482; H.S. Edwards, *The Germans in France*…, p. 297.

33 "Wenn eine Stadt mit Festungswerken verbunden ist, so ist die Beschießung, wenn dieselbe aus militärischen Gründen notwendig ist, vorzugsweise auf die Festungswerke und die Vorwerke (Mauern und Thore der Stadt inbegriffen) und deren Zugänge zu richten, die inneren Stadtteile dagegen, welche von den friedlichen Bürgern bewohnt werden, möglichst zu verschonen" – J. Bluntschili, *Das moderne Völkerrecht*…, p. 20.

34 F. Martens, *Traité de Droit International*, Paris 1883; J. Westlake, *International Law*, Cambridge 1913, p. 221.

35 J.H. Morgan, *The War Book of the German General Staff*, New York 1915, p. 38.

36 *Ibidem*, p. 39.

37 F. von Liszt, *Das Völkerrecht*, Berlin 1898, p. 227.

contrary to the law of nations.[38] Similar observations can be found in the context of the status of Paris.[39] Von Moltke (The Elder) personally admitted that indiscriminate bombardment was a "violation of the rights of humanity"; however, thanks to this practice, the time of the siege was shortened, and the humanitarian goal was ultimately achieved.[40] It should be noted that the mass use of artillery in the 17th and 18th centuries still concerned mainly weapons with a tactical dimension, based on the Gribeauval system used to combat enemy troops. In the siege dimension, these cannons, as already mentioned, could not do more damage than bringing destruction to fortifications. Guns with greater range and kinetic energy were introduced only as a result of a technological breakthrough. In the mid-nineteenth century, an Italian artilleryman constructed the first breech-loaded cannon with a threaded barrel, which was later distributed in various armies of the world (Armstrong's gun and the French 75 mm gun from 1897). In the same period, due to technical capabilities, there was also an increased interest in conducting the so-called non-line-of-sight or indirect fire, i.e., shelling targets invisible to cannon operators. These factors meant that, in addition to areas directly adjacent to the front line, locations previously placed beyond the effective range became endangered by artillery bombardment. In the years 1865–1868, the scope of permissible artillery attacks against fortified urban areas was discussed in the specialized French press, indicating that it was desirable to bombard both fortifications and residential areas due to the psychological effects of such fire leading to a forced surrender.[41]

On the discussion on the status of undefended (open) cities, the contemporary conditions consisting in the creation of barricades and makeshift fortifications in city centers and near significant non-combatant clusters by a defending party were considered. In view of such a practice, it was pointed out that the responsibility for the protection of the civilian population should be shared by both attackers (the besiegers) and defenders (the besieged).[42] In addition, there is a tolerance among the lawyers of that period for the possibility of civilian casualties among the inhabitants of defended areas, and even the recognition of these people as temporarily losing their protection resulting from the fact of being non-combatants.[43] As a consequence, it was permissible to attack both forts and other types

38 Of course, it should be remembered that the German side in this respect tried to choose the example of "legal" bombardment in such a way as to legalize similar practices in a future war. See: M. Howard, *The Franco-Prussian War: The German Invasion of France 1870–1871*, Padstow 2003, e-book.

39 M. Busch, *Bismarck in the Franco-German War 1870–1871*, New York 1879, p. 131.

40 *International Law Topics and Discussions*, Washington 1914, p. 88.

41 *Appendix B. The Bombardment of Fortified Towns*, [in:] H.S. Edwards, *The Germans in France. Notes on The Method And Conduct of the Invasion The Relation Between Invaders and Invaded and the Modern Usages of War*, London 1874, p. 311.

42 G. Davis, *The Elements of International Law*, p. 302.

43 J. Risley, *The Law of War*, London 1897, p. 108; F. Martens, *Traité*…, p. 221; W. Manning, *Commentaries on the Law of Nations*, London 1839, p. 139.

of fortifications, as well as urban areas, if the entire location met the requirements of a defended area. This resulted from the fact that the practice of attacking fortifications, which was in fact an attack against an entire city in order to force the population to surrender earlier, had an important justification, and potential responsibility for these losses was shifted to the defending side.[44] However, this was not a uniform view, as the deliberate targeting a built-up area with cannons, even during an attack on a defended city, was still treated by some authors as a violation of the laws of war.[45] Others raised the need to observe the rules of far-reaching caution, especially if the target of the attack were to be public utility facilities or of special cultural and historical value.[46]

The French war guidelines from 1884 pointed to a conflict of perspectives: a publicist one, which dictated directing fire only at defense installations, because the opposite actions did not bring results, and a military one, which recognized that the bombing of an entire urban area was justified by the fact that the entire civilian population was at the same time part of the crew of a city under siege.[47] Achille Morin pointed out that defended towns can be attacked only to the extent necessary to achieve a real breakthrough of the defense.[48] Pasquale Fiore mentions that before the war of 1870–1871, it was widely accepted that the effects of artillery bombardments should be limited to fortifications or buildings of military importance, at the same time, it was not possible to clearly determine the contemporary practice of states related to attacking defended urban areas.[49] Emile Acollas strongly argued that the only legal way to attack built-up areas defended or fortified by the opponent is the one directed against defensive installations.[50] In this regard, incidents from 1838 (the attack of the French fleet on Mexican forts in Vera Cruz) and 1855 (sparing Sevastopol by Allied troops) were mentioned, which are, in the opinion of J. Lefebvre, the last examples of the "old" practice of shelling undefended areas.[51] Other authors explicitly considered the bombardment of built-up areas as an illegal means of combat, but acceptable and widespread in practice.[52] The only platform for mutual understanding was the ban on the bombardment of undefended areas and obliging the assailant to take all necessary measures to protect public facilities, places of worship, culture and

44 M.C. Waxman, *Siegecraft and Surrender*: *The Law and Strategy of Cities as Targets*, "Virginia Journal of International Law" 1999, vol. 39, pp. 363–364.
45 T.J. Lawrence, *The Principles of International Law*, Boston 1900, p. 334; A. Sheldon, *Political and Legal Remedies For War*, London 1880, p. 353.
46 G. Davis, *The Elements of International Law*, p. 302.
47 *Ibidem*, p. 19.
48 A. Morin, *Les lois relatives*…, p. 202.
49 P. Fiore, *Nouveau*…, p. 136.
50 E. Acollas, *Le Droit*…, p. 56.
51 J. Lefebvre, *Le droit*…, pp. 51–52.
52 P. Fiore, *Nouveau*…, p. 692.

hospitals from the effects of the attack, unless they are used by the opponent for defense. At the same time, there was also a suggestion to treat places that can be occupied by ground troops, without resistance from the opponent, as undefended areas.[53] In this context, a departure was made from the concept of fortified areas, recognizing, after E. Nys, that they do not fit into the realities of modern war (fortifications were losing their real combat value, while cities became fortresses because of their buildings).[54] It is worth noting that in French the phrase *l'occuper*, which should be translated as "occupy", is used in this regard. The adoption of the Polish word *okupacja* ("occupation") makes it possible to bomb cities which are potentially undefended (i.e., abandoned by regular armed forces), but at the same time, resisting during their occupation. This results from the adoption of a certain logical process, in which taking over a city precedes the period of its occupation and, as a result, the combatants lose the possibility of bombardment because of taking over an undefended city.

4. The Brussels Conference of 1874

On July 9, 1874, Tsar Nicholas II, in a circular addressed to diplomatic missions accredited in the Russian Empire, proposed convening a diplomatic conference to adopt international law solutions in the field of regulating and codifying the already existing *ius in bello* principles for humanitarian and civilizational reasons, as well as the general interest of humanity.[55] The project submitted by the Russian Empire was developed by a young Russian researcher of international law – Fjodor Martens – who based it in its basic outline on the so-called Lieber Code of 1863, from the period of the American Civil War.[56] The outcome of the

53 A.-L. Pillet, *Le Droit de la Guerre, Premier Partie – Les Hostilites, Conferences Faites aux Officieres de la garnison de Grenoble*, Paris 1892, p. 171.

54 "It is recognized that the legitimacy of the bombing does not depend on The question of whether the town is open or fortified, but Whether it defends itself" – E. Nys, *Le Droit International; Les Principes, Les Théories, Les Faits*, Bruxelles–Paris 1906, p. 214.

55 "La conférence n'ayant d'autre but que de consacrer des règles universellement admises" – *Actes de la conférence de Bruxelles de 1874 sur le projet d'une convention internationale concernant la guerre: protocoles des séances plénières: protocoles de la commission déléguée par la conference*, Paris 1874; C.J.-M. Lucas, *La Conférence Internationale de Bruxelles sur Les Lois et Coutumes de la Guerre*, Paris 1874, pp. 4–5.

56 An interesting analysis of the details of the Russian initiative was presented by Peter Holquist (*The Russian Empire as a "Civilized State": International Law as Principle and Practice in Imperial Russia, 1874–1878*). F. Martens believed that the most serious problem in the practical application of the *ius in bello* standards is the ignorance of their content by an ordinary

delegates' efforts was a document known as the Brussels Declaration concerning the Laws and Customs of War of 1874.

Considerable controversy surrounded Article 14 of the Draft, which stipulated that "fortresses or fortified cities may be besieged; areas that are not defended by enemy soldiers or civilians and are not resisting are considered completely open cities; these areas cannot be a subject to attack or bombing".[57]

Objections to this provision were raised by the German delegate, who requested that the word "completely" (*entièrement*) be deleted. The representative of Switzerland demanded that the word "towns" be added to the wording. The adopted changes altered the contents of the original provision as follows: "Defended places may be besieged. Cities and towns that are not defended cannot be attacked or bombed".[58] Treatment of a town located nearby a fort as a defended location aroused controversy. At the request of the chairman, it was concluded that if an open city does not support the defense of a fortress or forts, it should be protected against an attack. During the conference in Brussels in 1874, Antwerp residents presented to the government a Belgian petition on the adoption of a principle at the diplomatic meeting, whereby inhabited settlements located in fortified urban areas would also be protected by the standard of international law against bombardment in the event of a siege.[59] This project was later presented and supported by representatives of Belgium and the Netherlands, but eventually the German delegate indicated that the petition leads to removing the possibility to conduct military operations to the full extent and in the effective range by the combatants.[60] It is interesting that, although the project was not included in the final text, the subcommittees issuing opinions on its contents admitted that "military operations should be directed only against armed forces and means of combat of belligerents, never against citizens of a state who do not actively participate in military operations".[61]

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soldier and the difference in interpretations (he did not see the intentional behavior of the parties during the Franco-Prussian War of 1871 as consisting in the violation of the laws and customs of war, but resulting from an erroneous interpretation).

57 "Les forteresses ou villes fortifiées peuvent seules être assiégées. Une ville entièrement ouverte, qui n'est pas défendue par des troupes ennemies et dont les habitants ne résistent pas. les armes à la main, ne peut pas être attaquée ou bombardée" – *Actes de la conférence de Bruxelles de 1874*…, p. 5.

58 *Ibidem*, p. 9.

59 "[...] comme un principe d'humanité qu'on ne puisse bombarder des quartiers de villes même fortifiées" – *ibidem*, p. 9.

60 "M. le général de Voigts-Rhetz demande qu'il soit acte au' protocole que, le bombardement étant un des moyens les plus efficaces pour atteindre le but de la guerre, il est impossib'e de satisfaire au désir des intéressés" – *ibidem*, p. 49.

61 "Elle s'est trouvée d'accord pour constater que, d'après les principes qui président à ses délibérations, les opérations de guerre doivent être dirigées exclusivement contre les forces et les moyens de guerre de l'Etat ennemi et non contre ses sujets, tant que ces derniers ne prennent pas eux-mêmes une part active à la guerre" – *ibidem*, p. 42.

The petition of the residents of Antwerp from 1874, after some modifications, contains the essence of the modern solutions of international humanitarian law in the context of the principle of distinction, 100 years before the Protocol Additional I to the Geneva Conventions of 1977.[62] The final text of Article 15 of the Declaration stated that "Fortified places are alone liable to be besieged. Open towns, agglomerations of dwellings, or villages which are not defended can neither be attacked nor bombarded".

During the conference, the status of balloon crews during an armed conflict, which was a direct reminiscence of the incidents that took place during the Franco-Prussian war, was also considered.[63] As part of the work on the issue of regulations devoted to prisoners of war, the status of soldiers who operate behind enemy lines in order to obtain intelligence information or transmit messages between different sections of the front was also discussed.[64] It was decided that this category of military personnel would not be treated as spies in the case of an overt combat operation.[65] To this extent, the delegates shared the general position of the contemporary doctrine of international law, which indicated the need to assimilate aircraft crews (aeronauts) into the categories of combatants, among others by requiring possession of unified uniforms and appropriate military ranks.[66] In this respect, it was also decided to equate members of a balloon crew who deliver messages and maintain communication between different army units or a territory of a state with the status of ground troops. The representative of the German side decided to depart from the position expressed in the Bismarck dispatch of November 19, 1870, and agreed with the general view on the treatment of balloon crewmen as prisoners of war.[67] At the request of the delegate, amendments to the conference protocol, according to which balloon crews can be summoned to surrender and fired upon in the event of refusal, were entered.[68] In this situation, a downed crew is treated as prisoners of war.[69] The position excluding the

62 J.M. Spaight, *War Rights*…, p. 166.

63 D.H.N. Johnson, *Rights in Air Space*, Manchester 1965, p. 8.

64 *Actes de la conférence de Bruxelles de 1874*…

65 J.F. Lycklama à Nijeholt, *Air Sovereignty*, The Hague 1910, p. 1.

66 "Everything is arranged in the Topinion of M. Gefifcken, after That aeronauts should not be regarded as Spies (International Law IV, § 2141), Mr Wilhelm (1) That the principle of the assimilation of aeronauts to Once admitted, they should be placed under the same conditions, That is, to give them a uniform that clearly marks Their military character, and regular titles, as well as a Villon. So, if the balloons come to fall in the ranks Enemies, no one will be able to challenge their crews belligerents" – C. Calvo, *Le Droit International Théorigue et Pratique: précédé d'un exposé historique des progrès de la science du droit des gens*, Paris 1896.

67 A. Rousseau, *Les Prisonniers de Guerre*, Paris 1903, p. 149; A. Mattelart, *The Invention of Communication*, Minneapolis 1998, p. 218.

68 J.A. Farrer, *Military Manners*…, p. 148.

69 "M. le général de Voigts-Rhetz demande qu'il soit acte au protocole que les individus montés en ballon pourront être sommés de descendre; que, s'ils s'y refusent, on pourra tirer sur eux,

possibility of considering balloon ship crewmen as spies was confirmed at the conference of the 1877 Institute of International Law in Ghent.[70]

At the diplomatic conference in Brussels in 1874, the first ever effort was made to codify international war law. Despite the fact that in the end none of the states ratified the so-called Brussels Declaration on the Laws and Customs of Land Warfare, the 1874 concept was the basis for the later Hague solutions of 1899 and 1907 and undoubtedly a clear signal to the international community about the customary status of many fundamental norms of international humanitarian law.[71]

5. The Laws of War on Land drafted by the Institute of International Law

In 1880, the Institute of International Law debated a draft presented at a session in Oxford by the rapporteur, M. Gustave Moynier, regarding so-called instructions for conducting land warfare (*Manuel Des Lois De La Guerre Sur Terre – Manual on Laws of War in Land Warfare*).[72] The association wanted to emphasize its contribution to the discussion on the development of international law regulating the rights and duties of combatants in land warfare. It was emphasized that the six-year period between the 1874 Brussels Conference and the deliberations of the then experts in international law sufficed to confirm the general assumptions as to the correctness of attempts to codify the laws of war (at the same time recognizing the draft international convention based on the assumptions of the draft as premature). At the same time, it should be emphasized that this document was the first (*manual*) addressed to the armed forces that lacked "the character of innovation", but had "a set of clearly articulated and accepted principles of warfare".[73]

Within the scope of the dissertation, it should be noted that as a direct influence of the experience of the Franco-Prussian War of 1870, the experts of the commission decided to adopt an extended subjective scope of the term "prisoner of war". This category includes not only individuals who are part of the armed

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et que, lorsqu'ils seront capturés, ils seront prisonniers de guerre et ne pourront en aucun cas être traités comme espions" – H. Woodhouse, *Textbook of Aerial Laws and Regulations for Aerial Navigation, International, National and Municipal, Civil and Military*, New York 1920, p. 182.

70 "A celte catégorie appartiennent aussi les individus capturés dans les ballons et envoyés pour transmettre des dépêches, et en général pour entretenir les communications" – *Annuaire de l'Institut de Droit international*, vol. IV, p. 283.

71 C.J.-M. Lucas, *La Conférence*…, p. 2.

72 *Annuaire de l'Institut de Droit International*, vol. V, pp. 150–174.

73 *Ibidem*, p. 158.

forces fielded by a belligerent state, but also messengers providing official information and civilian pilots (aeronauts) who perform tasks of observing the enemy or maintaining land communication with various sectors of the front (Article 21).[74] Moreover, Article 24 of the instructions indicated that tasks performed by aircraft crews could not be included in the category of espionage.

6. An attempt to delegalize air warfare – The Hague 1899

A Russian diplomatic note issued by the then Minister of Foreign Affairs of the Russian Empire, Prince Mouravieff, of August 12, 1898, indicated the need to "preserve world peace and the possible reduction of excessive combat arsenals" as the primary focus for the future discussion of diplomatic missions accredited at the court in St. Petersburg on the new framework for international convention.[75] The dispatch expressed the Russian court's concerns about the social, technological and economic consequences of the arms race related to the mass production of heavy weapons at the end of the 19th century.[76] On December 30, 1898, Russian diplomacy issued a new note setting out the detailed program of the conference and the proposed agenda. Point 3 of the aforementioned document raised, as an element of the discussion, the issue of "limitation of the use in field fighting of explosives of a formidable power, such as are now in use, and prohibition of the discharge of any kind of projectile or explosive from balloons or by similar means".[77]

74 "The same rule applies to messengers openly carrying official dispatches, and to civil aeronauts charged with observing the enemy, or with the maintenance of communications between the various parts of the army or territory" – *The Laws of War on Land*, Oxford, September 9, 1880 in: D. Schindler, J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, Dordrecht 1988, pp. 36–38.

75 A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Text of Conventions with Commentaries*, Cambridge 1909, pp. 39–40.

76 In the period immediately preceding the first peace conference in the Hague in 1899, the production of quick-firing artillery guns began in substantial numbers in the factories of companies such as Schneider (France), Krupp (Germany) and Vickers (Great Britain). Expanded armaments companies received government orders for thousands of artillery pieces. See: M.W. Janis, *North America: American Exceptionalism in International Law*, [in:] B. Fassebender, A. Peters (eds.), *The Oxford Handbook of The History of International Law*, Oxford 2012, p. 543; J. Goldblat, *Arms Control: The New Guide to Negotiations and Agreements*, London 2002, p. 19.

77 J.B. Scott, *The Hague Conventions and Declarations of 1899 and 1907, Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations*, Oxford 1915, p. xvii.

During the conference, based on the commission chairman's decision, the issue was discussed by the first committee, which, after a short debate, adopted the Russian proposal, considering the possibility of aerial bombardment as "inflicting excessive damage upon the enemy". The rapporteur from the French side argued that the current level of technical advancement of balloons were such that they could not be considered a key element of the war effort, and, moreover, the lack of accuracy of such bombing did not allow the force of this asset to be directed against targets of an eminently military nature. It was pointed out that the future normative solution in the field of air bombing applied only to balloons, not including artillery and similar means, understood by the committee delegates as a new means acting in a way similar to balloons, but not yet invented. A significant contribution to the adoption of the regulation was made by the United States technical delegate, Capt. Crozier, who demonstrated at the last meeting of the subcommittee that the current aviation technology did not permit the assumption that balloons would be able to achieve effectiveness and sufficient accuracy in order to limit the effects of air bombing. At the same time, he noticed that it could not be ruled out that aviation might improve its effectiveness and thus be an asset that would effectively shorten the length of combat and negative consequences of warfare, which justified adopting only a temporary moratorium.[78] It was not decided to introduce the phrase "aviation means" in the final text due to the definition difficulties, recognizing the priority of the phrase "similar".[79] In addition, it was accepted that the ban was only temporary and applicable for 5 years, which was approved by the participants of the commission – this was due to the belief in the possibility of improving the accuracy of air strikes and a significant increase in the effectiveness of aviation in future military operations.[80] According to Gen. Mounier, adoption of permanent solutions would be devoid of practical properties, and balloons might become a "legal means of waging warfare".[81]

The result of the above-mentioned considerations was the adoption of the so-called IV of the Hague Declaration of 1899 on the prohibition of launching projectiles and explosives from balloons for a period of 5 years. The declaration contained the *si omnes* clause characteristic of all documents adopted during the peace conferences in 1899 and 1907, triggering the applicability of the Hague Dec-

78 W. Crozier, *Report of Captain Crozier to the Commission of the United States of America to the International Conference at the Hague Regarding the Work of the First Committee of the Conference and its Sub-committee*, [in:] J.B. Scott (ed.), *The Hague Peace Conferences of 1899 of 1907*, vol. 2, Baltimore 1909, p. 30.

79 J.B. Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts, The Conference*, New York 1920, pp. 280–281.

80 *Ibidem*, p. 354; W.M. Gibson, *L'Aéronautique et le droit international de la guerre*, "Revue générale de droit aérien" 1935, vol. IV, p. 236.

81 J.B. Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts, The Conference*, p. 280.

laration only if the parties to the conflict were also states bound by the declaration. The main content of the declaration was the agreement "prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature".[82] The declaration was ratified by 25 states (including Austria-Hungary, France, Germany, Italy, Japan, Russia, the United States). The United Kingdom and Turkey did not sign or ratify the declaration.[83]

The declaration referred in principle to a pattern associated with an operation similar to bombardment with the use of a balloon rather than anticipating the emergence of a new similar means. The text of the document seems to be precise and unequivocal in its prohibition of air bombing by means of balloons or other "new methods of a similar nature".[84] In this manner, it was possible to extend the applicability of the provisions of the declaration to cover new means, similar in action to balloon bombing. The authors' intention clearly envisaged the possibility of the emergence of improved methods for conducting air operations and, as a result of the general acceptance of the above conclusion, they resolved to impose only a temporary ban.[85] Therefore, a complete prohibition of aviation as a means of conducting armed combat was not determined, introducing rather a kind of temporary moratorium.[86] The legal experts' expectations were expressed in a statement that combat airships would have sufficient capabilities to limit the scope of aerial bombing to military objectives only. Paul Fauchille, who presented the draft regulation of airspace at the session of the Institute of International Law in 1902, criticized conference participants and delegates for adopting a ban with an empty normative content, due to the technical inability of balloons to carry explosive payloads. Ernest Nys recognized that by adopting a declaration of only a temporary duration, the conference participants actually voted against an attempt to permanently limit the possibility of conducting air warfare.[87] William H. Boothby emphasized that the text of the Declaration of 1899 was an attempt to balance the precision requirements for the language of conventions, and at the same time a formulation flexible enough to include the emergence of future and unknown means of conducting offensive air operations.[88]

82 The Hague declarations of 1899 (IV, 1) and 1907 (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons in: Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 7, Washington 1915.

83 H. Woodhouse, *Textbook of Aerial Laws*…, p. 184.

84 P.H. Windfield, *Aircraft*…, pp. 260–261.

85 M.N. Schmitt, *Air Warfare*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 120.

86 R.F. Williams, *Developments in Aerial Law*, "University of Pennsylvania Law Review" 1926, vol. 139, p. 140; N. Ronzitti, *The Codification of Law of Air Warfare*, [in:] N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006, p. 4.

87 E. Nys, *Le Droit International*…, p. 111.

88 W.H. Boothby, *Weapons and the Law of Armed Conflict*, Oxford 2009, pp. 15–16.

7. The Draft of the Institute of International Law on Bombardment of Open Towns by Naval Forces 1896

In 1896, during a session held by the Institute of International Law, the rapporteur on the admissibility of shelling towns in the course of naval war, Den Beer Poortugael, discussed the issue of defining an open town. During the discussion, the participants argued that the most important issue in determining the scope of the legal definition of an open town is whether it is also an undefended area, which, according to the participants, was a key criterion. It was pointed out that there were exceptions in which an undefended area may be subjected to bombardment (e.g., defensive installations, in order to collect enforced requisitions and in a situation where the area is defended), and the intensity of bombardment is an irrelevant circumstance. Opinion was divided on the issue of attacking the capital city of a given state as the sole criterion. There was (unanimous) opposition to recognizing a given area as an target of opportunity merely due to the presence of a military garrison stationed there in peacetime.[89] In conclusion, it was found that there are no fundamental differences between the laws on land bombardment and the norms regulating the possibility of bombardment in circumstances of naval war. Proper application of Article 32 of the Oxford Instruction (drafted by the Institute in 1880) was stressed, prohibiting destruction which is not justified by military necessity, as well as the bombing of undefended locations.[90] A town or city lost its status of an open area if it was defended by fortifications or a complex of forts, located at a maximum distance of 10 kilometers from the urban area. An open area could be bombed if such an attack were to be used for enforcing necessary contributions, destruction of military installations. A town or city could not be bombed solely because it is the capital of a given state, or because it has a garrison stationed there in peacetime.

Both the provisions of the Brussels Declaration of 1874 and the so-called Oxford Instruction of the Institute of International Law concerned the laws and customs of land warfare. In 1896, due to the lack of regulation of the possibility of conducting naval operations against objects located on land, the Institute of International Law decided to adopt an appropriate instruction on the principles of conducting naval bombardment.[91] According to the provisions of the resolution in Article 1, it was pointed out that there were no differences between the legal re-

89 *Annuaire de l'Institut de Droit International*, vol. XV, pp. 146–149.

90 *Ibidem*, p. 150.

91 *Documents Relating to the Program of the First Hague Peace Conference, Laid Before the Conference by the Netherland Government, Translation*, Toronto 1921, pp. 59–60.

gime governing naval and land-based bombardment. Article 2 indicated that the relevant provisions of the Oxford Instruction regarding, among others, bombing of undefended locations were valid in relation to actions against coastal areas. However, in Article 4, clear exceptions to the above principle were outlined. First, under this provision, an open locality was considered to be a location which is not defended by fortifications or other means of resistance, or by forts located nearby (from 4 to 10 kilometers). An attack on such a built-up area was considered illegal, with a few exceptions. Second, warships had the right to shell an open town or city in order to destroy docks located within it, military establishments, war material depots and warships staying in the port. Third, an attack was also allowed in order to enforce contributions or supplies necessary for the functioning of the fleet. Furthermore, an open town or city that defends itself against the entry of land forces or landing units that have disembarked on the shore may be shelled to support the assailant's own troops or an overland assault if the town or city puts up resistance. Bombarding urban areas to cause fires was prohibited ("bombardments the object of which is only to exact a ransom were specially forbidden"). Article 5 prohibited attacking open towns or cities only because a given town or city is the capital of the state or the seat of the government, or a peaceful garrison is stationed there.[92]

The provisions of the resolution, despite the apparent unification of the regimes governing naval and land-based bombardment, at the same time introduce a cardinal exception to the general prohibition of attacking undefended localities, consisting in the possibility of destroying objectives of a military nature regardless of the status of the locality. At that time, there was no similar norm in the case of land-based bombardment, which fundamentally differentiates the legal rigors applicable on the basis of land and naval warfare. The reasons for such a distinction were explained during the discussion held at the First Hague Conference in 1899.

8. Land-based and naval bombardment – The Hague 1899

During the discussion on the problem of bombings and sieges, an important issue appeared related to the unification of regulations regarding land-based and naval bombardment. Another subcommittee recognized some fundamental differences in the rules governing the right to conduct naval and land bombardments – in the case of naval attacks, attention was paid to the possibility of accepting the admissibility of attacks on undefended areas in which specific military installations

92 *Ibidem*, pp. 313–317.

were located.[93] Eduard Rolin, a French scholar of international law (serving as a delegate of Siam), pointed out that the customs applicable in naval warfare were of a different nature than in the case of land operations and, as a result, town or cities and coastal ports may also be bombed in undefended areas. Attacks launched by warships are different in nature in that, unlike the actions of land troops, naval fleets do not have the ability to occupy an area, so bombardment can be the only means of inflicting losses on the enemy. At the same time, E. Rolin emphasized the inadmissibility of attacks aimed at terrorizing the civilian population and thoughtless destruction of property.[94] This conclusion was met with opposition by the delegates of Italy and Belgium arguing for the need to harmonize the regulations governing various bombardment regimes, considering it unacceptable to allow warships to attack objects that can normally be targets in land warfare. However, this discussion did not reach a constructive conclusion in 1899 and was left without a definitive resolution, with only an acknowledgment of the fundamental contentiousness of the issue. In the context of Article 15 of the Brussels Declaration of 1874, following the German delegate Gen. Gross von Schwarzhoff, it was argued that there was no need to stress that an artillery barrage target must be a fortified area, as it was possible to attack built-up areas located near the fortifications. Already in that period, the doctrine addressed the need to pay attention to the actual elements of recognizing the status of a given location as defended, and not fortified, which was determined by the possibility of a given locality's occupation by an approaching land army without resistance.[95] At the same time, it was decided to leave the further content of the provisions on the prohibition of attacking undefended cities, villages and dwellings (Article 25 of the Regulations to the Hague Convention of 1899).

On July 3, 1899, under the leadership of F. Martens, a meeting (No. 5) of the Second Committee was held, which on that day considered the issue related to the chapter "bombing and sieges" and discussed (former) Article 15 of the 1899 draft on the prohibition of bombing undefended areas.[96] The Belgian representative, A.M. Beernaert protested against the interpretation proposed by M. Rolin and the distinction between land-based and naval bombardments. In his opinion, it was unacceptable to permit the emergence of a situation in which warships were authorized to attack areas that were protected in the case of land operations.[97] However, this view was not shared by all who confirmed the French position in this aspect. The German delegate, on the other hand, claimed that including the phrase "fortified areas are defended" in the original text was unnecessary due to

93 J.B. Scott, *The Proceedings of the Hague Peace Conferences; Translation*…, p. 409.

94 *Ibidem*, p. 410.

95 F. Longuet, *Le droit actuel de la guerre terrestre, son application dans les conflits les plus récents*, Montpellier 1900, p. 107.

96 Fortified areas are subject to siege. Open towns, settlements and villages that are not defended, cannot be attacked or bombed.

97 J.B. Scott, *The Proceedings of the Hague Peace Conferences; Translation*…, p. 493.

the fact that the above provision could not include field fortifications in its scope, to the exclusion of permanent ones, which justify laying siege to a given area. This view was unanimously accepted.[98] Pointing out that "this prohibition certainly ought not to be taken to prohibit the destruction of any buildings whatever and by no means when military operations rendered it necessary".[99] was an important reservation voiced by Gross von Schwarzhoff. The subcommittee did not object to this remark.[100]

The Hague Convention of 1899 on the Laws and Customs of War on Land, along with its Regulations, received only partial acceptance. The participants who refused to be bound by the convention, included, among others, Germany, Austria-Hungary, the United States, Great Britain, Italy, Japan, Serbia and Turkey. In the club of the great powers, only the representatives of France, Russia attached their signatures, as did smaller states (Belgium, the Netherlands).[101] The conference was therefore only a partial success and only in the normative layer – it confirmed the nature of several norms from the Brussels Declaration of 1874, especially in areas such as the classification of belligerents, the treatment of prisoners of war, as well as the manner of conducting sieges and bombings. However, the main goal set by Fyodor Martens, which was to make a widely recognized and consolidated codification of the norms of customary law, was not achieved, especially in the light of a significant percentage of states that did not join the conference. As a result, a small number of ratifications, in the face of the contents of Article 1 of the Hague Convention of 1899 and the *si omnes* clause meant that in the international situation at that time it was not possible to apply this convention in European geostrategic circumstances.[102]

In the context of the laws of air warfare, it should be emphasized that there was unanimous recognition of the validity of the existing doctrinal views regarding the recognition of balloon crew members performing communication missions as prisoners of war – which was reflected in the adoption of Article 29 of the Hague Regulations of 1899, excluding balloon operators from the category of spies.[103]

98 *Ibidem*, p. 494.

99 *Ibidem*, p. 424.

100 *Ibidem*, p. 59.

101 The ICRC website provides incorrect data on the number of ratifications, due to the incorrect classification of the ratification of the final act of the conference (ratified by all participants) as the number of ratifications in the scope of the Convention on the Laws and Customs of War, which was ratified by only 15 states.

102 Given the formation of Entente and Central State alliances, ratification by France and Russia meant that the entry of Great Britain (which did not sign the convention) into the future world war prevented the convention from being applied in the global conflict. R. Kolb, *The Law of Treaties: An Introduction*, Northampton 2016, p. 123; R. Hanski, *The Second World War*, [in:] L. Hannikainen, R. Hanski, A. Rosas (eds.), *Implementing Humanitarian Law Applicable in Armed Conflict: The Case of Finland*, Dordrecht 1992, p. 46.

103 T.E. Holland, *The Laws of War on Land (Written and Unwritten)*, Oxford 1908, p. 47.

Due to the adoption of the relevant Declaration on the Prohibition of Launching Missiles and Explosives, the status of crew members who participated in balloon combat missions was not regulated at the Hague Conference of 1899.[104]

9. Legal status of airspace at the beginning of the 20th century

The use of balloon-type flying objects began to raise issues related to interstate communication, especially in terms of state sovereignty over the air column located within its boundaries. The openness of airspace led to certain consequences related to the right to fly over foreign territories. However, the issue of the right of a given ruler (owner) of a given territory to the air column was not a legal *terra incognita* – it had already been addressed in ancient times through the responsibility of property owners for objects falling from heights, as well as the right to collect fruits falling from trees, including those growing on someone else's land.[105] The principle of extending dominion over the airspace within one's borders (*cuius est solum, eius est usque ad coelum et ad inferos* – from Latin, whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell) was referenced in the perspective of private law (e.g. the Napoleonic Code and systems based on civil law or the *Bury v. Pope* case from 1586 in the area of common law).[106] The first balloon flights raised doubts concerning the violation of the rights held by the owners of the lands over which they flew.[107] Gradually, it was recognized that the principle of *cuius est solum* cannot be unlimited.[108] In states with the common law system foundation, efforts were made to determine *in casu* the scope of dominion exercised by a land owner in the airspace – e.g. in the 1930s the Massachusetts Supreme Judicial Court ruled that a flight made at a height of 100 feet (approx. 33 meters) above the ground level is a violation of property rights, but it did not determine the existence of a rule in this aspect.[109] Ultimately, the scope of author-

104 J.B. Scott, *The Proceedings of the Hague Peace Conferences; Translation*…, p. 60.

105 Y. Abramovitch, *The Maxim 'Cujus Est Solum Ejus Usque Ad Coelum' As Applied in Aviation*, "McGill Law Journal" 1962, vol. 4, no. 8, pp. 250–253.

106 P.H. Sand, J. de Sousa Freitas, G. Pratt, *An Historical Survey of International Air Law Before The Second World War*, "McGill Law Journal" 1960, vol. 1(7), pp. 23–24; A. De Lapradelle, *De L'Origine De La Maxime Cujus Solum, Ejus Coelum*, "Revue générale de droit aérien" 1932, pp. 295–300.

107 S. Truxal, *Economic and Environmental Regulation of International Aviation: From International to Global Governance*, London 2017, pp. 2–4.

108 J. Piet Honig, *The Legal Status of Aircraft*, Dordrecht 1956, p. 15.

109 Worchester Smith and another v. New England Aircraft Company Incorporated and Others. 270 Mass. 511.

ity is determined by marking the boundary of the air column through relevant standards of aviation law guided by air transport safety considerations.

The above issues essentially concerned internal air transport or – until the beginning of the 20th century – the boundaries of the authority of the property owner.[110] However, establishing rules governing international air traffic was becoming an open question – and therefore a fundamental one about the right of a state to rule its own airspace and its scope.[111] In his seminal work *Mare liberum*, Grotius pointed out that the status of the air was similar to the oceans – common in nature and unable to be appropriated by any sovereign power.[112] However, this Dutch theorist of international law also noticed the lack of clarity regarding the status of the airspace over a particular territory, mentioning Roman law with regard to buildings rising above the ground.[113] From an obvious point of view, the issues of international flights in the times of Grotius were not considered to a greater extent and awaited the technical breakthrough of balloon transportation, which was becoming widespread from the mid-nineteenth century.

10. The first draft by Paul Fauchille from 1902

Between July 31 and August 3, 1889, one of the first international meetings devoted to the issues of aviation development took place in Paris.[114] At the congress, the question of the scope of air transport in the event of war, including the possibility of its suspension, was also presented for the first time.[115] However, credit for the first study on the content of international aviation law should be given to a French professor, an outstanding scholar of international law of that period, Paul Fauchille. In 1901, this author published an article entitled *The legal regime*

110 P.P.C. Haanappel, *The Law and Policy of Air Space and Outer Space: A Comparative Approach*, The Hague 2003, pp. 1–2.

111 B.F. Havel, G.S. Sanchez, *The Principles and Practice of International Aviation Law*, Cambridge 2014, p. 18; H. Lauterpacht, *The Function of Law in the International Community*, New Jersey 2000, p. 301.

112 H. Grotius, *Freedom of the Seas*, New York 1916, p. 24.

113 H. Grotius, *The Rights of War and Peace*, Indianapolis 2005, p. 428.

114 One of the participants of the conference was Stefan Drzewiecki, a Pole in the Russian service, an insurgent in the January Uprising, and a well-known engineer. At the time, he was carrying out the first studies and research in the field of aerodynamics.

115 Ministère Du Commerce, *De L'Industrie Et Des Colonies, Exposition Universelle Internationale De 1889*, Direction Générale De L'Exploitation, Congrès International D'Aéronautique, Procès-Verbaux Sommaires, Paris 1889, p. 22; R. Bartsch, *International Aviation Law: A Practical Guide*, Oxon 2016, p. 7.

of airspace and aerostats (*Le domaine aérien et le régime juridique des aérostats*), which seems to be the first academic study on the status of flying objects and space from an international legal perspective. In this work, the French researcher expressed his belief that the principle of state sovereignty in airspace may disturb the possibility of air transport development and be an example of abuse of law by a state exercising sovereignty in a specific area in relation to other air travelers.[116] Aviation technology, which at that time had entered the era of powered airships capable of making long-distance controlled flights, was observably developing.[117] In addition, in 1898, the first agreements regulating how military aerostats conducted overflights were concluded between the governments of Austria-Hungary and the German Empire, which signaled the international nature of airspace solutions.[118] This French lawyer, as a member of the Institute of International Law, was appointed rapporteur on the issue of the legal status of airspace.[119] First of all, it should be emphasized that P. Fauchille recognized that in addition to the need to establish the legal status of airspace, it was also necessary to make reference to the reality of the military use of balloons for warfare. The French lawyer demonstrated great scientific foresight in this regard, recognizing that aircraft would dominate military operations both on land (through their capability of carrying weapons) and at sea (through their ability to detect submarines).[120] In his analysis, Fauchille emphasized the existence of a serious looming threat of unregulated air warfare.[121]

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116 P. Fauchille, *Le domaine aérien et le régime juridique des aérostats*, "Revue générale de droit international public" 1901, pp. 400–404.

117 In 1884, the French army created the first controlled airship powered by electricity – Le France. In 1900, the French oil industrialist Henri Deutsch de la Meurthe established a reward of 100,000 francs for the first flying machine capable of circling the Eiffel Tower in Paris under a specific time. In 1901, an airship built by Alberto Santos-Dumont, known as "Santos No. 6", achieved that goal. At the same time, LZ 1, constructed by Count von Zeppelin, made its first flight over Lake Constance in southern Germany. See: R. Bluffield, *Over Empires and Oceans: Pioneers, Aviators and Adventurers: Forging the International Air Routes 1918–1939*, Tichehurst 2014, pp. 42–43.

118 A. van Wijk, *The Legal Status of the Aircraft Commander – Ups and Downs of a Controversial Personality in International Law*, [in:] A. Kean (ed.), *Essays in Air Law*, The Hague 1982, p. 313; C. Berezowski, *Le développement progressif du droit aérien*, "Recueil des cours" 1969, vol. 128, p. 10.

119 *Annuaire de l'Institut de Droit International*, vol. XIX.

120 "Les aérostats ne deviendront-ils même pas un jour de véritables engins de combat? Dès aujourd'hui, leurs passagers peuvent être munis de fusils qu'ils déchargeront sur les ballons de l'adversaire; mais actuellement ils ne sauraient porter des canons, des projectiles de quelque poids ou des matières explosibles qu'ils lanceront au-dessous d'eux sur les troupes de l'ennemi. Ces dernières manoeuvres ne sont pas cependant inconcevables" – *ibidem*, p. 23.

121 "Il se peut que la guerre aérienne soit alors autorisée par les puissances avec tous les développements que la science pourra lui donner. Et onne saurait affirmer que cela serait un mal. Les conséquences d'une pareille lutte dans l'espace serontsi terribles que, pour s'y soustraire, les États en arriveront peut-être à éviterla guerre elle-même" – *ibidem*, p. 23.

The report of French scholar was not limited to presenting the problem, but also took into account possible developmental directions of the international aviation law regime in the form of an original regulation draft. As part of the submitted proposal, P. Fauchille made a preliminary division of aerostats (this is how the 1902 draft of the Institute of International Law referred to airships) into state-owned and civilian. Referring to the subcategories of military aerostats, it was emphasized that they should be on state duty under the control of the land forces or the navy and be manned by a uniformed crew (command by a uniformed officer is mentioned in a later part).[122] In Article 2 of the draft, the issue of the necessity to mark aircraft (by presenting the national flag) was addressed.[123] Fauchille emphasized that it was not so important to recreate the signs of the national flag as to use other characteristic signs (e.g., flames) that may effectively identify symbols of nationality from considerable distances.[124] The need to distinctly condemn the possibility of aircraft operating under so-called false flags as contrary to international law and morality was pointed out.[125] The sanction for the "stateless" nature of the aerostat was its qualification as a "pirate ship".[126] This would be prevented by the introduction of general regulations regarding the obligation to bear a state designation, as well as for appropriate control by competent state authorities. Fauchille proposed in the following provisions (Articles 4, 5, 6) detailed rules for maintaining aeronautical documentation, lists of crews and transported goods, as well as a register of aircraft as tasks for the central administration.[127] The validity of these provisions confirms the great intellectual abilities of this French author, whose ideas were significantly ahead of his time.

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122 "Les aérostats, publics, c'est-à-dire affectés au service de l'État, sont militaires ou civils. Sont considérés comme militaires tous ballons sous le commandement d'un officier de l'armée de terre ou de mer. commissionné par l'autorité militaire et montés par un équipage militaire. Sont considérés comme civils tous ballons sous le commandement d'un fonctionnaire civil de l'État et montés par un équipage à la nomination de l'État ou de ses représentants" – *ibidem*, p. 26.

123 "Tous aérostats, publics ou privés, doivent porter, d'une manière constante, attaché au milieu de leur enveloppe, le drapeau national (1). Les aérostats publics, militaires et civils, arboreront leurs flammes respectives, les premiers sur le côté de leur nacelle elles seconds sur leur enveloppe au-dessous du drapeau national". "All aerostats, public or private, must continuously carry the national flag (1) in the middle of the envelope. Public aerostats, both military and civilian, shall fly with their markings […]" – *ibidem*, p. 26.

124 "C'est par la formé qu'au point de vue aéronautique les drapeaux des différents États devront se différencier: la forme d'un drapeau, ainsi, que son emplacement, sont eu effet visibles: dans l'espace jusqu'à 3,600 et 4,000 mètres; il conviendrait dès lors que les États s'entendissent pour fixer chacun à ce point de vue la configuration de son drapeau" – *ibidem*, p. 27.

125 "Cet usage peut se concevoir, quoique, en droit et en morale' internationale, il soit un acte gravement répréhensible donnant à l'État lésé in juste sujet de grief" – *ibidem*, p. 29.

126 *Ibidem*, p. 28.

127 *Ibidem*, p. 30.

However, the most fundamental proposal of the French lawyer was to introduce the principle governing freedom of airspace pursuant to Article 7.[128] This principle applied both in times of peace and war, subject to the restrictions necessary to preserve the rights of the state-territory in the field of counterintelligence, customs and tax offences, sanitary conditions, safety in navigation, as well as national security.[129] For Fauchille, as for Grotius, de Vattel and van Bynkershoek, high seas areas were not subject to appropriation, including appropriation by a state-territory (over which a given air column rises). The justification for the proposal indicated that airspace was not subject to appropriation or any sovereignty – the French theoretician argued that the adoption of a different view would be ambiguous, preventing efficient interstate communication.[130] While emphasizing the inability to seize airspace, Fauchille allowed the exercise of certain powers of states related to the protection of their sovereignty, also in the context of an armed conflict, introducing the concept of a restricted air zone (*zone de protection ou d'isolement*), where it was permissible to exercise certain powers related to operations upholding state security, customs and sanitary standards.[131] This, however, did not equate to imposing a state's sovereignty over part of the atmosphere up to a certain altitude but only granted authority to a state-territory to exercise certain rights while not contributing to the possibility of appropriating a given part of the atmosphere. The scope of their implementation was limited by the extent of the rights enjoyed by other states.[132] Free air transportation could operate above an altitude of 1,500 meters over the territory subject to appropriate restrictions (the justification was the possibility of taking effective aerial photography as part of intelligence activities) and a distance of 1,500 meters from the shores and coastal fortifications. Public and private aerostats located within the boundaries of the restricted airspace could be searched (the right to visit a state-owned aerostat) and they could be pursued to the limits of the restricted airspace of another state, and the right to force a suspected aerostat to land or ultimately shoot it down[133] could be exercised too. Within a restricted zone, the aerostats of a territory-state had an unlimited right to travel. At the same time there was also an obligation to abolish certain rights of a territory-state. Third-state aircraft were allowed to fly through restricted

128 "L'air, par sa nature même, ne se prête à aucune appropriation; il ne saurait être occupé d'une façon réelle et continue: il ne peut donc être un objet de propriété" – *ibidem*, p. 32.

129 *Ibidem*, p. 33.

130 *Ibidem*, pp. 33–34.

131 "The air constituting one of these things, since is free, each State must therefore be able to restrict, vis-à-vis of others, the use of the air which surrounds it. However, air being a res nullius whose use is; common to all, a State in the space of its right of conservation that, as far as exercising it, it does not deprive other States" – *ibidem*, p. 35.

132 *Ibidem*, pp. 36–37.

133 *Ibidem*, pp. 40–44.

areas on the condition of prior notification of the flight. The right to land was granted to private airships, but it did not apply to state-owned aerostats – the requirement of prior consent was provided for in this respect.[134]

11. The International Law of Air Warfare drafted by Paul Fauchille in 1902

The French lawyer did not limit his deliberations to just the issue of the peaceful use of aviation. In accordance with the spirit of the era, according to the then contemporary experts in international law, issues related to the military use of airships and balloons should be resolved in parallel with other issues related to the opening of airspace to general use. In his 1902 draft, Paul Fauchille reflected on the boundaries of the operational (as well as legal) theater of air warfare. In land and sea warfare, belligerents may conduct military operations within the boundaries of their territory and in areas beyond the jurisdiction of neutral parties (e.g., in high seas s). Fauchille transferred these elements to discussions addressing air warfare, recognizing that, in principle, the airspace within the territory of a belligerent state is open to the space of warfare (Article 21).[135] The French lawyer did not foresee any restrictions in conducting air warfare over the high seas. However, in his opinion, it was problematic to maintain the concept of "freedom of airspace" as part of an ongoing air war, by allowing aerostats of belligerent states to conduct military operations over the territory of neutral states, because of the threat resulting from the possibility of an uncontrolled drop of missiles.[136] Article 22 of the draft established a ban on the aerial navigation of vessels belonging to neutral states in any part of the atmosphere stretching above the territory of a belligerent state and at a distance of 11,000 meters from the coastline.[137] Article 23 of the draft provided that balloons were fully subject to the laws of land and naval warfare, in particular the Second and Third Hague Conventions of 1899.[138] Fauchille wondered if imprecise and imperfect weapons such as aerostats could

134 *Ibidem*, pp. 45–46.

135 "Belligerent states have the right, in any part of the airspace, to commit acts of war over their territories and over the high seas. A belligerent state is not authorized to perform acts of war that may lead to the fall of ammunition over the territory or coasts of another state within the effective range of air armament. In the event of an outbreak of armed conflict, aerostats are divided into the aerostats of belligerent and neutral states" – *ibidem*, p. 58.

136 *Ibidem*, pp. 60–62.

137 *Ibidem*, pp. 64–67.

138 *Ibidem*, p. 68.

be considered a legal means of combat.[139] The French lawyer also predicted the reality of air combat between aerostats – understood as an exchange of fire between their crews. In his opinion, balloons and airships can, first of all, be compared to torpedoes – both technically and legally. Torpedoes were considered a particularly effective weapon, as they could rapidly sink enemy ships, but they also reduced evacuation time.[140] At the same time, they were widely accepted by maritime states as an acceptable means of combat – according to Fauchille, the same analogy should be applied to balloons.

For the French lawyer, air warfare is a fully acceptable method of conducting warfare – both in terms of aerostats fighting and bombing targets at sea and on land ("La guerre aérienne, telle qu'elle peut actuellement se comporter, n'est donc pas en soi illégitime"). He believed that air attacks were no more treacherous than land artillery attacks taking advantage of terrain topography or deploying submarines.[141] Fauchille criticized states for the non-binding nature of the Hague Convention of 1899, for the temporary nature and lack of practical reference to the technical capabilities of balloon aviation at that time (recognizing that balloons in that day and age did not have the practical capabilities to carry weapons to bomb civilians), noting at the same time a serious deficiency of the *si omnes* clause application, while at the same time calling for air warfare not to be fought in a legal vacuum.[142]

The French author argued that in the context of the rules of air warfare, many more analogies should be drawn with the principles governing naval warfare than land warfare, due to the missing capability to occupy and control a territory, which eliminates a number of issues related to, for example, rights and obligations of the occupying party ("de l'assimilation de la guerre aérienne à la guerre maritime").[143] Further in Articles 25, 26 and 27 of the draft, it is stated that balloon crews shot down or landing in enemy territory had the status of prisoners of war, could not be treated as spies, and the wounded were to be treated in accordance with the standards of the Hague Convention of 1899 for the Adaptation to Mari-

139 *Ibidem*.

140 "On en autorise, en effet, dans la guerre maritime qui sont aussi terribles: les torpilles, lancées des flots ou du dessous de la mer font sombrer les, cuirassés, avec leur équipage; d'une façon si rapide que le sauvetage en est presque toujours impossible" – *ibidem*, p. 68.

141 *Ibidem*, p. 69.

142 "La déclaration Ire de La Haye, du 29 juillet 1899, a néanmoins, formellement «interdit de lancer des projectiles et des explosifs du haut des ballons ou par d'autres modes analogues nouveaux». Mais, il convient de l'observer, au moment où cette déclaration a été rendue, elle ne pouvait avoir aucun caractère pratique puisqu'il n'était pas possible aux ballons de se charger de projectiles; et ses auteurs paraissent bien avoir voulu réserver le cas d'une invention de ce genre, puisqu'ils ont limité la prohibition qu'ils édictaient à une durée de cinq années; la Grande-Bretagne, d'ailleurs, a refusé d'admettre cette interdiction, et il a été nettement déclaré qu'elle serait sans effet dans les guerres où serait partie un État non signataire" – *ibidem*.

143 *Ibidem*, p. 70.

time Warfare of the Principles of the Geneva Convention of 1864.[144] In his vision, Fauchille also permitted the belligerents to land on the territory of a neutral state and perform certain repairs (by analogy with the regulations applicable in naval warfare and related to the presence of a warship of a belligerent in a neutral port).[145] Interestingly, in Article 32 the French theoretician of international aviation law referred to the issue of free-flying unmanned aerostats, considering them as equivalent means of war, not subject to seizure by neutral states ("Ils constituent alors un moyen de guerre auquel le belligérantsera en droit de s'opposer dans toutes les portions de l'atmosphère où les actes d'hostilité sont permis").[146]

The second rapporteur of the draft, Ernest Nys (professor of international law at the University of Brussels, later judge of the Permanent Court of International Justice), pointed out that the institutions of the law of the sea would be the starting point for a discussion on the legal status of airspace. The modern view on state jurisdiction over territorial sea, especially in the context of establishing its width by the range of coastal cannons, was also reflected in the existence of the so-called restricted airspace ("canon can generate sovereignty over the atmosphere"). Ernest Nys supported Fauchille's comments on the protection of certain rights of a state concerning the airspace which is closest to the territory (*droit de conservation*), but according to him – and the latter – these rights supported no claim of any state to airspace.[147] In his view of the scope of so-called state conservation laws in airspace, he was a much more radical supporter of the concept of freedom of the air than Fauchille. The Belgian professor questioned the legitimacy of determining the altitude of the restricted air zone up to 1,500 meters above sea level (because of navigation difficulties, requiring constant observation of the area) or the rules regarding crew nationality.[148]

In the context of the international law of air warfare, Nys pointed out that until 1870 there were no *ius in bello* norms relating to the use of aerostats in the event of an armed conflict. The Belgian lawyer considered Bismarck's letter of November 19, 1870 to be an unacceptable example. Resorting to the Lieber Code of 1863

144 *Ibidem*, pp. 72–74.

145 "Article 23. Balloon warfare is subject to the laws and customs of maritime warfare, subject to the provisions of the Second and Third Declarations of The Hague of July 29, 1809"; "Article 25. The crew of any enemy balloon, public or private, which falls into the power of the adversary, is a prisoner of war" – *ibidem*, pp. 76–80.

146 *Ibidem*, p. 85.

147 In fact, the above conglomerate of state rights and obligations resulting from the so-called de droit de conservation is very similar to the concept of the so-called maritime contiguous zone. This zone is not part of the territorial sea of a coastal state, but at the same time, such state has the right to exercise certain powers related to fiscal, customs and immigration issues within the contiguous zone. *Ibidem*, p. 106.

148 "N'y a-t-il pas exagération dans les précautions; n'oublie-t-on pas que la navigation aérienne ne s'exercera pas uniquement à des centaines et à des milliers de mètres de hauteur, mais qu'aérostats et aviateurs rendront les plus utiles services s'ils peuvent «naviguer» sans trop s'éloigner de la terre?" – *ibidem*, p. 108.

(Articles 99 and 100) he indicated that during the Civil War, uniformed soldiers delivering messages and operating behind enemy lines already had to obtain the status of a prisoner of war in the event of capture. This view was accepted on the basis of later drafts (the Brussels Declaration of 1874, the Oxford Instruction of 1880 and the Hague Convention with respect to the Laws and Customs of War on Land).[149] Nys argued that the prohibition set out in the IV Hague Declaration of 1899 on the prohibition of the discharge of objects is not definitive, but only temporary ("La prohibition ne fut pas prononcée de manière définitive"). It is also worth mentioning that E. Nys is also one of the first specialists in international law to use the phrase "aircraft" or "airplane" (*aéroplans*) in a scientific study in 1906.[150]

12. The Session of the Institute of International Law in Ghent in 1906

During the next session of the Institute of International Law in Ghent in 1906, the discussion on the content of the Fauchille draft of 1902, presented to delegates at a meeting in Brussels, was resumed.[151] For the first time, the principle of freedom of the air was countered by the view of the possible exercise of sovereignty in airspace by a state-territory due to reservations related to the security of the state – the owner of the air column. In this regard, reference was made to solutions known from the international law of the sea: the border of the so-called territorial air is determined by the range of anti-aircraft artillery.[152] Some specialists postulated that a state – the owner of the air column extending over its area – should treat a given area of airspace on the same principles as the sovereignty of a coastal state held over the territorial sea (L. Oppenheim used the term "territorial atmosphere").[153] Paul Fauchille argued

149 *Ibidem*, pp. 111–113.

150 *Ibidem*, p. 110.

151 *Ibidem*, Session De Gand – Septembre 1906.

152 *Ibidem*, p. 295.

153 "Since the territory of a State includes not only the land but also the rivers which water the land, the maritime belt, the territorial sub soil, and the territorial atmosphere, all these can, as well as the service of the land itself, be an object of State servitudes. Thus a State may have a perpetual right of admittance for its subjects to the fishery in the maritime belt of another State, or a right to lay telegraph cables through a foreign maritime belt, or a right to build and use a tunnel through a boundary mountain, and the like. And should ever aerostation become so developed as to be of practical utility, a State servitude might be created through a State acquiring a perpetual right to send military aerial vehicles through the territorial atmosphere of a neighbouring State" – L. Oppenheim, *International Law: A Treatise. Vol. I. Peace*, London 1909, p. 259.

with these views (acting as rapporteur) since they posed a threat to the freedom of air transport. He argued that the delineation of the free air zone with the range of the cannons would lead to the cessation of air transport for technical reasons; a solution of a conventional nature would lead to arbitrary and harmful treatment of third-state aircraft.[154] During the meeting, the rapporteur of the Institute proposed a working definition of a hybrid nature with the following content: "the air is in principle free, and states can exercise preventive and defensive powers".[155]

As a result, at the session held by the Institute, three legal views relating to the issue of state sovereignty in airspace were distinguished. The first, presented by E. Nys, postulated that air transportation should be unrestricted, including in the immediate vicinity of land (this was the view presented at the session of the Institute of International Law in Brussels in 1902), also disregarding the rights to state security. In complete opposition to the views of the Belgian lawyer stood the principle of exclusive state sovereignty assuming the inability to conduct air transport on the basis of arbitrary decisions of a given state – the owner of the air column.[156] On the other hand, P. Fauchille maintained that it is permissible, at most, to grant a state the right to maintain a restricted airspace up to an altitude of 1,500 meters, assuming that the airspace is free, and the territory of the air column is not subject to state occupation. Another theory was advocated by J. Westlake, a representative of the British doctrine of international law, who explicitly advocated the recognition of the airspace, without altitude restrictions, as subject to the sovereignty of a state where the right of transit is exclusively of an exceptional nature (in a manner analogous to the status of a territorial sea).[157] Westlake postulated a complete reversal of the Fauchille concept, by indicating that the state has sovereignty over the airspace located above its territory, excluding the right of innocent passage of balloons and other flying machines. In response to this concept, the French lawyer pointed out that there was no possibility to objectively appropriate a specific airspace and that he found it incomprehensible how the right of innocent passage could be enforced in airspace. The Italian representative M. Corsi supported the British position, pointing out that P. Fauchille's concept did not sufficiently protect the fundamental principles of the territorial integrity of states from the action of an external entity.[158] Eduard

154 *Annuaire de l'Institut de Droit international*, vol. XXI, p. 295.

155 "1° l'air n'est susceptible ni de propriété ni de souveraineté, donc l'air est libre; 2° l'État a un droit de conservation et de défense pour garantir les éléments essentiels de son existence, tant physique que morale. D'où cette formule: L'air est libre sous réserve du droit de conservation et de défense de l'État adjacent" – *ibidem*, p. 296.

156 *Ibidem*, p. 297.

157 *Ibidem*, p. 298.

158 "[…] ur l'espace aérien qui le borde, l'Etat a non seulement le droit de prendre toutes les mesures nécessaires à sa sûreté, mais encore le droit de réaliser tous les avantages économiques que donne la possession du sol" – *ibidem*, p. 300.

Rolin highlighted that the discussion was, in his view, premature due to the contemporary state of aviation technology.[159]

It is worth noting that the Institute's discussion partially addressed issues related to the use of telegraphic technology and the transmission of radio waves across the borders of warring and neutral states. During the Russo-Japanese War in 1905, a Russian commander in Port Arthur considered the persons dispatching telegraph messages and radio broadcasts to be spies. Evaluating these events, the German delegate von Bar argued that in the context of balloons and airships, it was premature to determine what the airspace regime should look like. However, he noted that neutral states may oppose the transmission of radio waves through their territory during war, which may indicate the emergence of certain rules in relation to the legal status of airspace.[160] The amendment introduced by Prof. Westlake was rejected by a majority vote of the participants at the session of the Institute of International Law in Ghent, which showed the approval of Paul Fauchille's concept regarding airspace freedom, while simultaneously revealing a clear dissenting opinion on the matter.[161]

Table 3. Concepts of the division of airspace at the session of the Institute of International Law in Ghent in 1902

Altitude	Paul Fauchille	John Westlake	Ernest Nys
> 1500 m	Restricted area	Full sovereignty	Free area
< 1500 m	Free area	Full sovereignty	Free area

Source: own work.

13. The development of aviation law before World War I

The need to regulate the legal status of airspace was becoming an urgent issue with international implications. This was due to an increasing number of incidents related to interstate balloon flights, as well as the appearance of a conventional heavier-than-air aircraft in 1903 (the Wright brothers' invention), which was equipped with an external and independent propulsion. In this respect, three incidents were the driving force behind further international regulation in this regard. In 1904,

159 *Ibidem*, p. 301.
160 *Ibidem*, p. 302.
161 *Ibidem*, p. 305.

Russian border guards fired at balloons flying over the then Russian-German border.[162] In 1908, German balloons landed on French territory (most of the crew were officers of the German armed forces), and in 1909, Louis Blériot won a competition organized by the "Daily Mail" for the first person to fly across the English Channel, flying unhindered from France to Great Britain, without requesting any permission for his flight.[163]

Another draft of international aviation law was created at an international conference in Paris in 1910.[164] At the convention, new terms were used in the form of *appareils d'aviation* (aviation devices) and the term *aéronefs* (aircraft) proposed by L. Renault.[165] Considerations of the legal issues in aircraft navigation were prepared on the basis of the work of the First Committee, which was tasked, among others, with discussing the distinction between private and state-owned aircraft, nationality and method of marking aircraft as well as specific rules for the functioning of public aircraft. Paul Fauchille became the Commission's rapporteur. During the discussion, it was agreed that aircraft in state service should be classified based on the type of service they performed and the fact that they were commanded by a state official.[166] As part of this classification, the existence of military aircraft intended for service in the air force and under the command of uniformed personnel of the armed forces was distinguished.[167] The need for each aircraft to have a nationality was emphasized. The adopted assumptions of the document indicated a gradual erosion of the view of freedom of the air in favor of the exclusive sovereignty of the state in airspace, through the requirement for bilateral interstate agreements regarding air transport ("L'établissement de lignes internationales de communication aérienne dépendra de l'assentiment des États intéressés").[168] The German side demanded a clear authorization for a state-territory to issue regulations regulating air traffic, first of all emphasizing the need to adopt the theory of complete and unconditional state sovereignty in the airspace over its territory and territorial waters.[169] The French side, represented by Paul Fauchille, maintained that these changes should not undermine the general principle of the freedom of aerial navigation.[170] The British delegation strongly objected to this view, arguing

162 H.B. Robertson, *The Status of Civil Aircraft in Armed Conflict*, "Israel Yearbook on Human Rights" 1997, vol. 27, p. 113.

163 P.H. Sand, J. de Sousa Freitas, G. Pratt, *An Historical Survey*…, pp. 30–32; D. Richemond-Barak, *Underground Warfare*, Oxford 2018, p. 69.

164 Conférence Internationale de Navigation Aérienne: Procès-Verbaux des Séances Et Annexes; Paris, 18 Mai–29 Juin, 1910.

165 *Ibidem*, pp. 23–25.

166 *Ibidem*, p. 70.

167 *Ibidem*, p. 72.

168 *Ibidem*, p. 192.

169 J. Cooper, *The International Air Navigation Conference, Paris 1910*, "Journal of Air Law and Commerce" 1952, vol. 127, p. 132.

170 *Ibidem*, pp. 206–210.

that "the abstract rights of an aircraft to fly freely over foreign territory cannot be accepted as it lacks a basis in international law".[171] Representatives of this state asserted the absolute right to prohibit foreign aircraft from flying through their airspace during wartime for reasons of national and aviation security, tied to the intention to reserve airspace only for their own theater of military operations.[172] Other states (e.g., Bulgaria) advocated for the French model with modifications regarding the ability to exercise rights related to the national defense and the security of its citizens.[173]

The solutions of the Paris draft also referred to the regulations governing military aircraft. Article 41 provided for the classification of public and military aircraft, recognizing that the latter must be in military service, under the command of a uniformed officer, with the simultaneous obligation to mark aircraft in accordance with this officer's nationality (Article 42). Article 44 essentially introduced a prohibition on the overflight of military aircraft over the territory of another state without its consent. Article 49 of the Paris Draft was a clear statement of the circumstances related to the gradual division of international aviation law into the sphere of air operations in peacetime and war.[174] Although the 1910 Convention was also intended to apply in a state of war, it created only the obligations and rights of neutral parties, without limiting the rights of the waring parties arising from a state of hostility between them. The need for military aircraft to have an appropriate state designation was stipulated.[175] In the context of the passage of a military aircraft across a given state, the need to obtain prior authorization or a clear invitation of the state – the owner of the air column was raised.[176] Military aircraft should have a status similar to warships and not be subject to the jurisdiction of a third-party state.[177] The issue of air communication during wartime was to be addressed by a future conference.[178] Ultimately, due to the differences in fundamental matters regarding the unequivocal support of state representatives for the doctrine represented by Fauchille (supported by the French delegation) or Westlake (raised by the British side), the conference came to nought.[179] However, it should be noted that the 1910 conference contributed significantly to the development of international aviation law – many of the legislative solutions prepared in

171 *Ibidem*, p. 210.
172 *Ibidem*, p. 270.
173 *Ibidem*, p. 274.
174 *Ibidem*, p. 198.
175 *Ibidem*, p. 286.
176 *Ibidem*, p. 292.
177 *Ibidem*, p. 289.
178 *Ibidem*, p. 267.
179 *Ibidem*, p. 264; D. Johnson, *Rights*…, pp. 23–24; E.L. Giemulla, *Chicago System: Genesis and Main Characteristic*, [in:] E. Giemulla, L. Weber, *International and EU Aviation Law: Selected Issues*, Alphen aan den Rijn 2011, p. 7.

the framework of the Paris draft were accepted in later documents of this branch of law.[180] The 1910 draft also indicated that the issue of deploying military aviation in an armed conflict and the conditions for conducting air warfare were to be the subject of a separate treaty regulation – this legislative framework was replicated in all subsequent convention solutions. In fact, the proposals of the Congress were the last document of international aviation law, which at least partially covered issues related to the operation of military aviation during an armed conflict.

14. Development of the principle of exclusive state sovereignty in airspace

The discussion on the international law forum also resonated widely in the contemporary doctrine of international law. Jenny F. Lycklama à Nijeholt in his publication *Air Sovereignty* from 1910 pointed out that in most cases the principle of complete sovereignty in airspace was considered as an opportunity to block the functioning of international air transport.[181] At the same time, the author himself strongly opted for the concept of assigning states "exclusive sovereignty in unlimited airspace, which can be limited only by the appropriate will of a given state".[182] In a similar spirit, A. Kuhn expressed his views in 1910 on the pages of "American Journal of International Law", pointing out, in his opinion, obvious differences between the status of high seas, which, due to their nature, were impossible for the sovereign to control for practical reasons, and the airspace extending above a state's territory.[183] Amos S. Hersey, in turn, considered, after Oppenheim and Westlake, that the control over airspace should be of a similar nature as in the case of the sovereign's control over territorial waters, pointing to the use of the right of innocent passage by aircraft that may be subject to state jurisdiction (but only in the context of private aircraft).[184] Harold Hazelnite emphasized that, in his opinion, the principle of complete freedom of the air (especially in the version presented by E. Nys) would never gain full acceptance among the international community. Air is not like a sea domain, as the problem of airspace is an issue

180 P.H. Sand, J. de Sousa Freitas, G. Pratt, *A Historical Survey*…, p. 30; E. Sochor, *The Politcs of International Aviation*, Hampshire 1991, pp. 1–2.

181 R.F. Williams, *Developments*…, p. 141.

182 J.F. Lycklama à Nijeholt, *Air*…

183 A.K. Kuhn, *The Beginnings of an Aerial Law*, "American Journal of International Law" 1910, vol. 4, p. 113.

184 A.S. Hershey, *The International Law of Aerial Space*, "The American Journal of International Law" 1912, vol. 6, p. 384.

affecting all states of the world, and maritime activity is generally limited to the coastal area.[185] Hazelnite pointed out that the researchers advocating the existence of the principle of full complete sovereignty in airspace considered, above all, protection of the territory from the possibility of damage resulting from air transport to be the most important issue.[186] Interestingly, the author argued that J. Westlake's idea, which grants other aircraft the right of innocent passage in airspace, is too far-reaching in limiting their sovereignty. As a solution, he proposed the adoption of international regulations in the form of a convention that would balance the interests of states while simultaneously ensuring the development of international air transportation.[187]

15. The Second Hague Peace Conference of 1907

15.1. General remarks

The key historical event that took place between 1899 and 1907 was the widely commented Russo-Japanese war (1904–1905), which, as indicated in another chapter, sparked an active international legal debate, especially as to the circumstances accompanying its commencement and course. It was accompanied by a general increase in tension in interstate relations and a gradual creation of two opposing political and military poles – the Triple Alliance and the Triple Entente.[188] In 1904, Britain and France signed the Entente Cordiale Treaty, aimed directly at Germany, whose armament process began to threaten British naval and colonial dominance. A serious event in German-French relations was known as the so-called Moroccan incident. In the years 1904–1905, France tried to take control of independent Morocco, which was met by German intervention (the visit of Emperor William II to Tangier), almost resulting in a new conflict between the two states. The war did not take place due to the Great Britain's clear support for French actions.[189] As a result, convening the Second Peace Conference was aimed at achieving two goals. Firstly, the aim was to ease tensions in international

185 H. Hazelnite, *The Law of the Air: Three Lectures Delivered in the University of London at the Request of the Faculty of Laws*, London 1911, p. 14.

186 *Ibidem*, p. 28.

187 *Ibidem*, p. 36.

188 See: R. Hamilton, H. Herwig, *World Wars: Definition and Causes*, [in:] *eidem*, *The Origins of World War I*, Cambridge 2003, pp. 1–45.

189 G. Cashman, L. Robinson, *An Introduction to the Causes of War: Patterns of Interstate Conflict from World War I to Iraq*, Plymouth 2007, pp. 42–43.

relations during that period. Secondly (as in the context of the First Conference), the treaty regulations were intended to lead to a partial "equalization of odds" in the future conflict by obtaining the disarmament of certain types of weapons, which were sure to play a key role in the upcoming conflict.

Ratio legis in the legal context was the need to revise the provisions adopted at the First Peace Conference in 1899 regarding the laws and customs of war on land, especially on the obligations of neutral parties and the initiation of hostilities. It was also necessary to respond to the contents of the Declarations submitted in 1899 (outside the conventions), including – which was crucial in view of the subject of the work on aerial bombardment – the IV Declaration on the prohibition of the discharge of projectiles and explosives from balloons for a period of 5 years, dated July 29, 1899, due to the expiry of the 5-year moratorium period in 1904.[190] It was also anticipated that works would commence in order to create a special regulation concerning naval warfare, with key issues such as the following: determining the scope of permissible bombardments of land targets, the use of torpedoes and coastal mines, the possibility to convert merchant ships during wartime, the right to seize property at sea, and the duration for which warships could remain in neutral ports after hostilities had begun. All the above program proposals were to be presented by telegram to representatives of foreign states accredited to the Russian Empire. The Hague was again chosen as the venue for the Second Peace Conference. The most important fragment of the discussion on the revision of thelaws and customs of land warfare and the initiation of hostilities took place at the forum of the Second Committee chaired by A.M. Beernaert and T.M.C. Asser.[191]

15.2. Extension of the IV Declaration of 1899 on the prohibition of the discharge of projectiles or other explosives from balloons

At the meeting of the Committee on August 7, 1907 (Meeting No. 5) the issue of further extension of the effective term of the 1899 Declaration concerning the Prohibition of the Discharge of Projectiles or Other Explosives from Balloons was considered. It was noted that due to the expiry of the 5-year period starting in 1904, the document was considered non-binding.[192] The Belgian delegation presented a proposal to renew the declaration of 1899 by another 5 years (i.e., until 1912) with the same content as the original document. This started a discussion about the future of the solution. The Russian representatives pointed out that in

190 At the first peace conference in The Hague in 1899, in addition to the Declaration on balloons, declarations on asphyxiating gases and expanding missiles were also adopted.

191 J.B. Scott, *The Proceedings of the Hague Peace Conferences; Translation*…, p. 63.

192 "This Declaration, which had been made only for a period of five years, expired in 1904" – *ibidem*, p. 150.

their opinion the period of 8 years between the Declaration of 1899 and the second peace conference in the Hague in 1907 was not enough to analyze the possibilities of aviation technology and aerial bombing.[193] The available information indicated the possibility of obtaining a relatively small improvement in the effectiveness of aerial attacks, when compared to artillery or naval bombardments. The essence of the Russian proposal in this respect was to cease the use of temporary solutions, and to decide on the adoption of a permanent and conventional regulation (rather than an additional declaration), significantly related to the already existing Regulations to the Hague Convention of 1899.[194] To this extent, it was intended to modify the existing Article 25 of the Regulations, which prohibits the bombing of undefended cities, villages and buildings, by introducing an additional premise, would account for aerial bombardment using balloons or "other new methods operating in a similar manner".[195] The Russian proposal contained the following provision of the amended Article 25 of the Regulations: "It is forbidden to bomb or attack, using artillery or balloons or 'other new methods operating in a similar manner' cities, villages, buildings and structures that are undefended and do not contain military installations or depots that can be used by the enemy for war purposes".[196]

The delegate of Austria-Hungary leaned towards adopting another temporary ban, arguing that there were no arguments of military nature supporting the view that aerial bombing was an effective method of conducting military operations. At the same time, it was emphasized that "there is no possibility for the combatants to defend their rights to airspace and the borders of their airspace, which belongs to them just like control over their property and citizens" (an important remark in the context of the principle of full sovereignty in airspace, which was intensively discussed at the sessions of the Institute of International Law in Ghent in 1902 and Brussels in 1906). Extending the application of the 1899 Declaration was considered a compromise solution, which at the same time was treated as an opportunity to develop aviation without a military factor. Commenting on the delegates' assertations, the French professor L. Renault pointed out that, in his view, the extension of the continued application of the Declaration of 1899 was not rationally justified from a humanitarian point of view, since it was still permissible to conduct warfare

193 "We do not know, – and the years which have passed since the Declaration of 1899 have given us very little information on this point, – what military aviation, or, if you will, aerial artillery, may have in store for us" – *ibidem*, p. 146.

194 W. Hull, *The Two Hague Conferences and Their Contribution to International Law*, Boston 1908, p. 80.

195 J.B. Scott, *Instruction to the American Delegates to The Hague Peace Conferences and Their Official Reports*, Chicago 1916, p. 104.

196 "It is forbidden to bombard or attack, by artillery or by throwing projectiles or explosives from balloons or by the aid of other new methods of a similar nature, towns, villages, dwellings or buildings that are not defended and do not contain establishments or depots that can be utilized by the enemy for purposes of the war" – J.B. Scott, *The Proceedings of the Hague Peace Conferences; Translation*…, p. 146.

with artillery. According to the French delegate, both land-based and air bombings fall under the same legal regime and share similar technical characteristics, and there is no justification for excluding the possibility of conducting warfare through broadly understood aviation.[197] The representative of the Netherlands requested the application of the 1899 Declaration to be extended due to the need to better understand the characteristics of aviation, while emphasizing the humanitarian (rather than pragmatic) *ratio legis* of the legislation, highlighting the threats associated with aerial attacks.[198] The British delegate drew attention to the economic considerations in favor of the adoption of the ban, which lead to a lull in the arms race, and the representatives of Turkey, China and Portugal expressed their support for an extended applicability period of the 1899 Declaration.

The lack of uniformity among the conference participants resulted in the modification of the positions taken by other states. In this situation, the Greek delegate reserved the right to support the Russian and French proposals. During the vote on the adoption of the Belgian proposal to extend the applicability of the 1899 Declaration, those in favor included, among others, the representatives of The United States, Austria-Hungary, Romania, Italy, Turkey, Belgium, as well as conditionally (subject to obtaining unanimity) Germany. The representatives of France and Russia voted against it. An interesting observation regarding the great powers' strategy was made by M.W. Royse, who noted that the supporters of extending the 1899 Declaration were those states that did not have significant air power in 1907, or Great Britain, which feared the real possibility of an airstrike against its territory. In turn, the opponents of extending this declaration were France and Germany, which had an extensive military aviation development program (airships and the first conventional airplanes) and were not interested in any restrictions whatsoever on its progress. However, the deciding factor, which settled the issue of air bombing legalization by introducing an amendment to the provisions of Article 25 of the Hague Regulations in the 1899 version, was the position of the Russians, who had the largest number of aircraft at their disposal in 1907.[199]

15.3. The Adoption of Article 25 of the Hague Regulations of 1907

Russian representatives sought to put their proposal to a vote. As part of the formal discussion, a new proposal was submitted by the Italian delegate. His initiative had an interesting form, namely, it consisted of two articles. The first article prohibited the discharge of missiles or explosives from balloons not manned by

197 *Ibidem*, p. 147.
198 *Ibidem*, p. 148.
199 M.W. Royse, *Aerial Bombardment and the International Regulation*, New York 1928, pp. 86–103.

a military crew (to include unmanned aerostats prospectively, too). The second article stipulated that air bombing was subject to the same restrictions as in the case of naval and land warfare, provided that it was consistent with new methods of conducting military operations.[200] The need to regulate the issue of air bombing in a permanent form was addressed, due to continuous technical progress, the first results of which may have already indicated the possibility of drawing conclusions as to the ability to conduct military operations using aviation. Due to the above, for pragmatic reasons, the Italian delegation requested the adoption of a permanent solution, whose purpose would not be a proactive ban on military aircraft operations (due to the impracticality of such a solution), but the introduction of restrictions on air warfare acceptable to individual state representatives. It was believed that this problem could only be solved either by unanimous acceptance of the declaration by all states or by making amendments to documents relating to land and sea warfare.[201] Their task would be to harmonize all types of attacks: aerial, naval and land. It was feared that if only some of the states were to extend the application of the Declaration of 1899, in the absence of an amendment to the Hague Regulations, it would lead to a situation in which balloons would be used to attack undefended objects.[202] The five-year period was considered insufficient by the Italian delegation because it was not a sufficiently long period to reveal the full capabilities of aircraft as a means of combat. The Italian proposal to unify the regulations on various types of bombing was supported by the German side.[203] The French technical delegate argued that the word "bombardment" used pursuant to the Hague Regulations of 1899 has the same meaning in the context of any type of attack, regardless of the method (current or future).[204] The discussion revealed the differences between the delegates, who drew attention to the issue of

200 "It is forbidden to throw projectiles and explosives from balloons that are not dirigible and manned by a military crew. Bombardment by military balloons is subject to the same restrictions accepted for land and sea warfare, in so far as this is compatible with the new method of fighting" – J.B. Scott, *The Proceedings of the Hague Peace Conferences; Translation*…, p. 149.

201 "It may be that the rules relating to bombardment adopted by the 1899 Conference also apply, as the eminent Mr. Louis Renault of the French delegation has said, to balloons, but as this interpretation has not yet been given it cannot be considered as settled" – *ibidem*, p. 151.

202 "If unfortunately a war should break out then, balloons belonging to the belligerent armies could throw their projectiles against an undefended town, drop their explosives on the dome of a cathedral or on the tower of a museum, and they would be within their right; private balloons could, with the authority of the State, be armed and thus play a part in aerial operations similar to privateering without being restrained by the Convention of Paris" – *ibidem*.

203 "He consequently asks that the vote on the two articles of the Italian amendment be separated and declares that he will favor only the second" – *ibidem*, p. 152.

204 "As to the third point, which concerns the restrictions accepted for war on land and sea, it seems to him to be sufficient to give the text of the 1899 Regulations respecting the laws and customs of war on land the general character which they have in effect, since the word bombardment is applicable to every method, present or future, which may be employed in throwing projectiles or explosives" – *ibidem*.

Article 25 of the Hague Regulations, questioning whether the provisions of this article cover the cases of air bombing. In the end, the second part of the Italian proposal gained widespread support (with only one vote against).[205]

On August 14, 1907, discussions continued on the renewal of the IV Hague Declaration of 1899. Delegates from Russia and Italy upheld the intention to supplement Article 25 of the Hague Regulations with a legislative solution that would allow for protection against attacks on undefended built-up areas, including protection against air bombing.[206] These representatives proposed the following revised wording of the provision: "It is forbidden to attack or bombard undefended cities, villages, buildings, by artillery or by throwing missiles and explosives from balloons, or by other new methods in a similar way. It is forbidden to ignore during aerial bombardment existing restrictions in force during land or sea bombardment, provided that the above restrictions are consistent with the new method of conducting armed combat". The minutes of the meetings reveal a certain conflict between the chairman of the committee, who opted for the extension of the 1899 Declaration, and the delegates of Russia, France and Italy, who sought to amend the provisions of the Hague Regulations of 1899.[207] However, the French technical representative recognized that distinguishing the types of bombardment with respect to the platforms from which they are launched (sea, air or land) is somewhat superfluous due to the universal nature of the phrase "bombardment". Therefore, he proposed the use of the phrase "by whatever means" (*par quelque moyen que ce soit*), added after the phrase "it is forbidden to attack or bombard".[208] The proposal was widely accepted and finally approved unanimously by the participants of the committee's work.[209] In this way, the ban on attacking inhabited areas and undefended buildings was extended to include air operations.[210]

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205 *Ibidem*, p. 153.

206 "Same time by the delegation of Italy, were inspired by the same thought: to add to Article 25 of the Regulations of 1899 concerning the laws and customs of war on land a provision that would assure for all time to undefended towns, villages, dwellings and buildings immunity from attack or bombardment even by means of balloons or other new analogous means" – *ibidem*, p. 14.

207 Editorial Note, *The Use of Ballons in the War Between Italy and Turkey*, "The American Journal of International Law" 1912, vol. 6, p. 487.

208 "In these circumstances he must ask whether the enumeration proposed by the delegation of Russia will strengthen the principle in view to spare as far as possible the places and buildings in question. On the contrary he thinks it would be preferable to make the present text of Article 25 more precise by inserting the words: «by any means whatever,» after the words: «It is forbidden to attack or bombard.» Such an addition would certainly oifer better guaranties both for the present and the future" – J.B. Scott, *The Proceedings of the Hague Peace Conferences; Translation*…, p. 15; W.M. Gibson, *L'Aéronautique*…, p. 238.

209 "The President says that the Commission is unanimous in adopting the proposal thus amended" – J.B. Scott, *The Proceedings of the Hague Peace Conferences; Translation*…, p. 15.

210 C.H. Stockton, *Outlines of International Law*, New York–Chicago–Boston 1914, p. 359; Z. Cybichowski, *Międzynarodowe prawo wojenne z uwzględnieniem przesilenia bałkańskiego*

15.4. Fiasco of XIV Hague Declaration of 1907

On August 17, 1907, the proposals of the committee were discussed in the plenary session of the conference. During the vote on the renewal, for 5 years, of the Declaration on the Prohibition of the Discharge of Missiles and Explosives from Balloons of July 29, 1899, the French delegation emphasized that it was unable to support the extension of the applicability of the 1899 document, arguing that the amendments to the 1899 Hague Regulations on the Laws and Customs of Land War sufficiently met the humanitarian needs to regulate the issue of aerial bombardment.[211] The British side proposed that the 5-year period should be eliminated, and a provision was introduced on the validity of the declaration "until the Third Peace Conference is convened".[212] Of the larger states, only the United States (and the United Kingdom itself) voted in favor of the British amendment. Most of the powers of this era voted against or abstained from voting. Additionally, the vote on the Declaration itself, in the form of a proposal submitted by the Belgian side (modified by the amendments of the British delegation), was far from uniform, and objections were expressed by Germany, France and Russia.[213]

The Declaration concerning the Prohibition of the Discharge of Projectiles and Explosives from Balloons of October 18, 1907, known as the Fourteenth Hague Declaration, reproduced the previous document of 1899 in its fundamental content.[214] A significant change was the removal of a specified applicability period of the Declaration – in 1907 it was assumed that it would be in force until the end of the Third Peace Conference. With this conference (planned for 1915), the doctrine of international law associated hopes regarding, among others, the issue of using aviation in a future armed conflict.[215] Due to the fact that the third conference in The Hague was never convened, from a formal point of view, the document is still in force today regarding the states that signed it. However, the formal application of this document, in accordance with the *si omnes* clause, had been significantly limited only to cases in which both warring parties are simultaneously a party to the declaration. Of the larger states, only the United States, Belgium, and the

[*International Law of War and the Balkan Crisis*], Lwów 1914, p. 46; R. Bechoff, *L'Aviation et les lois de la guerre*, "Revue générale de droit aérien" 1932, vol. 9, p. 530; A. De Lapradelle, *La guerre italo-abyssine et le respect des lois de la guerre*, "Revue générale de droit aérien" 1936, p. 32; J.B. Scott, *Instruction to the American Delegates*…, pp. 103–104.

211 "It considers that the humanitary object is fully attained by the general provision of the Regulations of 1899 on bombardment, especially since, upon our proposal, the words «by any means whatever» have been added to the prohibition laid down in Article 25 of these Regulations" – J.B. Scott, *Instruction to the American Delegates*…, p. 85.

212 *Ibidem*.

213 *Ibidem*, p. 577.

214 XIV Declaration Prohibiting the Discharge of Projectiles and Explosives From Balloons; J.B. Scott, *Instruction to the American Delegates*…, p. 687.

215 R.E. Heinselman, *Aerial Warfare*, "The Canadian Law Times" 1913, vol. 33, p. 747.

Netherlands signed the declaration. All other powers refused to sign it. The above phenomenon signaled that the states clearly emphasized the will to allow aviation as a new means of conducting warfare, and air bombing as a legal method of attack. The discussion on the regulation of air attacks by means of a provisional declaration, which took the form of a proactive ban, became a permanent provision in the Hague Regulations. The delegates agreed that the introduction of a ban on bombing undefended cities in any way found sufficient humanitarian justification, because it prevented the possibility of carrying out air attacks to a greater extent than would be permissible in a land war. At the same time, the scope of the discussion that took place in connection with the provisions of the so-called IX Hague Convention of 1907 on Bombardment by Naval Forces was omitted. One of the unconscious mistakes of the preparatory work was probably the recognition of the issue of applying the 1899 Declaration as part of the discussion related to the regulation of the Convention of 1899 on the Laws and Customs of War on Land, which naturally limited the scope of the discussion.

15.5. Naval Bombardments at the Hague Conference of 1907

The issue of naval bombardment was not the subject of a treaty solution at the first Hague Conference in 1899. Due to the above, the third commission was entrusted with the task of preparing a draft of a new convention, which would cover attacks on undefended cities and built-up areas by naval forces. The proposal to regulate the issue was submitted by representatives of several states. The United States addressed the general rule resulting from Article 25 of the Regulations to the Convention of 1899, at the same time emphasizing that inhabited areas may be "[…] liable to the damages incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port; and such towns, villages, or buildings are liable to bombardment when reasonable requisitions for provisions and supplies at· the time essential to the naval force are withheld, in which case due notice of bombardment shall be given".[216]

The joint proposal of the delegates of the United States, Spain, Italy, the Netherlands and Russia assumed that "When the necessities of the military operations require the destruction of military works, military or naval establishments, depots of arms or war materiel, workshops used for the needs of the hostile fleet or army, or ships of war in the harbor, the commander of the naval force may himself proceed to said destruction by bombardment, if the local authorities, after a formal summons and after the expiration of a reasonable time of waiting, have refused to satisfy these requirement".[217] The French representatives requested the addition of

216 *Ibidem*, pp. 657–658.
217 *Ibidem*, p. 659.

a provision that "is understood that the prohibition to bombard the undefended town holds good, as in the preceding case, and then the commander shall take all due measures in order that the town may suffer as little harm as possible".[218] The international proposal became a subject of discussion in the committee forum. Chairman A.M. Beernaert argued that the essence of adopting the 1899 ban on bombing areas inhabited by the civilian population was the need to protect the principle that non-combatants cannot be the object of military operations if they do not participate in them.[219] He noted that doubts were raised in connection with the phrase "bombardment of a coastal city" being categorized as an act of naval warfare, rather than land warfare.[220] Commenting on the submitted proposals, he approved the conditions allowing for attacks, in exceptional situations, on undefended ports and seaside locations, recognizing the right of combatants to destroy military establishments.[221] During the discussion of the draft convention, the participants noted the impracticality of the nature of the requirement to issue a warning, due to the loss of tactical and strategic capabilities.[222] Many of the delegations considered this provision unnecessary; while simultaneously maintaining their acceptance of the viewpoint related to the ability to attack certain devices and objects (this wording did not appear directly during the discussion on the content of the draft) of military importance, located within the undefended locations.[223] Due to the above, the decision was made to modify the obligation to issue a prior warning by adding the phrase "if the military situation allows".[224]

15.6. Den Beer Poortugael's interpretative declaration

It is worth quoting the deliberations of the members of the third commission of the first subcommittee on the meaning of the phrase "undefended locations". An interpretation of this wording was presented by a delegate of the Netherlands (Den Beer Poortugael). In his opinion, in a land war, a defended area was in fact a place

218 *Ibidem*, p. 660.

219 "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 form a part of positive international law" – *ibidem*, p. 543.

220 *Ibidem*.

221 *Ibidem*, p. 544.

222 *Ibidem*, p. 546.

223 "As to Article 2, we do not see why, in undertaking the bombardment of defended towns, as, for example, military ports, the commander of the vessels should warn the authorities in advance. It is also difficult to understand the necessity of warning the local authorities regarding an attack on war-ships in ports or military or naval establishments, etc., and of waiting quietly for the local authorities to themselves destroy them" – *ibidem*, p. 547.

224 *Ibidem*, p. 548.

that could be occupied without resistance by the approaching troops. The defense of a city, per the meaning of the provision, may consist of both permanent fortifications and temporary ones, e.g., urban barricades.[225] In the context of naval warfare, the inability of warships to occupy a specific location on land (except for combined land and sea operations) was noticed.[226] To better illustrate this, the delegate used the example of the Dutch coast, which is defended against the possibility of a sea landing, while pointing out that the existing coastal fortifications did not mean that a given city (The Hague, in this case) could qualify as "defended". He recommended caution in the interpretation of certain norms that could be a pretext for extending the effects of military operations to include locations that do not pass the "defended" area test.[227] In his opinion, there was a need to make a continuous distinction between coastal defense and a city located near a coastal area, which can be bombed only if it qualifies as a defended city.[228] During the discussion, the Portuguese delegate asked for clarification of the concept of an undefended city.[229] In response, it was decided that Den Beer Poortugael's declaration would be officially registered in the conference minutes and would serve as a definition of the term, while also pointing out that the creation of a more precise definition was difficult in the context of the draft.[230] The above reservation was not objected to in the course of the work of the third committee. The report of the subcommittee rapporteur emphasized that the mere existence of fortifications did not determine the possibility of classifying a given area as "fortified" if they were not actually manned by a crew.[231] It was also indicated that there were significant difficulties in formulating a binding definition of "defended" or "undefended".[232]

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225 "In land warfare there is no doubt; it is as clear as day. An armed force is marching toward 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" – *ibidem*, p. 549.

226 "Naval forces do not march towards a town. Their aim is not to possess themselves thereof except in case they act conjointly with land forces" – *ibidem*.

227 "Scheveningen is, so to speak. The Hague. Would one, because of the defense of the Scheveningen coast, be able to regard The Hague as defended in order to bombard this open town? No, certainly not. The enemy certainly has every right to use his artillery against our artillery and the other defenses of the coast, to whatever extent he deems advisable, but he has no right to bombard the town under the pretext that it is a defended town" – *ibidem*, p. 550.

228 *Ibidem*.

229 "Captain Burlamaqui de Moura requests a precise definition of an «undefended town»" – *ibidem*, p. 551.

230 *Ibidem*; *International Law Topics and Discussions*, Washington 1914, pp. 73–75.

231 "In the first place, it should be firmly established that the existence of fortifications does not of itself suffice to permit the bombardment of the place fortified if the fortifications are not defended" – J.B. Scott, *The Proceedings of the Hague Peace Conferences; Translation*…, p. 551.

232 "We believed that we should refrain from formulating a definition in the text itself of the project, in view of the difficulty of defining precisely this purely negative idea" – *ibidem*, p. 344.

15.7. Discussion of the list of military objectives in the Ninth Hague Convention of 1907

Another part of the discussion focused on the category of establishments, ports targeted for bombardment or coastal areas, regardless of their status. The German delegate pointed out that, in addition to military establishments, there may be other elements of infrastructure in a built-up area which the combatant may have "significant reasons of a military nature" to destroy, such as an important railway intersection or supplies belonging to a private entity.[233] The above conclusion sparked some controversy among the conference participants by adding the phrase "factories and supplies" as another category of objects that can be destroyed in an undefended location. The participants considered the above changes to be too far-reaching.[234] The Netherlands representative argued that introducing the possibility of attacking a given location due to the existence of supplies might well lead to the possibility of qualifying the entire area of a coastal urban center as a target of bombardment. As a result, an amendment was introduced, changing the term "supplies" to a phrase largely derived from French – "war materiel", meaning war materials.[235] These conclusions were accepted by the majority of the subcommittee participants and then submitted for discussion to the entire committee. The general rule of prohibiting attacks against undefended areas (referred to as Article 1[236] in the new numbering) was unanimously accepted. In the context of Article 2, it was argued that the dispositions of both provisions were closely related through the use of the phrase "despite/however", which testifies to the recognition of Article 2 as a norm introducing an exception to the ban on bombing undefended areas.[237] The rapporteur's report emphasized that Article 2 was a result of the recognition of distinctions occurring on the basis of land and sea warfare by conference delegates, which should consequently lead to the adoption of a separate legal regime. It was recognized that combatants had the right to destroy certain types of objects, even in the absence of grounds for considering a given location as defended.[238] A total prohibition of bombardment, in the version adopted on the basis of the document on the law and customs of land warfare, was considered impractical and impossible to comply with.[239] There was no

233 *Ibidem*, p. 551.
234 *Ibidem*.
235 "Rear Admiral Siegel says that he is willing to withdraw the word «supplies» since the expression «war materiel» which is now in Article 5 is entirely satisfactory to him" – *ibidem*, p. 552.
236 *Ibidem*, p. 343.
237 *Ibidem*, p. 346.
238 *Ibidem*.
239 "Indeed the Commission is unanimously in favour of prohibiting bombardment of undefended towns; but, on the other hand, to lay down a prohibition that is too absolute would be placing commanders of naval forces in a position where it would be impossible to obey" – *ibidem*, p. 348.

unanimity as to the right moment to launch a naval attack, and above all, there was a fundamental discrepancy regarding the application of a prior warning. The records of the discussion also reveal the concerns of the conference participants related to attacking undefended areas, where the right to bomb a wide category of objects posed a real threat to the civilian population, especially considering the relative and optional nature of the warning issued.[240] In this regard, the French version of Article 2 of the draft convention began to gain popularity. It emphasized that, in the event of an attack on an undefended area, the scope of destruction should be limited to a minimum, and a conditional warning should be introduced "if the military situation permits such".[241] It received the full support of the great maritime powers (the United States, Germany, Austria-Hungary, France, Great Britain, Japan, Russia).

The document that was ultimately adopted, marked as the Ninth Hague Convention concerning Bombardment by Naval Forces in Time of War of 1907 in Article 1, provided for a prohibition on bombing undefended ports, cities, settlements and villages.[242] Article 2 of the provision, after negotiations, took on a form similar to the French proposal. The provision of this article stipulates that military establishments, naval installations, war material depots, workshops and factories that can be used by a belligerent party, as well as warships remaining in port, are legitimate targets. In the event of special military considerations, recognizing the general ban on attacking undefended areas, a given fleet commander could undertake shelling without warning, with the requirement to take all precautions regarding the civilian population. With reservations, mostly regarding Article 1, all the states participating in the conference voted in favor.[243]

15.8. The differences between the rules governing land and naval bombardment

The rules governing naval bombardments had been significantly modified compared to the relevant regulation occurring in terms of land operations. State delegates accepted that a total ban on bombing undefended locations in the context of maritime warfare cannot be absolute. In this respect, emphasis was placed on

240 "The question is, whether to permit destruction by bombardment and with suddenness, without any warning, of the public and private depots, not only the installations adapted to serve the fleet and the army but also shipyards, bridges, railway stations, etc. Where is the town which, if bombarded in these circumstances, will not suffer incalculable damage from projectiles that fall on establishments and occupied places, in the streets and accidentally upon numerous neighboring dwellings?" – *ibidem*, p. 349.

241 *Ibidem*, p. 350.

242 "It is forbidden to bombard by naval forces undefended ports, towns, villages, dwellings or buildings. […] A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbor" – *ibidem.*

243 *Ibidem*, pp. 88–89.

the definite difference in the characteristics of the operations conducted by a navy, which, unlike land troops, did not have the capability to occupy a specific territory. Article 2 of the Ninth Hague Convention of 1907 assumed the possibility of attacking a specific category of objectives which could be categorized as military objectives in the modern sense. Nevertheless, especially in the context of factories and material depots, one significant difficulty was the assessment of the actual value of these facilities for the military contribution of the opposing party since the provision did not present any specific circumstances in this respect and was based only on the potential possibility of using the materials in question. There was also the obligation to take all precautions in the event of bombing objects located within the boundaries of undefended locations. It is worth noting that, during the plenary discussions, voices emerged signaling the need to better define the phrase "undefended localities". Even then, it was admitted that defining the scope of this phrase with clarity was hampered in the context of the conditions for conducting naval warfare. The solutions introduced certainly took into account, to a much greater extent, all aspects related to the conduct of naval warfare. A key aspect was, just as in the context of air warfare, the acceptance of the inability to occupy locations. However, determining the method of assessing whether a given place counted as defended or not was problematic. Existing records of plenary meetings and deliberations reveal that in their course it was established that ports and coastal cities may be the subject of naval bombardment if they possess anti-ship weaponry, such as, for example, coastal artillery. The list of military objectives should be considered consistent with military logic and so wide that even accepting that Article 2 of the Ninth Hague Convention of 1907 contained an enumerative list of objects, but it did not change the fact that the scope of application of this standard allowed it to cover virtually any building of military significance.

16. Session of the Institute of International Law in 1910

The issue of air transport in times of peace was again the subject of a report by Paul Fauchille at the next session of the Institute of International Law in 1910. The French professor commented on the solutions adopted on the basis of the Paris draft of 1909, at the same time gradually changing his position on the previously adopted principle of freedom of the air, in 1910 calling it the concept of freedom of aerial navigation, which is subject to restrictions due to the security of the state and its citizens.[244]

244 *Annuaire de l'Institut de Droit International*, vol. XXIII, p. 298.

Fauchille tried to combine the issue of a state's general sovereignty over its airspace (as *res communis*) with the nature of air as an elusive element (as *res nullius*), recognizing that the principle of full sovereignty is in complete conflict with John Westlake's postulate as regards the granting of the right to innocent passage over its national territory. The French scholar of international aviation law pointed out other flaws in the principle of full state sovereignty in its own airspace. He argued that during a war, assuming that the airspace was free, hostile aircraft could not perform acts of war over the territory of neutral states, while having the right to fly over it. In his view, full state sovereignty will prevent warring parties from conducting warfare in airspace if they are separated by a neutral state and do not share borders, pointing here to the example of Greece and Bulgaria.[245] Fauchille argued that the right to free overflight in airspace may be subject to arbitrary restrictions, for instance as a result of considering the flight of an aircraft as a threat due to the hypothetical possibility of its fall onto the territory of a given state. He countered the uncertainty and arbitrariness of the law of innocent passage with rigid regulations governing the rights of the state to close certain air zones due to the so-called conservation laws.[246] The institute's rapporteur also revised the height of the restricted zone, considering that the level of 1,500 meters is insufficient for protection against espionage operations in the light of the progress of aerial photography – as a solution, he proposed regulations prohibiting the transport of spy equipment on aircraft and the establishment of special military protection zones, within which operating air transport would not be allowed.[247] As a consequence, the French professor updated his approaches submitted on the basis of the 1902 draft. Article 7 of the draft assumed that "aerial navigation is free, but each state has the right to enforce the rights necessary to protect its territory, national security and the protection of the population inhabiting its territory". In Article 8, it was emphasized that "in order to protect its rights, a state may close certain parts of the atmosphere, in particular it may prohibit aerial navigation over and around fortified areas".

In the opinion of the German delegate von Baar, straightforward resorting to the analogy between international law of the sea and aviation law cannot be justified in all cases. The German author emphasized that the risks to the population associated with unregulated aerial navigation of unlimited nature were much more serious than in the case of maritime navigation. There was also a lack of technical capability to verify the altitude of the aircraft, and various circumstances were also indicated that might contribute to the violation of restricted airspace

245 During the Institute's deliberations, Greece and Bulgaria did not have a shared land border. It was established as a result of the so-called First and Second Balkan War (1912–1913).

246 *Annuaire de l'Institut*…, vol. XXIII, p. 301.

247 *Ibidem*, p. 302.

zones.[248] Von Baar believed that the above factors must lead to the abandonment of the principle of freedom of the air in favor of international regulation that will regulate the conditions for exercising state sovereignty in airspace.[249] The author also commented on Paul Fauchille's perspective regarding the regulation of aviation use during wartime, arguing that the analogous application of the rules governing naval warfare was incorrect, especially in terms of the right to prize (confiscation of commercial ships).[250]

17. Session of the Institute of International Law in 1911

The Institute's rapporteur at the 1911 session emphasized the need to consider the issues governing the use of the aircraft in circumstances of future war, pointing to the growing interest in aviation in military circles. Fauchille concluded that the subject of air warfare had matured both technically and legally to the point where an attempt could be made to create a code of air warfare. In this regard, the existence of regulations on land and naval warfare, which were created at the diplomatic conference in The Hague in 1907, was emphasized. Fauchille stressed that the air warfare regime would include regulations dedicated exclusively to air warfare, separate from the rules governing armed conflict on land and at sea, while taking into account provisions applicable to other forms of warfare.[251] The analogy, according to the French scholar, should be used as a form of assimilating the provisions of air warfare with the standards of naval warfare to a greater extent than in land warfare. This was supported, among others, by the issue of seizing enemy property at sea, which should be regulated in accordance with the regulations applicable to naval operations. A similar problem was the issue of the permissible scope of converting civil (private) aircraft into military ones. Fauchille recognized that leaving balloons in the service of land or naval troops does not mean that they should be treated as a means of combat on land or at sea and thus make a similar extension of the provisions regulating these dimensions of conducting military operations.[252] The scholar emphasized that air bombing was a fact that lawyers had to face in full, also despite the adoption of a relevant declaration in 1907.

248 *Ibidem*, pp. 313–314.
249 *Ibidem*, p. 314.
250 *Ibidem*, p. 316.
251 *Annuaire de l'Institut de Droit International*, vol. XXIV, p. 24.
252 *Annuaire de l'Institut*…, vol. XXIII, p. 25.

18. Paul Fauchille's draft law of air warfare

For these reasons and considering the 1910 resolutions of the Institute of International Law concerning the preparation of a draft addressing aerial operations in wartime, Paul Fauchille prepared a draft code of air warfare.

> Article 1. Belligerents have the right, in any part of the atmosphere, to conduct military operations over their own land, sea and coasts. It is prohibited to conduct military operations in a way that may cause damage on the territory of a neutral state, in particular fighting in close proximity to the range of the aircraft's armament.[253]

The provision limited the possibility of conducting air warfare only to the borders of the warring states. The authors of the draft were particularly focused on avoiding the possibility of damage in neutral states, which affected the ban on air combat in the border area. Further comments concerned the issue of the circulation of military aircraft over the areas occupied by neutral states, in fact boiling down again to a dispute regarding the principle of freedom of the airspace advocated by the French author. This was strongly opposed by a representative of the German doctrine, arguing for the necessity of a complete ban on the use of neutral states' airspace by warring aircraft.[254]

> Article 2. Military aerostats are not considered belligerents, subject to the provisions of Article 3, unless they have a clear military purpose assigned by a state and are commanded by a uniformed officer. Military aircraft should have a visible and clear marking.[255]

Observing the deliberations of the Institute of International Law on the status of state-owned and military aircraft, it is necessary to notice the gradual and uniform treatment of the prerequisites for the acquisition of military status by a given aircraft. The first determinant was the presence of a given aerostat in the state service of a military nature. The second was the fact of having a uniformed ranking officer as commander'. The third element was that the aerostat had a clear and visible sign of nationality.[256] The first requirement concerned the characteristics of the aircraft, specifically its technical and structural adaptation for specific tasks intended for military forces (a separate issue was the possibility of converting the passenger version of aircraft to the military version). The second element was

253 *Ibidem*, p. 28.
254 *Ibidem*, p. 139.
255 *Ibidem*, p. 28.
256 *Ibidem*, p. 66.

the requirement directly related to the status of the crew of a military aircraft – the necessity of wearing uniforms was related to preventing the possibility of treating captured pilots or crew members as spies. Indirectly related to this was the need to have a clear indication of nationality.

> Article 3. The use of sports-type aerostats is prohibited between combatants. However, private aerostats may be placed into military service provided that they remain under the command of an officer of the warring party and bear clear markings.[257]
> Article 4. The transformation of a private aerostat into a military one may take place during a war on the territory or territorial waters of a state – the owner of the aerostat, on the high seas , in the airspace of neutral states under the conditions set out in the Hague Convention of 1907 regarding the transformation of merchant ships into warships. Private aerostats converted into military airships cannot change their status during the entire period of hostilities.[258]

Articles 3 and 4 were an expression of the application of analogies to practices taking place in the sphere of naval warfare, where it was possible to convert merchant ships into warships. The above provision is related to Paul Fauchille's concept of airspace freedom. Adopting a separate view related to the recognition of the full sovereignty of a state in the air column extending over its territory would involve the adoption of the opposite position, since allowing the possibility of conversion over areas occupied by neutral states would result in a violation of neutrality principles.[259] An expression of maintaining the idea of free airspace was also Article 23. It pointed out that neutral aerostats were permitted to using the airspace of warring states above an altitude of 11,000 meters, or else were considered to be instances of espionage.[260]

> Article 5. In air warfare, the IV Hague Convention of 1907 regulating the laws and customs applicable to land and sea warfare should be applied as widely as possible. The provisions of Section I, Chapter II, the provisions of Section II, Chapter I, and Section II, Chapter III of The Hague Convention of 1907 on the Laws and Customs of War on Land are applied to the regime of air warfare.[261]
> Article 6. Discharging projectiles or bombs from balloons, intended solely for the dispersion of gases or projectiles that spread within the human body, is prohibited in accordance with the provisions of the Second and Third Hague Declaration of 1899.

257 *Ibidem*, p. 28.
258 *Ibidem*, p. 29.
259 *Ibidem*, p. 68.
260 *Ibidem*, p. 34.
261 *Ibidem*, p. 29.

> Article 7. It is forbidden to bomb undefended cities and villages. The rules on bombardments in land and naval warfare of the Hague Convention of 1907 apply to aerial bombardments.[262]

Fauchille emphasized the need to apply the regulations accordingly , i.e., to the extent that it would be consistent with the nature and needs of air warfare. In particular, in the rapporteur's opinion, in circumstances of air combat, the norms regulating the status of prisoners of war (Section I, Chapter II of the Hague Convention of 1907 on the Laws and Customs of War on Land), the rules of harming the enemy (in the field of perfidy and treachery – Section II, Chapter I), as well as the provisions of Section II, Chapter III (on parliamentarians) should be applied. The French author also referred to the provisions on naval warfare. However, since the Second Peace Conference did not adopt regulations on the laws and customs of naval warfare, the intention of the delegates was to introduce the principle of proper application of the provisions governing land warfare to the norms applicable in naval warfare.[263] A fundamental exception in this regard was the issue of bombing cities, towns, and settlements by naval forces, which became the basis for the adoption of the new treaty regulation in the form of the IX Hague Convention of 1907 on Bombardment by Naval Forces in Time of War. The French author believed that the leading (*en principe*) regime governing the principles of air warfare should remain the rules applicable in naval warfare. However, it allowed (*mais non exclusivement*) the possibility of applying also, depending on the needs, the above-mentioned norms of the Fourth Hague Convention of 1907 on War on Land.[264]

The legislative solution proposed by the French author was assessed by the Institute's commentators (Rolina, Meuerra, Melili) as partly misleading as to the actual content of the regulation of air warfare ("general de la formule de cet article a pu induire en erreur")[265]. This position must be agreed with. First of all, the solution to the problem of air bombing raises the most doubts. Article 25 of the Regulations to the Fourth Hague Convention of 1907 is found in Section II, Chapter I of the Convention – which indicates that Fauchille's intention was to designate this chapter as primarily applicable to air warfare. On the other hand, the French rapporteur pointed out that the legal regime of naval warfare was far better adapted to the characteristics of warfare, allowing for the appropriate application of regulations governing naval fleets. The combination of these elements

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262 *Ibidem*.

263 *Ibidem*, p. 69.

264 "[…] que la guerre aérienne doit être assimilée à la guerre maritime plutôt qu'à la guerre continentale: il faut, suivant les cas, lui appliquer les règles de l'une ou de l'autre; les cas où on doit s'inspirer de celles de la guerre maritime seront toutefois plus nombreux que ceux où on doit suivre celles de la guerre sur terre" – *ibidem*, p. 70.

265 "Le caractère un peu trop général de la formule de cet article a pu induire en erreur; sur sa portée certains membres de la commission" – *ibidem*, p. 69.

creates a certain legislative chaos, as, for example, in the case of aerial bombardments, the prohibition of attacking undefended areas is absolute in land warfare, while in the context of naval operations, it Is subject to significant limitations. However, this disorder is only superficial. In the course of discussions on the content of Article 7, one of the commentators of the provision requested the adoption of an amendment to the adopted draft, arguing that the prohibition on bombing did not apply to warships, military supply depots, and docks.[266] The rapporteur's response to this request was to indicate the legal provisions of the Hague Convention of 1907 on Bombardment by Naval Forces in Time of War as appropriate. This would solve possible doubts, and the change would be *superfluum*. This is an important observation, indicating that, in Fauchille's view, the provisions concerning naval bombardments would be applied in the context of aerial attacks. This remark will be considered to a greater extent later in the work.

> Article 8. Aerostats that, acting under cover or false pretense, collect or attempt to collect information over the territory of a warring state or land and sea areas occupied by hostile military formations or groups of warships with the intention of informing the opposing party, are considered to be spying craft. Crew members of aerostats are not considered spies when being uniformed and performing tasks for reconnaissance or communication functions between different parts of the army or territory.[267]

The above provision concerned the treatment of aircraft crews. Some commentators postulated that aerostats that do not have nationality marks or indicate a false nationality while conducting observation should be considered spy aerostats. It was also argued that the crews of aircraft that carry out aerial bombardment, while not fulfilling the definition of a military aircraft, were to be treated as pirates/spies. According to the rapporteur, the above proposals were contained in the first sentence of Article 8, which included a general prohibition on the perfidious use of flags, insignia or symbols of parlimentaires, the Red Cross and the opposing fighting state (Article 23(f) of the Hague Regulations of 1907).[268] However, there were some doubts related to the status of, for example, crews participating in bombing missions. Since the second sentence of Article 8 referred to prisoners of war as uniformed persons who operate in the reconnaissance and communication services and maintain communication with various parts of the army or territory, doubts arose regarding the status of crewmen performing combat missions, e.g., of the nature of strategic bombing behind the front. As a rule, the crew members of these aircraft operated on board aerostats meeting the status of military aircraft and were uniformed. However, they did not perform reconnaissance or

266 *Ibidem*, p. 141.
267 *Ibidem*, p. 30.
268 *Ibidem*, p. 72.

communication missions. On the other hand, due to the uniform and being in an insignia-bearing aircraft, they acted as combatants, and for this reason they would have the status of prisoners of war.

The regulations of Articles 9–19 of the draft by Paul Fauchille regulated the issue of seizure of goods on board, as well as the status of combatant state-owned aerostats remaining on the territory of the other combatant state.[269] Article 22 introduced solutions in the field of air warfare analogous to those contained in the provisions of the Thirteen Hague Convention of 1907 on the Rights and Duties of Neutral Powers in Naval War.

19. Commentary to the draft of air warfare code of 1911

Undoubtedly, Paul Fauchille's draft was the first comprehensive legal solution on the issue of air warfare. The legal regime of air warfare, thanks to the efforts of the French scholar, became a separate part of international humanitarian law. The author correctly envisioned that aviation would become the same weapon of military operations as the tools used in land and naval warfare. He also pointed out that the XIV Declaration of 1907 would not be respected in a future conflict and, for this reason, he pointed out that international law experts ought not to waste energy on sterile (in his opinion) discussions on the legality of air bombing *per se*, but accept this method of conducting military operations as legal and devote themselves to the issue of regulating this matter in a manner acceptable from both a humanitarian and military perspective. Fauchille made significant progress in this regard by deciding to implement the regulations governing bombing in naval and land warfare into the legal regime of air warfare. This was a significant breakthrough, because unlike the delegates participating in the 1907 II Peace Conference in the Hague, Fauchille avoided legalist "tunnel vision" and remained consistent in his vision of assimilating the law of naval and air warfare. In this way, the issue related to the absolute prohibition of attacking undeveloped areas in land warfare was significantly modified by the introduction of the possibility of applying the norms applicable in naval warfare, allowing the destruction of certain categories of objects also in a situation where a given location is not defended. The French rapporteur displayed substantial legal foresight in this context. The regulations presented on the basis of the concept from 1911 were comprehensive and covered a wide range of issues.

269 *Ibidem*, pp. 76–100.

It is a characteristic fact that the majority of lawyers operating at the Institute did not share Paul Fauchille's insightful assessment of the phenomenon of air warfare, believing that the new possibilities of conducting warfare were incompatible with the currently applicable international law or are inhumane in nature, which would be a sufficient enough reason to introduce a preventive ban on the development of this technology (claiming explicitly that the phenomenon of air warfare could not exist).[270] At the same time, the fact that in 1907 only some states decided to sign the document was overlooked, especially the lack of support from the leading powers of that period, and the exceptional progress of military aviation technology. The institute's rapporteur referred to the above allegations in his excellent reply. For Fauchille, air combat was a reflection of the conditions at sea and on land. In view of this, both the exchange of fire between aircraft (air-to-air combat) and between aircraft and land objects would have a legitimate dimension.[271] It was emphasized that the main efforts of specialists should be directed not towards an attempt to outlaw this means of combat as such, but towards limiting the dimension of air warfare to harming the enemy's armed forces only, without the possibility of attacking civilians and undefended cities and villages. The French rapporteur also rejected the argument that presented considerations of a humanitarian nature, pointing out that torpedoes and naval mines were weapons which were commonly deployed by navies of various states despite their potential "perfidious" character.[272]

In the vote on the adoption of the final resolution relating to air warfare, the motion of T. Holland and J. Westlake to prohibit military aircraft from performing any acts of hostility or possibly limit their operation to non-combat tasks was rejected.[273] In the end, by a vote of 14 to 7, a resolution was adopted, which recognized "air warfare as acceptable, but on the condition that it does not create a greater threat to the civilian population than sea or land war".[274]

20. Le Moyne's draft law of air warfare

The task of creating a comprehensive code devoted to air warfare was also undertaken by another French scholar, V. Le Moyne, who proposed his own draft regulation in his doctoral dissertation in 1913.[275]

270 *Ibidem*, p. 53.
271 *Ibidem*, pp. 56–57.
272 *Ibidem*, p. 58.
273 *Ibidem*, p. 343.
274 *Ibidem*, p. 346.
275 V. Le Moyne, *Le Droit Futur de la Guerre Aérienne: Thèse pour le Doctorat*, Nancy 1913.

Article 1. Air warfare is allowed and properly regulated by the regulations applicable in naval and land warfare.[276]
Article 2. The theatre of air warfare is delimited by the borders of the warring states over their territorial sea and the high seas.[277]
Article 3. For the duration of the war, all combatant aircraft are prohibited from flying over the territory of neutral states and vice versa.
Article 4. In the event of war, all aircraft – civilian and private – may be seized as part of the theatre of war. All seized aircraft should be returned after the end of the war; alternatively, an equivalent should be paid.
Article 5. The combatants may take any action against neutral aircraft found within their territory.
Article 6. Only the crew of an aircraft operating covertly or under false pretenses, with the intention of collecting information about the enemy, may be considered spies.
Article 7. The status of the aircraft should be determined on the basis of state designations.
Article 8. Military aircraft of the combatants found on the territory of neutral states are subject to seizure. They will be returned after the end of the war; the aircraft crew is subject to internment.[278]

Compared to the provisions of the Institute of International Law of 1911, the fundamental difference was the recognition of the legitimacy of the postulates put forth by the German doctrine at the session in Madrid and the adoption of a complete ban on the passage of warring state's aircraft through the airspace of neutral states. Additionally, contrary to the position of the Institute's rapporteur, P. Fauchille, the French researcher considered that "the danger of air bombing on a scale similar to that of land or naval shelling is small, and the inhabitants of undefended cities and villages can be reassured of their fate in this respect".[279] Elsewhere, the author stated that "the role of aircraft will be limited only to purely ancillary task".[280] For this reason, Article 1 of Le Moyne's draft established that air warfare would be legitimate and governed by the relevant regulations applicable to naval and land warfare. An important observation made by Le Moyne, and one still relevant to this day, is the recognition of the boundaries of a military aviation operations theater in the event of an armed conflict, based on the borders of

276 *Ibidem*, p. 205.
277 *Ibidem*, p. 229; "Âîûsi donc, dans la guerre aérienne, les hostilités auront lieu dans Tatmosphère qui domine le territoire de belligérants, leur mer territoriale et la mer libre. La circulation aérienne sera complètement interdite pour les belligérants au-dessus du territoire des neutres et pour les neutres au-dessus du territoire des belligérants et de leur mer territoriale" – *ibidem*, p. 234.
278 *Ibidem*, pp. 109–258.
279 *Ibidem*, p. 127.
280 *Ibidem*, p. 205.

1) warring states, 2) their territorial sea, and 3) the high seas. A subsequent section of the author's work contained an extensive commentary on the 1911 draft of the Institute of International Law, especially on the principle of aerial navigation freedom and the principles of neutrality.

21. A draft law of air warfare by James M. Spaight

Studies made by the British lawyer and pilot James M. Spaight, who made an extensive analysis of the problem from the perspective of World War I, the inter-war period and World War II, are of great value in the study of the law of air warfare. The first item referring to the status of military aviation in the event of an armed conflict was created before the outbreak of the Great War in 1914 and, like Le Moyne's study, contains interesting *de lege ferenda* proposals relating to the draft proposed by the Institute of International Law in 1911. Spaight, in its preliminary considerations, accurately pointed out that the regulation of Article 25 of the 1907 Hague Regulations applicable in the context of air bombing was irrelevant to air warfare.[281] In this regard, he used a reasonable analogy to naval operations, which did not have a physical capability to occupy a given location in a manner characteristic of land forces.[282] The military advantage resulting from naval action can only be obtained by destroying buildings of specific military value – consistently with the provisions of Article 2 of the IX Hague Convention of 1907. Meanwhile, according to the author, the nature of air operations is similar to naval operations, which forces consent to attack without warning undefended areas where military objectives are located.[283]

> Article 1.
> An aircraft shall be considered to be a military aircraft and its crew to be belligerents provided the aircraft is under the direct authority, immediate control, and responsibility of a belligerent Power, that it bears the distinctive sign of its character as a military aircraft of the said Power, irremovable and recognisable at a distance, and that its crew are subject to military discipline, observe the laws and customs of war, and wear the uniform or other distinguishing emblem of their national force.

281 *Ibidem*, p. 32.
282 *Ibidem*, pp. 15–17.
283 "Air bombardments are subject to the provisions of the IX Hague Convention of 1907 on Bombardment by Naval Forces in Time of War. Air bombing requires prior authorization from the high command" – *ibidem*, pp. 18–19.

Spaight considered the existing ideas defining the status of a military aircraft and its crew to be unsatisfactory, raising the need for strict adherence to the principle of distinguishing combatants from civilians.[284] The author himself criticized the system of painted markings used during the Balkan War as insufficiently visible to combatants.[285] In the light of the provision, military aircraft were those 1) under the control of a warring state, 2) aircraft bearing a visible sign of nationality, 3) aircraft controlled by crewmen wearing uniforms or having clear distinctions, subject to discipline and respecting the laws and customs of war. The latter requirement – uniforms – was treated as particularly useful in a situation in which crew members would be forced to leave an aircraft, as a sign of combatant status. This argument was also based on the basis of Article 30 of the French decree of December 16, 1913, which mandated that military aircraft had to have a uniformed crew and a certificate attesting the military nature of the aircraft and crew.[286]

> Article 2.
> The crews of all other aircraft engaging in any act of hostilities may be brought before the courts as unqualified belligerents, and the aircraft may be confiscated. An "act of hostilities" includes the conveyance of individual passengers who are embodied in the armed forces of the enemy, the transmission of intelligence in the interest of the enemy (whether by carrying messages or despatches, or by the use of code lamps, signals, or wireless telegraphy), and the carriage of munitions of any kind.

In this regard, Article 2 constituted the prohibition of civilian warfare under pain of losing protection from the effects of warfare, as well as the possibility of confiscation of an aircraft.[287] The author's use of the phrase "unqualified combatant" is noteworthy.[288]

> Article 3.
> The crews of military aircraft are, in respect of everything that concerns them as individuals in the armed service of a belligerent, under the domain of the various Declarations

284 "An aircraft shall be considered to be a military aircraft and its crew to be belligerents provided the aircraft is under the direct authority, immediate control, and responsibility of a belligerent Power, that it bears the distinctive sign of its character as a military aircraft of the said Power, irremovable and recognisable at a distance, and that its crew are subject to military discipline, observe the laws and customs of war, and wear the uniform or other distinguishing emblem of their national forces" – J.M. Spaight, *Aircraft in War*, London 1914, p. 114.
285 *Ibidem*, p. 71.
286 *Ibidem*, p. 74.
287 *Ibidem*, p. 51.
288 *Ibidem*, pp. 114–115.

> and Conventions which regulate war and neutrality, so far as the said Declarations and Conventions are not inconsistent with the provisions of the present code.

Article 3 indicated that the military aircraft crews had the status of combatants and were subject to "all Declarations and Conventions that relate to war and neutrality".[289] The right to the status of a war prisoner was extended to the crew of private aircraft, provided that they did not participate in espionage or armed conflict.[290]

Article 4 provided for the possibility for a warring party to detain a private aircraft belonging to the enemy, the status of which under Article 5 would first be established on the basis of the relevant state mark.[291] Article 13, in turn, indicated that aircraft on board warships were a special component of the ship – the author foresaw the possibility of aircraft carriers in this respect.[292]

> Article 6.
> Private enemy aircraft may be confiscated: (1) if they circulate in a belligerent's zone of operations, on land or sea, or in the vicinity of his troops, warships, military aircraft, transports, military works, military or naval establishments, stores, depots, workshops, etc.; (2) if they disobey a belligerent's orders or his prescribed signal or warning to land.
> Article 7.
> Private enemy aircraft may only be fired apon, endangered, or destroyed in flight: (1) if they engage in any act of hostilities, as defined in Article 2, or of espionage; (2) if they disobey a belligerent's orders or his prescribed signal or warning to land; (3) if the circumstances of the case are such that a belligerent is forced by imperative military necessity to omit the signal or warning to land which humanity demands.

Articles 6 and 7, as proposed by the British author, represent a somewhat normative novelty – they concern the possibility of the appearance of private (i.e., non-military) aircraft in the war zone. The author recognizes that ultimately these aircraft should not be shot down, but that this provision expires when a given aircraft flies within the vicinity of military operations, provided that the private aircraft behaves in a hostile manner.[293]

> Article 8.
> The crew of a private enemy aircraft can only be considered suspected of espionage if they obtain or seek to obtain information above the territory or territorial waters of

289 *Ibidem*, p. 115.
290 *Ibidem*.
291 *Ibidem*, p. 116.
292 *Ibidem*, p. 119.
293 *Ibidem*, pp. 55, 116.

a belligerent, or above territory or territorial waters occupied or held by his military or naval forces, or above his squadrons, warships, transports, or aircraft, or, generally, in the zone of his operations, with the intention of communicating the information to the hostile party. In the case of enemy military aircraft acting in the same way, the crew can only be considered suspected of espionage if they disguise or try to disguise their aircraft's real character as an enemy military aircraft, or otherwise act on false pretences. When an individual lands from aircraft to carry out a service of espionage, his case falls, in accordance with the general principle, under the rules governing espionage in land warfare. Persons suspected of espionage may be brought before the courts; they cannot be punished without previous trial, and cannot, after rejoining their forces, be punished on subsequent capture for past acts of espionage. Aircraft concerned in espionage may be confiscated.

Within the content of Article 8, criticism of the lack of precision of Article 29 of the 1907 Hague Regulations was revealed, indicating that it does not take into account all the possibilities of the occurrence of espionage behind the front. An important normative novelty was the indication of the need to conduct appropriate court proceedings to unequivocally determine the detaine's status.[294]

Article 11.
Belligerent military aircraft are forbidden to enter the territory, territorial waters, or atmosphere of a neutral Power.
Article 12.
A neutral Power is bound to exercise such vigilance as the means at its disposal permit to prevent any violation of the provisions of Article 11. It is bound to take such measures as are necessary and possible to take possession of belligerent military aircraft entering its territory, territorial waters, or atmosphere, whether voluntarily or under force majeure, and to detain the aircraft until the peace. The crew of such aircraft shall be dealt with in the same way as the land forces of a belligerent entering neutral territory.

Within the framework of Articles 11 and 12, Spaight clearly supported the position expressed by the German doctrine, also contesting J. Westlak's view on enabling military aircraft to exercise the right of innocent passage.[295] The British author was absolutely convinced that state security considerations would necessitate the adoption of the principle of exclusive state sovereignty in airspace.[296] Articles 14–19 concerned regulations related to specific neutrality rules, including the scope of permissible use of airspace by warring parties.

294 *Ibidem*, pp. 35, 117.
295 *Ibidem*, p. 118.
296 *Ibidem*, pp. 60–61.

22. Regulation of the legal status of airspace in the years 1911–1918

22.1. The British Aerial Navigation Act of 1911

The Act of 1911 passed by the British Parliament was the world's first piece of domestic legislation to regulate aerial navigation. The act set out the rules of civil responsibility for aircraft users who operate them in a reckless and dangerous manner, creating a responsibility for damages. The document granted the relevant authorities the power to close certain areas of airspace for reasons of public interest. An overflight ban could be extended to any aircraft. In the dimension of the discussion on the airspace status, the British law clearly opted for the views of John Westlake, introducing the possibility of unilateral regulation of the status of airspace over the British Isles by the authorities of that state.[297]

22.2. The Franco-German Agreement of 1913

On July 26, 1913, in Berlin, representatives of France and Germany signed an agreement on aerial navigation between the two states (*Navigation Aérienne Entre La France Et Allemagne*).[298] The agreement contained arrangements regarding the possibility of aircraft flying across the state border. It was assumed that without an appropriate invitation from the government of the state concerned, aircraft belonging to the military administration of another state, having a fully or partially uniformed crew, could not enter foreign territory, except in situations related to danger to the ship or crew. The agreement gave authority to search the aircraft in such a situation to check for intelligence-gathering equipment and inspect the documents of the crew on board. Governments would undertake to provide the opposing party with information on the uniforms of their air forces and to mark their military aircraft in a clearly visible manner. The mutual recognition of aircraft flying qualifications was agreed. The possibility for non-military aircraft to cross the border was allowed, provided that they had the appropriate permission of the aviation authorities, clear registration markings, appropriate documents, as well as a relevant residence permit for the particular foreign state issued by

297 B. Donahue, *Attacks of Foreign Civil Aircraft Trespassing in National Airspace*, "Air Force Law Review" 1989, vol. 30, p. 51.

298 *Exchange of Notes Between France and Germany Concerning Aërial Navigation*, "The American Journal of International Law" 1914, vol. 8, pp. 214–216.

consular services.[299] An absolute ban on air traffic was in force in the so-called restricted areas associated with areas of particular military importance (e.g., the belt of French border fortifications near Metz and Verdun). This agreement emphasized the adoption of the principle of full state sovereignty in airspace, also regarding the regulation of mutual air communication of a civil nature. The crews of non-military airships were obliged to obtain a number of permits and approvals to carry out interstate overflights, which stood in stark opposition to Paul Fauchille's idea of airspace freedom.[300]

In the same year, the British Parliament passed an amended version of the Aerial Navigation Act, which, like the Franco-German agreement, essentially banned the overflight of foreign military aircraft (possible only at the invitation of His Majesty's Government) and introduced far-reaching restrictions on civilian traffic over the British Isles.[301]

22.3. World War I and the attitude of neutral states

On August 2, 1914, under the Aerial Navigation Act of 1913, the British Home Office issued an order closing the airspace over the British Isles, as well as territorial waters, for aircraft of all types except for those engaged in military and public operations.[302] The position of neutral states in World War I reflected the practice of states recognizing their exclusive sovereignty in airspace.[303] As early as 1913, the Dutch government adopted regulations governing the shape of aerial navigation in a similar way to the content of the Franco-German agreement of the same year. On August 3, 1914, the Netherlands announced that any foreign aircraft crossing the state border without permission would be treated as an enemy and shot down.[304] The lack of air resources prevented the effective enforcement of this provision and throughout the war, the warring parties violated the airspace of the Netherlands, which, due to its location, was strategic for air strikes from the British Isles towards northern Germany. On September 22, 1914, a British military aircraft bombed the Maastricht

299 Journal Officiel de la République Française. Lois et décrets, No. 217/1913.

300 S. Stadlmeier, *International Commercial Aviation: From Foreign Policy to Trade in Services*, Paris 1998, p. 15.

301 L. Oppenheim, *International Law: A Treatise, Vol. I. Peace*, p. 354.

302 T. Barclay, *Law and Usage of War: A Practical Handbook on the Law and Usage of Land and Naval Warfare and Prize*, London 1914, p. 2.

303 One of the official reasons for the invasion of Belgium by Germany was the violation of its airspace by the French air force, see: R.F. Williams, *Developments*…, p. 151.

304 M. Abbenhuis, *Neutral Borders, Neutral Waters and Neutral Boundaries and Their Meanings in the History of the Netherlands*, [in:] B.J. Kaplan, M. Carlson, L. Cruz (eds.), *Boundaries and Their Meanings in the History of the Netherlands*, Leiden 2009, p. 175.

area.[305] Another bombing of an erroneous nature took place on April 30, 1917 in Zierikzee, where 3 people died.[306] The Dutch government, after determining the perpetrating party, issued an official protest, recognized by the United Kingdom in the form of compensation of 30,000 florins for the victims of air bombing. Numerous cases of British flights over Dutch territory were met with accusations from the German side about the inaction of the Netherlands and the lack of active counteraction in order to defend its neutrality. To this end, the German side intended to provide the Dutch army with anti-aircraft weapons on the condition that they would not be used against the German air forces.[307] One of the flashpoints of the German-Dutch dispute was the case of the L-19 airship, which, returning with damaged engines from a bombing mission against Liverpool in February 1916, was fired upon by Dutch anti-aircraft defense and forced to ditch in the North Sea, which indirectly contributed to the death of the entire crew (also as a result of refusal to provide assistance by a British fishing boat located nearby).[308]

As part of the actions taken by the Dutch authorities, another significant event occurred. On August 29, 1914, the German government issued an official note regarding (in its opinion) the Netherlands' unlawful seizure of a German military aircraft (seaplane) moored at a port. The Netherlands refused to grant a 24-hour stay in its territorial waters and ports as a neutral state, arguing that the nature of the aircraft meant that it should not be treated on the same terms as a warship.[309] As a result of this situation, the crew and the aircraft were interned, which from 1915 became the standard practice of the Dutch government toward all parties involved in the conflict.

Danish airspace was similar. At the outbreak of the war, the authorities of this state were unable to decide whether to close their airspace due to their eagerness to avoid potential conflicts with the German side. Between 1915 and 1916, German aviation repeatedly violated the country's borders and its territorial waters, which included the overflights of damaged Zeppelin-type airships. In April 1915, the Danish authorities proposed a complete ban on flights over

305 M. Abbenhuis, *The Art of Staying Neutral: The Netherlands in the First World War, 1914–1918*, Amsterdam 2006, p. 91.

306 W. Klinkert, *Defending Neutrality: The Netherlands prepares for War, 1900–1925*, Leiden 2013, p. 144.

307 M. Karau, *The Naval Flank of the Western Front: The Development and Operations of the German Marine Korps Flandern 1914–1918*, Barnsley 2003, p. 95; J.E. Kaufmann, H.W. Kaufmann, *The Forts and Fortifications of Europe 1815–1945: The Neutral States: The Netherlands, Belgium and Switzerland*, Barnsley 2014, p. 39.

308 O. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, „American Journal of International Law" 1953, vol. 47, pp. 562–563; D. Sloggett, *A Century of Air Power: The Changing Face of Warfare 1912–2012*, Barnsley 2013, p. 143.

309 J.C. Cooper, *National Status of Aircraft*, "Journal of Air Law and Commerce" 1950, vol. 17/292, p. 302.

the territory and territorial waters of the state (excluding the special status of the Danish Straits). However, it was only after an incident involving German aviation flights over Copenhagen in operations against British submarines that, on May 4, 1916, Denmark closed its airspace to foreign aircraft. The Danish government's stance on this matter was cautious, requiring a distinction between intentional airspace violations and exceptional circumstances. It permitted the use of force only after issuing a warning shot and exclusively against undamaged aircraft.[310]

Switzerland was struggling with similar consequences of World War I. On August 4, 1914, the government of this state issued a statement in which it prohibited military aircraft belonging to the belligerent parties over its territory.[311] During a British air raid on the German Zeppelin base in Friedrichshafen on November 21, 1914, Swiss airspace was violated, prompting an official diplomatic protest. The British government issued an apology, while cautiously maintaining a legal ambiguity that allowed, on the one hand, for the protection of the British Isles from the potential threat of aerial bombardment, and on the other, could serve as a potential pretext to justify violations of neutral state' airspace.[312]

The stance taken by neutral states during World War I regarding their own airspace was an essential element in shaping the fundamental principles governing international aviation law.[313] The regulations issued by the Netherlands, Denmark, and Switzerland, prohibiting foreign flights over their territories while treating aircrew and aircraft as subject to internment, alongside the lack of explicit objections from the belligerent parties (the British diplomatic note from 1914 did not raise reservations on this matter), served as evidence to international law experts that the principle of full state sovereignty over airspace was recognized as the foundation of international aviation law by the end of the conflict.[314] At the same time, the attitude of neutral states fundamentally defined the geographical outline of the air warfare theater.

310 M.H. Clemensen, *The Development of Air Defence of Copenhagen*, [in:] H. Amersfoort, W. Klinkert (eds.), *Small Powers in the Age of Total War, 1900–1940*, Leiden 2011, pp. 137–138.

311 "Article 17. All balloons and aircraft not belonging to the Swiss Armed Forces may not fly in the airspace extending over the territory of Switzerland, except for special authorizations […] the passage of any foreign aircraft is prohibited and shall be prevented by all available means". Budesgetze und Verodungen, 1914, 30:353, quoted by *International Law Topics: Neutrality, Proclamations and Regulations with Notes 1916*, Washington 1917, pp. 71–72; D. Johnson, *Rights*…, p. 32.

312 W. Raleigh, *The History of The War in the Air 1914–1918: The Illustrated Edition*, Barnsley 2014, pp. 337–338.

313 See: W. Raafat, *La guerre aérienne et le droit des gens*, "Revue générale de droit aérien" 1934, pp. 40–42.

314 See more: A. Meyer, *Das Neutralitätsrecht im Luftkriege*, Berlin 1931.

23. Erosion of the immunity of undefended cities

The 1914 U.S. land warfare manual stated that the bombardment of forts, fortified locations, and cities serving as transit points for enemy troops was permissible. It highlighted out that the presence of medical units in such areas did not constitute a sufficient reason to alter the status of the location (para. 214).[315] It was also pointed out that there were no rules prohibiting the use of balloons and airplanes as a means of bombing forts and fortifications (para. 215).[316]

The instruction developed at the request of the German military staff regarding the laws and customs of land warfare stated, in the section concerning bombardment, that war is not only about fighting the enemy itself but also about targeting its resources. Any city, village or settlement can be bombed not only when it is defended, but also when it is merely occupied or used for military purposes. Fortified sites – such as fortresses – can be assailed at any time on account of their nature. The urban areas connected to the fortresses in the light of the German instruction are subject to bombardment as a whole, and limiting the shelling to the fortified area only was rejected as impractical and detrimental to the success of the military operation. The instruction called for the preservation of public utility buildings, but only if they are not designated for military use – otherwise humanitarian considerations must yield to military necessities. In this way, the stance of French specialists in international law raising the issue of the bombing aimed at the cathedral tower in Strasbourg was criticized, pointing out that it was also an observation post for the French artillery. The only objects to be protected were the buildings covered by the Geneva Convention. The German document expressly extended the permissible scope of bombardment in urban areas, significantly distorting the intent contained in the Hague Regulations of 1907.[317]

24. Criticism of Article 25 of the Hague Regulations of 1907. Discussion of the legal status of London as a defended city

In the period immediately preceding the outbreak of World War I, the existing normative network regulating the law of aerial bombardment had already been deemed inconsistent. The doctrine of international law sought to provide its

315 *Rules of Land Warfare FM 27-10*, Washington 1914, p. 67.
316 *Ibidem*.
317 J.H. Morgan, *The War Book*…, pp. 100–103.

own interpretation, which would have practical value, reconciling the realities of the battlefield with the demands of humanitarianism. Thomas Holland maintained that the prohibition of bombing undefended areas could not be interpreted as a lack of permission to destroy military objectives, even within the boundaries of an undefended area.[318] Harold Hazelnite, in his lectures on the law of air warfare, also emphasized that the interpretation of the term "undefended town" was problematic. In his opinion, the introduction of new anti-aircraft defense measures might, as a consequence, change the interpretation of Article 25 of the Hague Regulations and cause areas treated so far as undefended to lose this status.[319] John Westlake pointed out that the price for maintaining the status of an undefended city was the "opening" of the city, allowing the enemy army to enter it without resistance.[320] Zygmunt Cybichowski considered that a locality ceased to be undefended if "the military takes up a defensive position within it".[321]

One of the noteworthy arguments regarding the status of undefended locations before the outbreak of World War I is the discussion concerning the legal status of London in the face of the looming conflict. On April 22, 1914, in the "Journal of the Royal United Service Institution", an officer of the institution, Colonel L. Jackson, published an article entitled *Defending Localities from Airborne Attacks*, in which he considered the possibility of an aerial attack on the British capital. He argued that existing military installations, factories and depots would provide sufficient justification for carrying out attacks, including those targeting large urban areas.[322] The British officer argued that the view of international law on the protection of undefended cities from aerial attacks should be aligned with the approach used in the context of land warfare. In other words, the test applied to undefended locations should be applied in the same way to air bombing. Thus, in the author's conclusion, an undefended city had to be an area that was not occupied and ready to be seized by an enemy army in order to be protected by the prohibition of air bombing. The British expert concluded by raising the question of whether any international law scholar could definitively state that bombing London from the air would violate the norms of the law of war, and whether there exists any authority capable of enforcing their application. In his opinion, cities such as the capital of the United Kingdom would soon be targeted by aerial attacks.

318 T.E. Holland, *The Law of War on Land*, London 1908, p. 46.
319 H. Hazelnite, *The Law of the Air*…, p. 123.
320 J. Westlake, *International Law. Part II: War*, Cambridge 1907, p. 355.
321 Z. Cybichowski, *Międzynarodowe prawo wojenne: z uwzględnieniem przesilenia bałkańskiego* [*International Law of War and the Balkan Crisis*], Lwów 1914, p. 46.
322 See: L. Jackson, *Defence of Localities against Aerial Attack*, "Journal of the Royal United Service Institution" 1914.

As part of a kind of reply to the questions posed by Col. Jackson was provided by T. Holland, who on April 24, 1914 in a letter addressed to the editorial office of the newspaper "The Time" emphasized that the changes introduced in 1907 during the second peace conference in the Hague in the contents of Article 25 of the Hague Regulations, in relation to the version adopted in 1899, were intended to cover situations related to aerial bombardment, recognizing London as an undisputed example of an undefended city.[323] In subsequent correspondence of May 2, 1914, Prof. Holland emphasized that the adoption of the solution in force on the basis of Article 25 of the Hague Regulations was to prevent wanton destruction of built-up areas without distinctly military object in view. This reservation is far more extensive than the principles outlined in the IX Hague Convention of 1907 on Bombardment by Naval Forces in Time of War. Holland, however, saw the possibility of different interpretations of the regulations, referring to the 1896 resolution of the Institute of International Law on naval bombardment and the discussion conducted there. This British international law scholar expressed hope that London, as a city lacking military value during peacetime, would maintain this status even in the event of armed conflict.

James M. Spaight agreed with Holland, recognizing the rules regarding bombardment in the Hague regulations of 1907 as unclear and applicable to land warfare. He recalled the content of British and German instructions issued before the outbreak of World War I, which stated that a location did not need to be defended; it was sufficient that the location was occupied before an opportunity to attack or march through it arose.[324] This raised the question of whether, within the concept of an undefended area, a situation exists where a location lacks fortifications or field equipment and is only occupied temporarily. Spaight believed that the only acceptable interpretation of the provision was to accept the possibility of attacking built-up areas, even if they were only a transit point for the passage of troops – even large concentrations of civilians should not prevent attacks against the enemy, who might otherwise gain illegitimate protection from bombing. Therefore, the British researcher proposed to define an undefended area as "one that is not occupied by the enemy and is possible to seize without offering armed resistance to the adversary".[325] Due to the above, according to the author, London cannot be considered an undefended object in the light of the provisions of Article 25 of the Hague Regulations and Article 2 of the Ninth Hague Convention of 1907 on Bombardment of Open Towns by Naval Forces.[326]

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323 T.E. Holland, *A Supplement to Letters to the Time upon War and Neutrality*, London 1916, p. 6–7.

324 J.M. Spaight, *Aircraft*…, p. 13.

325 *Ibidem*, p. 14.

326 *Ibidem*, p. 16.

25. World War I – French doctrine and air bombing

As demonstrated in the previous chapters, air warfare intensified significantly in the years 1915–1916. In 1915, the German air force launched numerous sorties against Great British and French cities. In response, citing the doctrine of reprisals, the French Air Force carried out a series of retaliatory strikes. One of the key actions was the attack on the German city of Karlsruhe on July 22, 1916, which caused significant civilian casualties.[327] This and other attacks were widely discussed within the doctrine of international law by the Entente states.[328] Particular concern was raised among scholars of that period by a sharp increase in civilian casualties related to aerial attacks carried out carelessly or without military justification.[329] Most of these incidents were attributed by contemporary experts to the inadequacy of the international legal framework. Édouard Clunet pointed out that the lack of special regulation on the issue of air warfare meant that the 1911 resolution of the Institute of International Law, which stated that air warfare was permissible to the extent that it did not pose greater danger than naval or land warfare, and was treated as an element of customary international law (a controversial thesis in itself, considering the outcome of the voting in the Institute). The author also considered London to be an open town, while Paris was classified as a mixed area, but the presence of forts on the city borders did not deprive it of undefended area status. The author argued that the bombing itself should be limited to fortifications (in accordance with the proposal of the inhabitants of Antwerp submitted during the Brussels Conference of 1874).[330]

A completely different view was expressed by C. Picciotto, who, noting the increasingly serious involvement of military aviation in the ongoing war, pointed out that it was premature to talk about a sufficient and stable outline of practice adhered to by states regarding the rules governing air warfare. The author noticed that the failure to ratify the provisions of the 1907 Convention resulted in activating the provisions of Article 2 of the *si omnes* clause, which resulted in the lack of both convention and customary law norms regulating air warfare.[331] The author

327 S. Tucker, *World War I: Encyclopedia*, vol. I, Santa Barbara 2015, p. 628.

328 L. Rolland, *Les pratiques de la guerre aérienne: dans la conflit de 1914 et le droit des gens*, "Revue générale de droit international public" 1916, pp. 531–545.

329 C. Pillet, *La Guerre Actuelle et Le Droit Des Gens*, "Revue générale de droit international public" 1916, vol. 2, pp. 27–28.

330 E. Clunet, *De l'emploi abusif des aérostats de guerre par les Allemands*, "Journal du droit international" 1916, pp. 387–404.

331 The above conclusion was motivated by two reasons. Firstly, the norm of the Hague Convention of 1907 was a customary law. Secondly, the *si omnes* clause was not triggered until 1917, when Liberia, a state which was not a signatory to the convention, entered the war on the side of the Allies.

expressed negative opinions about the drafts and attempts at codification submitted by P. Fauchille and J.M. Spaight, pointing out that they were based on postulates rather than reflecting the decoding of existing practice, criticizing reckless use of analogies.[332] According to the author, the theater of air warfare was determined by the scope of sovereignty of the airspace of neutral states. He emphasized the informal nature of the resolutions adopted by the Institute of International Law, as well as the "isolate" aspect of the attempt to delegalize air bombing made in 1899 and 1907. Due to the *si omnes* clause, the Hague Convention of 1907 was not treated by the author as binding due to the participation in the war of states such as Turkey, Serbia and Montenegro, which did not ratify the Convention, and only the rules of customary law could regulate the course of bombardments in land war. The author agreed that aircraft could bomb areas (buildings) when they are simultaneously defended, and their destruction was justified by military necessity. In addition, any air attack must be guided by the principle of military personnel exercising due caution and care to avoid causing harm to non-combatants. According to the author, there were no rules specifying when a military aircraft could be considered part of the armed forces of a warring party, nor defining the status of its crew.

Albert De Lapradelle argued that by refusing to extend the applicability of the IV Hague Declaration at the Second Peace Conference of 1907, the states that were parties to said declaration reserved the right to conduct air bombing of enemy ships, enemy land forces, arsenals and other military installations without having to issue a prior warning. At the same time, they must not exceed the limitations applicable to land and sea warfare.[333] The author argued that coastal cities should not be bombarded simultaneously by air forces along with naval or land forces unless common grounds for bombardment exist. Therefore, the bomb squadrons that appear over Paris and London, depending on the circumstances, i.e., with which branch of the military they cooperate, should be subjected to such a regime (naval or land-based). De Lapradelle pondered over the issue of independent air operations, conducted without the participation of a fleet or ground troops. The logical consequence in the case of defended areas was to consent to the attack on the condition of prior warning, and in the context of unprotected cities, the application of regulations of naval bombardment regulations

332 C.P. Picciotto, *Some Notes on Air – Warfare*, "Journal of the Society of Comparative Legislation" 1915, vol. 15, no. 2, p. 150.

333 "The powers which refused in 1907 to renew the prohibition of aerial bombardment intended thereby to reserve to themselves the right to destroy the ships of war of the enemy on the sea and the troops, in camp or in action, the arsenals, the storehouses, etc., of the enemy on land, without giving due warning. They did not claim and could not claim the right to pass beyond the limits prescribed for the nations by the laws of terrestrial and maritime warfare" – A. De Lapradelle, *Aerial Warfare and International Law*, "Scribner's Magazine" 1915, vol. 7, pp. 20–21.

and permission to destroy certain categories of objects listed in Article 2 of the IX Hague Convention of 1907. For the author, the problem lay with the technical possibility of negotiating with city authorities, which led to the conclusion that independent aerial bombardment was impossible due to the lack of cooperation with land or naval forces, even in relation to defended areas. In the context of land war, it was argued that an aircraft was not able to achieve bombing objectives, nor was it able to accept surrender or call on the local population to open a city for occupation.[334]

Soterios Nicholson, an attorney practicing in Washington in 1915, pointed to the protests of the French side regarding the bombing of Antwerp on August 25, 1914 and the attacks on Paris, which resulted in losses in both the civilian population and civilian property.[335] The author argued that open areas – i.e., those that can be occupied by land forces without encountering resistance from the enemy – can be defended, citing the example of Paris. The capital of France contains many objects and establishments of a military nature, which constitute legitimate military objectives. Nicholson was skeptical of the arguments raised by the British and French sides, considering, apart from obvious cases, part of the German bombing to be legal and permissible under the contemporary norms of *ius in bello.* The author pointed out the legality of targeting specific military objectives, while also advocating that during air operations, aircrews should avoid indiscriminate attacks. The same assessment of the attacks on Antwerp was expressed by M. Jourdain, who considered the city to be an example of a protected area.[336]

James Garner emphasized that due to the development of artillery, defensive tactics based on fortifications had completely lost their importance and the mere existence of old type fortifications (e.g., medieval ones) should not qualify areas possessing them as defended in the sense of the provision of Article 25 of the Hague Regulations of 1907. The author deemed the practice of carpet bombing unacceptable, citing the example of the German navy destroying British coastal areas merely because of the presence of small military depots, justifying the destruction of the entire town. In the context of aerial bombardments, the American author was the first to point out the necessity of treating the term "undefended localitie" differently in the context of air operations, arguing that in terms of air warfare it was difficult to apply the same assessment as in the case of land-based military operations. A defended locality in the context of air operations is one that

334 "It may be true that the city contains magazines and troops. If the city is not fortified the local authorities can be summoned to destroy them without a demand for surrender. If the city is fortified the only summons that can be addressed to it is the surrender – a summons which the aeroplane is manifestly unable to enforce" – *ibidem*, p. 20.

335 S. Nicholson, *Aerial Bombardment of Undefended Towns*, "The Law Student's Helper" 1915, vol. 5, pp. 5–7.

336 M. Jourdain, *Air Raid Reprisals and Starvation by Blockade*, "International Journal of Ethics" 1918, vol. 28, p. 544.

possesses anti-aircraft artillery.[337] For this reason, Garner agreed with Fauchill's idea, which assumed permission to attack a certain category of targets, subject to reasonable precautions taken by aircraft crews.

George Phillimore pointed to the issue of surface bombing, arguing that some military regulations (German regulations) and the doctrinal position emphasized the right of combatants to bomb an entire urban area, including private buildings. It is difficult to determine whether this meant allowing air attacks without restrictions in a situation in which a given urban area was under siege – in this respect, the author himself quoted the views of C.H. Stockton, who considered it unacceptable to attack undefended buildings even in a situation in which the whole locality was defended (this was especially true of air warfare).[338] A similar suggestion was made by W.E. Ellis, who claimed that independent air attacks, even on defended cities, could not take place without the simultaneous cooperation of the fleet and ground troops.[339] At the same time, it was argued that despite the difficulties related to compliance with the principle of distinction in air raids, the primary duty of commanders was to protect the civilian population and avoid unnecessary losses among non-combatants.[340] In this regard, the British author used the concept of so-called collateral damage.

26. Article 25 of the Hague Regulations of 1907 and its significance in air warfare

To summarize the above critical views of the doctrine, they can be narrowed down to several basic points:

1. The status of a defended city does not depend on whether a given location is simultaneously fortified; the essence of the problem is the location, within the city, village or settlement, of means that hamper the opponent's ability to occupy a given area (the ability to resist the opponent as a prerequisite for fulfilling the test specified in Article 25 of the Hague Regulations of 1907).[341]

337 J.W. Garner, *International Law and the World War: Vol I*, London 1920, p. 469.

338 C.H. Stockton, *Outlines…*, p. 325.

339 "This ambiguity suggests the advisability of formulating a rule to the effect that the aerial bombardment of non-military plants or buildings should be permitted only when «defended» places are actually attacked or invested by land or maritime force" – W.E. Ellis, *Aerial – Land and Aerial – Maritime Warfare*, "The American Journal of International Law" 1914, vol. 8, no. 2, p. 264.

340 G. Phillimore, *Bombardments*, "Grotius Society" 1915, pp. 59–65.

341 J.W. Garner, *International Law and the World War…*, p. 421.

2. The foundation of the undefended area test is the ability for the enemy's ground forces to occupy it without resistance.
3. It is not uniformly accepted whether cities located away from the front line count as undefended.[342]
4. There is a lack of clarity in the approach to the issue of the ordinary presence of armed forces (e.g., an infantry march through a given locality at the rear of the front), which have no intention of defending a given area; the issue is also relevant in the context of a peacetime garrison.
5. There is a lack of clarity regarding whether objects of obvious military value justify the bombing of a given area *per se*, or whether the requirement to consider a given locality as defended still applies in such a situation.[343]
6. The defended nature of a locality means that the target of bombing may be an entire built-up area, not just the points of resistance.
7. There is a lack of clarity in the recognition of air warfare as subject to the naval bombardment regime or the assumption that only an aircraft in the naval service may be subject to the provisions of the Ninth Hague Convention of 1907.[344]

27. Paul Fauchille's Air Bombing initiative

In 1917, the greatest specialist in contemporary international aviation law at that time, Paul Fauchille, devoted himself to the issue of air bombing. In his textbook of international law, the author initially emphasized that the air warfare regime was an assimilation of the norms applicable to land and naval warfare, but it should have its limits resulting from the characteristics of aviation.[345] The French professor emphasized the differences linked to regimes applicable to naval and land warfare, drawing attention to the exception allowing for attacks on certain categories of objects intended for war purposes, specified under Article 2 of the Ninth Hague Convention of 1907, which allowed naval forces to destroy a certain category of target, even if the area in question was undefended. Unlike in the navy,

342 "It would be difficult, if not impossible, to define what constitutes a defended locality, which, however, seems to be identical with a locality offering resistance to the enemy, whether fortified or otherwise" – *Points in International Law*, "The Canadian Law Times" 1914, vol. 34, p. 1179.

343 J.W. Garner, *International Law and the World War*…, p. 422.

344 W.M. Wherry, *Aerial Bombardment in International Law*, "New York Law Review" 1940, vol. 74, p. 138.

345 H. Bonfils, P. Fauchille, *Manuel de droit international public*, Paris 1914, pp. 1003–1004.

in land warfare it is possible to seize military establishments and factories when a given area can be occupied without resistance. Fauchille also advocated for the most realistic interpretation of the phrase "undefended localities" as built-up areas that could be occupied by the enemy without needing to break the defender's resistance.[346] Even fortified areas that are not defended cannot be shelled. The French researcher tried to demonstrate a point which had already been raised on the basis of the Second Peace Conference, which was such that the ban on attacking undefended areas did not have to be absolute if the targets of the attack were essential facilities from the point of view of military necessity. Fauchille argued that military aviation was not able to occupy a given built-up area like land troops, nor was it, in a manner similar to naval attacks, able to force a given area to surrender or pay contributions (*bombardement d'occupation*).[347] The French researcher argued that the scope of permissible bombing in air warfare must not exceed a level permissible in naval and land warfare. Bombing of a destructive nature carried out by aviation should not, even in the case of defended areas, lead to the approval of attacks against the civilian population. On the other hand, in the case of open towns, due to the inability of air forces to occupy a given territory, the nature of air warfare forced consent to destroying specific targets of military nature.

Therefore, the only targets that could have been destroyed by aviation, both in terms of defended and undefended areas, were, according to Fauchille, the armed forces of the belligerents, the command and representation of the government, military or naval installations, war material depots, and road and railway infrastructure in the form of bridges, roads and railway stations.[348] Fauchille emphasized the need to use these facilities for military purposes and the need to distinguish them from those serving the private needs of the civilian population, noting that it would be objectively difficult to require aircrews to apply the principle of distinction. At the same time, he pointed out that during the war, aircraft proved to be the best means of target acquisition and adjustment for the artillery fire of both land and sea batteries. The aircraft could recognize military objects of an obvious nature (such as forts or other types of field fortifications), while the detection of a given object's actual purpose was a key challenge, and in this respect the aircraft should also base its choice to attack on information obtained from intelligence.

Consequently, Fauchille was of the view that an aircraft should refrain from bombing when it was uncertain as to the nature of the intended target. He also saw the issue of increasing artillery fire effectiveness as a factor justifying the possibility of attacking a given built-up area. One should also note the formulation of the

346 P. Fauchille, *La bombardement aérien*, "Revue générale de droit international public" 1917, vol. 24, p. 63.
347 *Ibidem*, p. 64.
348 *Ibidem*, p. 70.

fundamental principle for all air operations in built-up areas by Fauchille, which emphasizes the need to direct air operations exclusively against hostile combatants or the opponent's resources and means of defense.[349] The civilian population and civilian property may suffer only in the event of erroneous bombing (which is an inevitable element during land-based and naval barrage), as well as in the event of a change in the intended use of civilian objects, which would deprive them of protection against attack and justify their destruction in light of the principle of military necessity. Protection against abuse inflicted by belligerents would be permission to attack the enemy in the form of reprisals, and to hold aircrews criminally liable. The same rules would apply in the case of attacks on both built-up areas and groups of buildings and facilities. In the context of warning implementation, it was pointed out that since air bombing did not serve to occupy a given area, but rather to destroy some of its resources, the use of air attack notifications should give way to considerations of military rationality.[350] Fauchille noted the need to forbid aviation to deploy certain types of bombs, including chemical weapons and – interestingly – aviation gasoline (*le jet de pétrole enflammé*). The perpetrators of violations could expose the belligerent to legitimate reprisals, criminal responsibility and compensation under Article 3 of the Forth Hague Convention of 1907.

In conclusion, Paul Fauchille formulated six principles governing aerial bombardment:

1. Attacking any locations is allowed – even those that are fortified, defended or occupied, or only those objects that are military installations, war material depots, workshops and factories, operating on behalf of the land forces, navy, armaments, representatives of governments, personnel of the armed forces and other persons involved in the operations of the fleet or army, with the exception of persons and objects protected by the Geneva Conventions. Civilians, their property, and state property not used by the armed forces and governments or having no strategic importance, such as bridges, roads and railway stations, should be spared.
2. Public facilities, hospitals, historic sites and places of worship are to be protected by visible signs provided by the defender.
3. Rules relating to cities and groups of people also apply to isolated facilities and individuals.
4. Air bombardment may take place without prior notification.

349 "Le fait essentiel que de tout ceci on doit finalement retenir, c'est que les attaques aériennes ne doivent en principe avoir pour objet que d'infliger des dommages aux combattants ennemis ou aux ressources et aux moyens de résistance des combattants ennemis, et que c'est seulement par exception que des citoyens paisibles ou des propriétés particulières peuvent être détruits" – *ibidem*, p. 71.

350 "La surprise est d'ailleurs, pour le bombardement aérien, une condition de sa réussite celui-ci perdrait beaucoup de son efficacité si les aéronefs devaient avant d'agir laisser à l'adversaire le temps d'user de ses moyens de défense" – *ibidem*, p. 72.

5. It is forbidden to use projectiles which unnecessarily increase suffering or make death inevitable, such as shells lighter than 400 grams which explode, burst, or contain infected materials in the form of poison, asphyxiating gases or aviation fuel.
6. Any pilot committing violations of the above rules will be held criminally liable. The belligerent state is obliged to pay compensation and may be subject to reprisals.[351]

28. Attack on Liepāja, January 29, 1915

On January 29, 1915, the German air force bombed Liepāja, a port located on the Baltic Sea coast (now a city in Latvia). According to information from the Russian side, published in the February 1, 1915 issue of "The Times", it was confirmed that Liepāja qualified as an undefended location. As a result of the fighting, a German aircraft was brought down and the crew was captured.[352] The Russians confirmed that the crew was denied the status of prisoners of war and found guilty of murder in connection with the attack on an undefended city, describing them as "air pirates". According to C.P. Picciotto attacking an undefended area was a war crime, and therefore the crewmen should be treated as criminals.[353] Joseph Kroell informs, however, that in an official communication on January 27, 1935, the Soviet Union declared the above practice illegal.[354]

29. A casuist approach to the theory of military objective

In his 1909 commentary on the Hague Convention of 1907, A. Pearce Higgins indicated that it was permissible to attack certain elements of infrastructure, such as railways, railway stations, docks, bridges, or coal depots belonging to the civilian

351 *Ibidem*, p. 73.
352 „The Times", February 1, 1915.
353 C.P. Picciotto, *Some Notes*…, p. 154.
354 J. Kroell, *Traité de Droit international public aérien: L'Aéronautique en temps de guerre*, vol. II, Paris 1936, p. 211.

population or public authorities.[355] In addition to the above, the commander was entitled to destroy war materials, plants and workshops useful for land forces or the navy, as well as "pure" military objectives. To this catalogue, Spaight added oil and fuel stockpiles located in both military and private depots, before purchase, for the needs of the armed forces, factories and plants producing aviation equipment, engines, and propellers, as well as private aviation schools.[356] John Westlake also added government buildings to this catalogue; they could be subjected to bombardment at any time.[357] The catalogue of military objectives under attack during World War I was expanded by German Emperor Wilhelm II's instruction of February 12, 1915 on the bombing of London, under which: 1) "His Imperial Majesty expresses the hope that the air warfare against England will be waged with the greatest possible enthusiasm"; 2) and "His Imperial Majesty allocates the following objectives for attack: war materials of any type, military barracks and installations, oil and fuel tanks, as well as the docks of the Port of London. The residential areas of London, and, above all, all the palaces belonging to the British royal family, cannot be made the object of attack".[358] The above views showed the gradual development of the concept of a military objective, but only in a casuist form. An abstract definition of the above wording only emerged in the interwar period.

355 A. Pearce Higgins, *The Hague Peace Conferences*…, p. 355.

356 J.M. Spaight, *Aircraft*…, pp. 19–20.

357 J. Westlake, *International Law. Part II: War*, p. 77.

358 S.F. Wise, *Canadian Airmen and the First World War: The Official History of the Royal Canadian Air Force*, Toronto 1980, pp. 234–235.

CHAPTER V

THE HAGUE RULES OF AIR WARFARE AND THEIR IMPACT ON THE LAW OF AIR WARFARE DURING WORLD WAR II – THE STATE OF THE LAW OF AIR WARFARE IN THE YEARS 1945–1972

1. Experiences of World War I – air warfare from a legal perspective. Status of the Fourteenth Hague Declaration of 1907

The Great War confirmed Paul Fauchille's predictions about the potential of military air force. The first strategic airstrikes carried out by German bombers against London, Antwerp and Paris also demonstrably lacked an effective response from international humanitarian law to the issue of air operations. Both sides of the conflict accused each other of bombing that breached the status of open cities, when such a status was invalid. This proved the failure of the existing normative network to effectively regulate the reality of the battlefield, necessitating changes in this respect as the main scope of the ICRC appeal of November 22, 1920 to the Assembly of the League of Nations. The Committee demanded the adoption of a ban on air bombing, pointing out that World War I had demonstrated the inability to make a proper distinction between defended and undefended cities, also recognizing the inability of airmen to effectively make selections during an air operation.[1] A partial reference point in this respect was furnished by the provisions of the 1919 Treaty of Versailles, which

1 J.W. Garner, *Proposed Rules for the Regulation of Aerial Warfare*, "American Journal of International Law" 1924, vol. 18, p. 71.

prohibited Germany from having an independent military air fleet (Article 198) and ordered the demobilization of air force personnel (Article 199).[2] A missed opportunity to regulate the phenomenon of air warfare was the 1919 Paris Conference, which eventually led to the adoption of the Convention governing air navigation (the so-called 1919 Paris Convention) as the first treaty of international aviation law. Arthur K. Kuhn lists three reasons for which no decision was made to discuss the status of military aviation in the event of war while working on the document pertaining to civil aviation. These were as follows: the widespread belief that the norms of *ius in bello* were undermined by the attitude of the Central States during the war, lack of time and the intention to ban war as a means of settling international disputes.[3] The only provision relating to air warfare was Article 38 of the 1919 Paris Convention, which stated that its provisions "shall not affect the freedom of action of the contracting States either as belligerents or as neutrals".[4]

The practice of World War I further confirmed that the XIV Hague Declaration of 1907, ultimately prohibiting air bombing, became a regulation whose binding force was either repealed by the contrary practice of states or was treated as non-binding due to the *si omnes*[5] clause. This also applied to those parties who were formally bound by the document – including both the United Kingdom and the United States. Amos S. Hersey pointed out that even before the Great War the declaration could not be considered an "integral part of international law".[6] Observing the decline of the XIV Hague Declaration of 1907, G. Schwarzenberger used a civilian concept based on the *rebus sic stantibus* clause – "a significant change of circumstances".[7] Unregulated air warfare became one of many serious gaps in the *ius in bello* system, apparent after World War I, alongside the issue of the use of combat gases, unlimited submarine warfare or the lack of an international justice system that would punish perpetrators violating the law of armed conflicts.[8]

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2 N. Ronzitti, *The Codification of Law of Air Warfare*, [in:] N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006, p. 6.

3 A.K. Kuhn, *International Aerial Navigation and the Peace Conference*, "American Journal of International Law" 1920, vol. 14, p. 371.

4 W.H. Boothby, *The Law of Targeting*, Oxford 2012, p. 324.

5 "Here is one case in which such nullification of a Hague Convention, bringing the law back to what it would be without the Convention, really wiped all prohibition from the books since no other laws prohibiting any such bombing had ever been even considered previously" – H.A. Gosnell, *The Hague Rules of Aerial Warfare*, "American Law Review" 1928, vol. 62, p. 419.

6 A.S. Hershey, *The International Law of Aerial Space*, "The American Journal of International Law" 1912, vol. 6, p. 384.

7 G. Schwarzenberger, *The Law of Air Warfare and the Trend Towards Total War*, "University of Malaya Law Review" 1959, vol. 1, p. 122.

8 H.S. Leroy, *Limitation of Air Warfare*, "Air Law Review" 1941, vol. 12, p. 24.

2. The Washington Conference on the Limitation of Armaments 1921–1922

The Washington Conference of 1921 on the Limitation of Armaments, convened at the invitation of the United States, reflected the voice of the international community striving to globally reduce tensions in relations between states.[9] The most significant point of the work undertaken at this conference from the point of view of the contents of this dissertation was the appointment of the Commission to Revise Rules of War at the meeting on February 4, 1922. The newly created structure, consisting of two delegates of conference participants, was tasked with discussing the validity of the 1907 Hague Regulations, in the face of the emergence of new means of conducting armed combat since then, and to propose solutions that would adapt the existing regulations to the realities of the battlefield.[10] The Commission received permission to take the advice of international law experts in, among others, the scope of air warfare.[11] It should be noted, however, that most of the attention of the states participating in the Conference was focused (at the legal level) on issues related to conducting unrestricted submarine warfare and the use of asphyxiating gases. In the political sphere, the main point was an attempt to limit naval armaments, particularly those of the Japanese Empire, whose development of naval power and significant territorial gains in the form of seizing German colonies in the Pacific were considered a geostrategic threat to the United States and the United Kingdom.[12] The interests of the great powers prevailed over legal considerations.

In view of the above, rules regulating the use of aviation in the event of an armed conflict were considered a secondary problem and were only included in the conference program as they entered their final phase of completion. On January 7, 1922, the Committee on Arms Reduction considered the report of the Subcommittee on restrictions in the production, use and nature of aircraft. This report divided aircraft into three categories: the first was commercial aircraft, the second – civil, and the third – military. The main thesis of the study was a general statement whereby introducing any solutions limiting the production and development of both civil and military aviation was unrealistic from a practical point of view and extremely difficult to formulate as a standard of international

9 P. O'Brien, *British and American Naval Power: Politics and Policy, 1900–1936*, Westport 1988, p. 166.

10 No. 1 Resolution for a Commission of Jurists to Consider Amendment of Laws of War, February 4, 1922.

11 *Resolution Establishing a Commission of Jurists to Consider Amendment of the Laws of War*, Conference on the Limitation of Armament, Washington, November 12, 1921 – February 6, 1922, U.S. Government Printing Office, 1922, p. 1640.

12 H. Croly, *Roads to Peace: A Handbook to the Washington Conference*, New York 1921, pp. 3–24.

law that would gain sufficient recognition. It postulated the adoption of the model set out in the Treaty of Versailles, restricting Germany's ability to develop its own aviation, by setting limits in terms of armament, engine power or range.[13] It was pointed out that civil aviation would always have sufficient military and technical potential and would certainly be used as military aircraft. In this regard, a total ban on aviation development as such would have to be introduced, which was considered impossible and impractical by the members of the committee. The same challenges existed in the sphere of air force development. It was pointed out that there was disagreement on the numerical limitation of military aircraft (unlike in the case of naval power) due to the large number of variables of subjective value (e.g., the scale of the colonial territory, the geographical location of a given state itself). As a result, the Washington Conference unequivocally rejected the attempt at complete and universal air force disarmament for various reasons.

Based on the above assumption, the report indicates needs resulting from humanitarian reasons and reducing tensions in international relations related to the preparation of regulations on the use of aviation in an armed conflict.[14] Consequently, it opted for the adoption of rules that should regulate the use of aircraft during a war and be the subject of an international agreement in the form proposed by the Subcommittee on the Laws of War.[15] At the same time, due to a lack of universal willing on the part of the conference participants to discuss the issue, as well as the end of plenary work (scheduled for February 1922), it was decided to make the issue of air warfare the subject of the next international conference – which seems highly symptomatic.[16] While discussing the report, this view was generally approved, considering the regulation too broad to be considered by the conference participants. It was highlighted that when drafting regulations relating to air warfare and reviewing the laws and customs of war, the subcommittees should only be tasked with technically examining what should remain of interest for future international legal solutions.

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13 Committee on Aircraft, *Report on Limitation of Aircraft as to Number, Character and Use-Washington, December 1921*, [in:] *Conference on Limitation of Armament: Washington 1921–22 (Treaties, Resolutions)*, London 1922, pp. 24–25.

14 "It is necessary in the interests of humanity and to lessen the chances of international friction that the rules which should govern the use of aircraft in war should be codified and be made the subject of international agreement" – *ibidem*, p. 34.

15 *Report of the Canadian Delegate Including Treaties and Resolutions*, Conference on the Limitation of Armament Held at Washington, November 12, 1921, to February 6, 1922, Ottawa 1922, paras. 55–55, p. 26.

16 "This Committee recommends therefore that the question to the rules for aircraft in war be not considered at a conference in which all the members are not considered at a conference in which all the member are not prepared to discuss so large a subject, but that the matter be postponed to a future conference which it is recommended be assemble for the purpose at a date and place to be agreed upon through diplomatic channels" – *Subcommitte on Aircraft – Report on Limitation as to Numbers, Character and Use*, Conference on the Limitation of Armament Held at Washington, November 12, 1921, to February 6, Washington 1922, p. 776.

3. Air warfare at the Washington Conference on the Limitation of Armaments

The scope of the work at the conference did not allow for the development of government positions in a timely manner, despite the delegates' widespread belief in the necessity to regulate air warfare. At this point, the chairman of the committee expressed regret and disappointment at the inability to regulate military air force development and the manner of its deployment in a future armed conflict.[17] An attempt was made to correct this deficiency in part by submitting an American proposal for the consideration of the conference participants, which read: "The use of aircraft in war should be in accordance with the rules of land warfare, by which the attack or bombardment by whatever means of towns, villages, dwellings or buildings that are undefended is prohibited. The bombardment of fortified places or of munition factories is legitimate, but cities and towns, unless defended, should be spared, and every safeguard should be invoked to protect noncombatants against attack from the air".[18] The proposal to adopt the resolution was accepted to this extent by the Italian delegate, who emphasized the consequences of the recent events related to the bombing of areas undefended by the German air forces during World War I. Recognizing the need to emphasize the principle of not attacking areas undefended by aviation, he proposed the adoption of the above declaration: "The Signatory Powers, desiring to ensure the enforcement of the rules of international law tending to the prohibition of the bombardment of undefended towns, villages, dwellings and buildings by aircraft, declare that they consider the said prohibition to be part of existing international law, and agree to be bound thereby as between themselves and to invite all other civilized nations to adhere thereto."[19] The French delegation emphasized that the above proposal was somewhat of a *superfluum*, as it had already been formulated during the work on the 1907 Hague Regulations and there was no need to repeat it.[20] The American delegate supported the Italian proposal, pointing out the state of legal uncertainty regarding the application of the 1907 rules during air bombing.

Attention was drawn to the existence of two regimes (naval and land), as well as the fact that the distinction between undefended and defended locations has little justification in the light of air warfare practice. "No town was defended against such bombardment," the American delegate argued, recognizing that almost every locality had some kind of defense.[21] In addition, it was noticed that the rules governing

17 *Ibidem*, p. 796.
18 *Ibidem*, p. 800.
19 *Ibidem*, p. 802.
20 *Ibidem*.
21 *Ibidem*, p. 804.

land bombing could not be considered sufficient in the light of the development and tactics of air operations at the time and required a new law in this area. The delegate considered attacks against railway infrastructure and armament factories to be legitimate, acknowledging in turn that the 1907 Hague Regulations were insufficient to protect civilian populations inhabiting undefended areas. In response, the Italian delegate indicated that he was prepared to modify his position and expressed an opinion that the jurist committee would consider all legal issues in detail, asking only for a common understanding of the principle of not attacking undefended settlements from the air. The French delegate expressed his agreement.[22] Having obtained a general consensus from the other participants, the vote on the draft resolution was withdrawn, recognizing the need for the commission of jurists to regulate this issue in detail. The chairman of the assembly drew attention to the technical complexity of the problem, fearing that once again waiting for a legal consultation might lead to an unacceptable extension of the deliberations of the future conference. The UK delegate argued that addressing the deployment of certain categories of targets of military significance (such as factories, railway stations, ammunition depots) near populated areas was particularly problematic in this respect. In order to give the prepared international norms their full shape, he considered it necessary that aviation experts, who would adapt the legal dialogue to a vision acceptable to both military and diplomatic circles, join the group of jurists.[23]

4. 1923 Hague Rules of Air Warfare

4.1. General remarks

> *The conclusions themselves cannot become international law until they are accepted by civilized powers, but consent does not have to be expressed only through a world conference.*[24]

The first meetings of the so-called commission of jurists took place on December 11, 1922 in Hague, and at the second meeting the chairman of the committee was J.B. Moore, who was a judge of the Supreme Court of the United States

22 It was noted in the conference documents that the French delegate emphasized the prohibition of bombing unfortified areas. *Ibidem*, p. 806.

23 *Ibidem*, p. 808.

24 Conference on the Limitation of Armament Held at Washington, November 12, 1921, to February 6, 1922. *Report of the Canadian Delegate*…, p. 26.

and a judge of the Permanent Court of International Justice. The delegates were from various fields; in addition to diplomats, air force and naval officers joined the work, as well as legal experts (W. Rodgers – United States, J.M. Spaight – the United Kingdom, A. De Lapradelle – France, A. Cavaglieri – Italy, M. Sugimura – Japan, J. Van Eysinga – the Netherlands).[25] Ultimately, the commission task was to cover issues related to the use of radio and aviation, thus dividing itself into two subcommittees. The members of the commission were aware of the difficult circumstances accompanying the discussion on the status of aircraft in future warfare and the real possibility that their efforts would be fruitless. However, they were determined to strengthen the role of international law through their discussion. Chairman Moore emphasized that, despite the preparatory status of the expert meeting, the importance and seriousness of the work that was discussed by the committee should not be underestimated. The utilitarian nature of the delegates' work was in opposition to the common opinion about the failure of international law regulating the manner in which military operations would be conducted.[26] The main objective of the commission was to create a regulation allowing the use of air force as a means of conducting warfare within the limits of the degree of violence acceptable in armed operations.

4.2. The proceedings of the commission of jurists

The pivotal and simultaneously the most important issue discussed by the commission of jurists in 1923 was the development of acceptable rules governing air bombing. The disclosed transcripts show that this was also the most difficult moment of the deliberations.[27] The initial stage of the talks dealt with the drafts submitted by the American and British sides. However, the most important preliminary finding was the conclusion that the definition of whether a given area is defensive in the context of ground force operations was invalid in relation to air operations and must be abandoned.[28] John B. Moore, who was commenting on the work of the commission, pointed out that the status of the Hague Declaration of 1899 on the prohibition of discharging projectiles and explosives from balloons had completely expired in the context of the practice of states with the outbreak of war in 1914, also due to the existence of the *si omnes* clause, which, in view of the relatively small number of ratifications of the extended Hague Declaration of 1907, had led to the conclusion that even in a purely formal context, this

25 J.B. Moore, *International Law and Some Current Illusions and Other Essays*, Chicago 1924, p. 182.
26 *Ibidem*, pp. 186–189.
27 See the speech of chairman J.B. Moore, who appealed to the participants of the committee for consensus on this issue. *Ibidem*, pp. 200–201.
28 *Ibidem*, p. 194.

document was not binding on the belligerents.[29] The commentator stated that air bombing posed the most serious challenge for the members of the commission. The British delegation proposed for the first time the introduction of the concept of a military target, but without any attempt to define it. The American draft, in turn, divided the area of air operations into zones located in a direct proximity and further away from the front; combat zones could be a bombing target without major restrictions (with the exception of facilities with specially protected status). On the other hand, in relation to areas located beyond the rear of front lines, only attacks against indicated targets of military significance (specified under Article 2 of the Ninth Hague Convention of 1907) was permissible. As a result, the American proposal did not define a military target (recognizing that it would leave too much freedom to the commander of the aircraft) but decided to adopt a casuistic view specifying which facilities might be the target of a military attack.[30]

The modified American version assumed that "aerial bombardment is permissible against military objectives, i.e. those whose destruction or damage will bring clear military advantage for the combatants".[31] Such targets included the enemy's armed forces, warships, military establishments, war material depots, armaments plants and communication lines used for military purposes. No bombing could target any civilian population. It was prohibited to attack troops deployed in built-up areas if "military concentration does not sufficiently justify it, given the danger to civilian populations resulting from this".[32] The Italian version differed from the American list of targets, indicating them as: 1) armed forces, 2) military barracks, 3) warships, 4) military arsenals, 5) armament and ammunition depots, 6) railway stations, 7) communication lines and transport, 8) plants and structures directly and effectively operating for armament production. It introduced a division into areas located near the front and zones located outside the area of direct combat.[33] In principle, in the light of the Italian proposal, an attack on towns located in the rear area of the theatre of operation was not allowed, except for the bombing of objects on the list of targets, which should be carried out under the condition that civilian casualties were avoided. If it were not possible to meet the above condition, an air attack could not be carried out. It was allowed, provided that there was a justified supposition of sufficient military concentration, in the case of

29 The only source on the proceedings of the jurists committee is the one indicated above. The author indicates that the preparatory works were published in the study *Procès-verbaux de la Commission de la Haye (1922–1923) pour la révision des lois de la guerre*, Paris 1930, unfortunately this source is not available.

30 A. Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice*, Oxon 2015, p. 20.

31 "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" – J.B. Moore, *International Law*…, p. 197.

32 *Ibidem*, p. 198.

33 *Ibidem*, p. 195.

operations in close proximity to a sea or land front, considering the government's obligation to remove civilians from a given area threatened by war.[34] Both drafts were introducing an order to pay an adequate compensation to persons and entities that suffered losses should the above provisions be violated, and the Italian instruction additionally introduced a rule that pilots be held criminally liable.

4.3. The Italian and American proposals to regulate air bombing

The differences between these drafts were quite fundamental, especially regarding the adoption of an acceptable category of targets that could be bombed. The American proposal assumed the need to complete a two-step test. First of all, it was necessary to determine whether the object of an attack was a military objective, i.e., one whose destruction or damage/injury would bring a distinct military advantage for the combatant. The second element of the above-mentioned test was to establish that the object listed in the first category may be the subject of an air attack only if it is included in the catalogue of legitimate targets: enemy armed forces, military factories and workshops, war material depots, military installations, factories involved in arms production of significant and well-known importance or communication lines used by armed forces. The Italian proposal did not include the concept of a military target, but created an exhaustive list of targets, broadly similar to the original American version – adding a new category in the form of a railway station. This raised objections from the commentator of the draft, who indicated that railway stations that were not used for war purposes could not be treated as targets in all conditions due to solely their status.[35] Another difference was to define the arms industry as effective and direct production contributing to the creation of weapons, ammunition and means of transportation. While the American draft assumed *prima facie* that a certain type of infrastructure would traditionally always operate for the war effort of a given state (e.g. Krupp plants in Germany), the Italian concept assumed the possibility that not only the final manufacturer of military equipment but also its sub-suppliers could be subjected to attacks, as long as they were effectively and directly involved in the final process of assembling armaments, ammunition and means of transport.

Another issue, with regard to which there appeared differences between the Italian and American views, was the response to the issue of fundamental practical value, i.e., an actual situation in which legitimate bombing targets were deployed near locations inhabited by civilian populations. The American draft envisaged that in such a situation it was not permissible to launch a carpet attack and

34 *Ibidem*, p. 198.

35 "Ordinarily a railway station as such possesses no military value whatever and its use is distinctively non-military in war as well as in peace" – *ibidem*, p. 199.

stipulated that the bombing should only be directed against a military object. The Italian proposal stipulated that an air attack should be carried out only if there was certainty that it would not result in casualties among the civilian population, stipulating that if absolute observance of this criterion were impossible, the bomber's crew should refrain from action. The text proposed by the Italian delegates was much more categorical in its form.[36]

A problem directly related to the interpretation of Article 25 of the Hague Regulations of 1907 regarding the prohibition on attacking undefended cities, villages and settlements was the matter of aviation operations against places located far from the front line. The Italian delegation, dividing the theatre of war into areas located directly by the front line and those beyond it, prohibited air attacks on towns located outside the zone of direct contact. The exception, however, was the bombing of objects listed in the closed list of targets. This means that bombing areas located away from the front line could only be conducted as a selective attack. In the case of towns located in the vicinity of hostilities, the possibility of performing area attacks was allowed, as long as it was justified by a sufficient concentration of enemy military apparatus. Thus, an actual situation was imagined in such a way that a built-up area might be used by the ground troops for direct defense against the approaching enemy, potentially as a fortified area. At the same time, it was recognized that the attacking side may, through its air force, carry out an area attack that would cause the enemy's resistance to weaken or collapse. The Italian delegation pointed out that the obligations of the attacker and the defender were permanent and equal during the conflict, arguing that the civilian population of such localities should be evacuated or relocated to a safe place beforehand. This marked a significant departure from the American draft, which assumed that the attack on sites of military concentration should take into account the potential danger for the civilian population.

After a five-hour meeting, on February 12, 1923, the delegates unanimously adopted the future Article 24 of the Hague Rules of Air Warfare, which was considered the most difficult and controversial element of the convention's work. What remained to be resolved were certain issues related to air force operations at sea and the granting of warship-specific authorizations to aircraft, e.g., by exercising the right to visit, blockade issues or adapting the standards of the prize law.[37] The final report on the commission's work did not contain any information on the implementation of these principles in the form of an international treaty. The *si omnes* clause, characteristic of the 1907 regulation, was not included either. This work was published in the form of a reprint in the "American Journal of International Law" No. 4/17 from 1923.[38]

36 *Ibidem*.

37 *Ibidem*, pp. 202–206.

38 *General Report of the Commission of Jurists at the Hague*, "The American Journal of International Law" 1923, vol. 17, pp. 242–260, also reprinted in "International Law Studies Series" 1924, vol. 96, pp. 96–154.

4.4. Status of military aircraft and crew in the light of the 1923 rules

> Article 1
> The rules of aerial warfare apply to all aircraft, whether lighter or heavier than air, irrespective of whether they are, or are not, capable of floating on the water.

This is a provision of utmost importance, as it indicates the material scope of the law of air warfare, applicable to all aircraft, regardless of technical properties. Pursuant to the article above, aircraft with their own propulsion as well as aerostats in the form of airships and balloons were treated in the same way. A similar remark was made in regard to seaplanes (which could be considered warships).[39]

> Article 2
> The following shall be deemed to be public aircraft: a) Military aircraft, b) Non-military aircraft exclusively employed in the public service. All other aircraft shall be deemed to be private aircraft.

In this respect, the creators of the commission emphasized the impact of the Paris Conference in 1919, which in a sense sanctioned the division of aviation proposed at the beginning of the twentieth century by P. Fauchille into military, public and other (presumably private) aircraft – according to their nature.[40] At the same time, it was decided that all aircraft, regardless of their status, should be subjected to the air warfare regime. Including only military aircraft in this regulation would not have been effective, due to the possible continuous interaction of military and civilian air traffic in the airspace of the belligerent states.

> Article 3
> A military aircraft shall bear an external mark indicating its nation and military status.

The *ratio legis of* the provision was to differentiate armed forces aircraft, due to the need to distinguish the status of military aircraft and private aircraft not in state service. In the light of the above commentary, it is less obvious whether public aircraft (e.g., in the service of the police force) could also be treated as part of the armed forces of a given state with a similar status to military aircraft. The above standard is a direct reference to the 1902 solution, in which P. Fauchille indicated that it was necessary for military aircraft to bear state-identifying markings. It

39 J.B. Moore, *International Law*…, p. 226.
40 *Ibidem*, p. 227.

is worth noting that, in accordance with the provision, the mark should specify not only the nationality of the aircraft but also its military status. At the time of drafting the document, based on the practice of states during World War I, the above standards had definitely already acquired the status of customary law since aircraft were obliged to bear a special mark to identify the air force of a given state, indicating both nationality and military status.

> Article 4
> A public non-military aircraft employed for customs or police purposes shall carry papers evidencing the fact that it is exclusively employed in the public service. Such an aircraft shall bear an external mark indicating its nationality and its public non-military character.

According to the commentary on the final report of the commission, the status of an aircraft of a public nature was determined on the basis of a given aircraft's documentation.[41]

> Article 5
> Public non-military aircraft other than those employed for customs or police purposes shall in time of war bear the same external marks, and for the purposes of these rules shall be treated on the same footing, as private aircraft.

Another category of public, but non-military aircraft included airships or airplanes that were used for postal or commercial services. In the context of international air traffic, their status should be identical to that of private aircraft, in accordance with Article 30 of the 1919 Convention on Air Navigation (the so-called Paris Convention).

> Article 6
> Aircraft not comprised in Articles III and IV and deemed to be private aircraft shall carry such papers and bear such external marks as are required by the rules in force in their own state.

The 1923 commentary attached importance to distinguishing civil air traffic from other categories of aircraft, indicating the need for the aircraft to have a characteristic registration mark, in accordance with the 1919 Paris Convention, i.e., letters identifying the state and number.[42] The *ratio legis* of this provision was supposed to guarantee the objectivity of belligerent and neutral states in recognizing the status of private aircraft.

41 *Ibidem*, p. 228.
42 *Ibidem*, p. 229.

Article 7
The external marks required by the above articles shall be so affixed that they cannot be altered in flight. They shall be as large as is practicable and shall be visible from above, from below and from each side.

The need to prevent any possible change of nationality during flight was emphasized – unlike naval warfare, where the use of a false flag was allowed under certain conditions.[43] The second aspect was the visibility of markings. On the one hand, the need to recognize the status of the aircraft was particularly important for anti-aircraft defense and in air combat itself. On the other hand, bright national signs could expose the status of the aircraft too easily and, as a result, compromise the element of surprise. It is worth noting that the commission strongly indicated the need to place state markings on all three planes of the aircraft: lower, upper and lateral.

Article 8
The external marks, prescribed by the rules in force in each State, shall be notified promptly to all other Powers. Modifications adopted in time of peace of the rules prescribing external marks shall be notified to all other Powers before they are brought into force. Changes to the method of aircraft marking should be notified immediately after their introduction.

The commission discussed the possibility of a ban on changing the markings of state aircraft during the course of hostilities, but it was decided that the implementation of the above solution might lead to a situation in which states with overly similar state designations would be exposed to losses from friendly fire.[44]

Article 9
A belligerent non-military aircraft, whether public or private, may be converted into a military aircraft, provided that the conversion is effected within the jurisdiction of the belligerent State to which the aircraft belongs and not on the high seas.

This provision referred directly to the standards of the convention of 1907 on the conversion of merchant ships into warships (7th Hague Convention).

Article 10
No aircraft may possess more than one nationality.

43 H.A. Gosnell, *The Hague Rules*…, p. 413.
44 J.B. Moore, *International Law*…, p. 230.

A similar solution was applied pursuant to Article 8 of the 1919 Paris Convention.[45]

Article 11
Outside the jurisdiction of any State, belligerent or neutral, all aircraft shall have full freedom of passage over high seas.

Article 12
In time of war any State, whether belligerent or neutral, may forbid passage of aircraft through its airspace.

Recognizing the uniqueness of the state of war, also based on the observations of the practice of states during World War I, the right to close the airspace was acknowledged.[46]

Article 13
Military aircraft are alone entitled to exercise belligerent rights.

By prohibiting belligerents from using private warships, as stipulated by the Paris Declaration of 1856, only units under the command and control of a given state may exercise belligerent rights.[47] The above solution was applied to military aircraft.[48] In this respect, it is worth mentioning an interesting concept by A. Meyer, who indicated the possibility of endowing aircraft with a certain type of legal subjectivity – in relation to its capability of exercising specific powers.[49]

Article 14
A military aircraft shall be under the command of a person duly commissioned or enlisted in the military service of the State; the crew must be exclusively military.

Article 15
Members of the crew of a military aircraft shall wear a fixed distinctive emblem of such character as to be recognizable at a distance in case they become separated from their aircraft.

45 *Ibidem*, pp. 231–232.
46 *Ibidem*, p. 232.
47 The Paris Declaration of 1856 regarding the conduct of war at sea, prohibiting so-called privateering, introducing a legal regime for neutral ships.
48 J.B. Moore, *International Law*…, p. 234.
49 „Hierdurch erhalten aber diese Schiffe und Luftfahrzeuge eine Ar Persönlichkeit und führen ein den Menschen Ähnliches Eigenleben, wodurch sie sich von den sonstigen Sachen abheben. Es wird daher bei ihnen, obgleich die Sachen sind ebenso wie bei den psychischen Personen" – A. Meyer, *Völkerrechtlicher Schutz der friedlichen Personen und Sachen gegen Luftangriffe*, Berlin 1935.

The above-mentioned three rules regulated the status of a military aircraft and its crew in the context of the crew exercising certain powers characteristic for the belligerent parties. The most important element of the above provision was the confirmation that the crew of a military aircraft also had belligerent rights even when they were separated from their aircraft. This was an important solution that removed the doubts existing against the background of the previous regulation, where the status of a prisoner of war was granted under Article 29 of the Hague Regulations of 1907 to the balloon crew members who were to provide messages and information intended for the army or a territory separated by the front. On this occasion, the issue of the status of other aircraft crews arose. It applied especially to those that did not perform courier service but operated as fighter and bomber units, i.e., essentially outside the scope of the regulations. The crew should also have a clear state marking in the event of leaving the aircraft and separating from it, but the requirement to have a uniform was waived, as in the case of Article 2 of the Hague Regulations of 1907.[50] In this respect, the requirement to have a uniform was replaced by the need for military aircraft to bear markings of membership in the belligerent state's air force.

> Article 16
> No aircraft other than a belligerent military aircraft shall engage in hostilities in any form. Military operations are also understood as the transmission of intelligence data during the flight for a belligerent's immediate use. No private aircraft outside the jurisdiction of its own state may be armed during the war.

The commentary argued that since the combatants are obliged not to make non-combatants the subject of military operations, the consequence of this principle is the prohibition of persons who are not part of the armed forces from participating in military operations. It was noted that in air warfare, reconnaissance and intelligence are of particular importance, which can also be carried out through radio equipment on board private aircraft. Given the consequences that could arise for the combatants, it was decided to deprive private ships actively participating in intelligence activities of protection, recognizing that this type of behavior violates the laws of war and should be punished accordingly – as an example of treachery.[51] In the context of the armament of a private aircraft, the above action was considered an active element of participation in military operations, which may also bear the signs of treachery – however, the above circumstance did not apply to areas under the jurisdiction of the combatant. In the context of public, non-military aircraft, their on-board equipment necessary to perform public functions was not considered an element of active action.

50 J.W. Garner, *International Regulation of Air Warfare*, "Air Law Review" 1932, vol. 2, p. 110.
51 J.B. Moore, *International Law*…, p. 236.

> Article 17
> The principles laid down in the Geneva Convention, 1906, and the Convention for the adaptation of the said Convention to Maritime War (X Geneva Convention of 1907) shall apply to aerial warfare and to flying ambulances, as well as to the control over flying ambulances exercised by a belligerent commanding officer. In order to receive the privileges applicable to mobile medical units, flying ambulances, in addition to their own state markings, must bear Red Cross markings.

As with the provisions on the adaptation of the provisions of the 1906 Geneva Convention to naval warfare, it was decided to apply an analogy to air warfare through the same mechanism. The introduction of the so-called flying ambulances category, whose status should be identical to that of other mobile flying devices, was a novelty.

> Article 18
> The use of tracer, incendiary, or explosive projectiles by or against air, is not prohibited. This provision applies equally to States which are parties to the Declaration of St. Petersburg, 1868, and to those which are not.

The Commission decided that it was necessary to establish a clear legal regime regarding the use of incendiary ammunition, as a result of a controversial attempt to convict one World War I pilot of using this type of ammunition as an act contrary to the law of war. Military considerations were the decisive factor here – this type of ammunition was necessary in air duels, as it allowed the pilot to assess the distance from the target and the effectiveness of his own fire. Incendiary ammunition turned out to be extremely effective against enemy airships. In addition, in 1923 it was assumed that the pilot had the right to use incendiary ammunition not only against an enemy aircraft, but also against land forces.[52] This decision was the result of the practical impossibility to change the ammunition kept on board the aircraft during the flight. According to J. Garner, this provision reflected the analysis of the practices of states participating in World War I. However, the individual case related to the arrest of a pilot using incendiary munitions and bringing him to court for violating the provisions of the St. Petersburg Declaration of 1868 and the Hague Regulations of 1907 forced the commission to adopt a solution that removed all doubts in this regard.[53] This view was approved by

52 *Ibidem*, p. 238.

53 "The use of tracer bullets for the purpose mentioned was a general practice among aviators during the World War and it was defended as a necessary means of effective attack, but in at least one case enemy aviators were arrested and put on trial on the charge that such methods were contrary to the existing rules of the Hague Convention. To remove the doubt regarding the lawfulness of the practice, the Commission considered it desirable to adopt a rule on the subject" – J.W. Garner, *International Regulation of Air*…, p. 110.

almost all representatives of the doctrine, with the exception of J.M. Spaight, who considered it to exceed the level of permissible damage inflicted upon the enemy.[54] Erik Castrén rightly highlighted that the practice of using incendiary weapons in World War I was widespread and it is difficult to consider it illegal in any way, and the St. Petersburg Declaration of 1868 should be interpreted more broadly due to the emergence of a new unknown means of combat.[55]

Article 19
The use of false external marks is forbidden.

The use of false marks during this period was treated as a specific violation of international law, deserving severe repression – it was not considered, in the light of the commentary on Article 19 of the above act, an acceptable military ruse.[56] When analyzing the practice of states during World War I, J.M. Spaight also drew attention to the use of foreign state marks (false ones), which he considered to be contrary to customary international law, emphasizing the importance of protests and responses related to the alleged cases of false nationality colors borne by French, Italian and German aviation.[57] In the same spirit, he emphasized the possibility of seized aircraft being used by the combatants, provided that relevant signs of previous nationality were removed. It was also legal to use emblems as markings for air squadrons or other formations. Another issue in this area was the question of using camouflage. In fact, many of the planes used during World War I had a uniform, often bright color (such as the planes of Manfred von Ritchthofen called the Red Baron). It was only at the end of the war that the Royal Flying Corps began experiments related to new camouflage colors, just like the German air force – according to the British author, these experiments were permitted as long as they allowed the correct identification of aircraft. Spaight emphasized that there was no doubt about the recognition of crews of properly marked aircraft as prisoners of war. In addition to the above *ratio legis*, J. Kroell indicated the requirement to properly distinguish military aircraft from other flying objects.[58] The issue of the uniform raised more doubts – airmen commonly recognized the markings of military aircraft as meeting the requirements resulting from Article 2 of the 1907 Hague Regulations.[59] Spaight emphasized that, in his opinion, even a lack of uniform cannot be the basis for refusing a detained pilot the prisoner of war status.

54 R. Berchoff, *L'avation et les lois de la guerre*, "Revue générale de droit aérien" 1932, vol. 9, p. 536.
55 E. Castrén, *Ilmasota – kansainvälisoikeudellinen tutkimus*, Helsinki 1938, p. 201.
56 J.B. Moore, *International Law*…, p. 239.
57 J.M. Spaight, *Air Power and War Rights*, London 1924, pp. 66–71.
58 J. Kroell, *Traité de Droit international public aérien: L'Aéronautique en temps de guerre*, vol. II, Paris 1936, p. 115.
59 J.M. Spaight, *Air Power*…, London 1924, p. 81.

> Article 20
> When an aircraft has been disabled, the occupants when endeavoring to escape by means of parachute must not be attacked in the course of their descent.

The parachute was a familiar means of rescue for aircraft crews even before the outbreak of World War I (the so-called Caltrop parachute). However, initially it was used only for aviators in observation balloons who were the most vulnerable to being shot down by fighter aircraft. Wider use of the invention in conventional aviation encountered practical and technical problems (lack of space, complicated evacuation procedure from biplanes or triplanes), as well as moral problems (the possibility of a premature jump or avoiding combat). However, they eventually became the standard equipment of every crew member in the air force of many states (with the exception of the Royal Flying Corps).[60] On the one hand, a pilot evacuating from a damaged aircraft was in a situation similar to a shipwrecked person, and on the other hand, his value as a highly qualified person meant that landing on his own territory usually implied that me might make a quick return to his own air force and continue the fight. As a consequence, the possible killing of an airman was ultimately an action which brought a real military advantage – especially if the landing were to take place within the area occupied by military forces being friendly to said airman. However, contrary to such reasoning, the practice of attacking crew members evacuating from damaged aircraft was generally considered impermissible.[61]

In the interwar period, the humanitarian *ratio legis* of the provision was approved in its entirety, noting, however, the existence of certain "practical" doubts regarding the status of airmen evacuating over their own territory.[62] In his work Riesch stated that the sources of the prohibition against attacking airmen in a forced situation had their basis in the content of Article 22 of the Hague Regulations of 1907, limiting the ability of combatants to use means that are harmful to the enemy.[63] Also, referring to the Martens Clause, he considered this type of action to be noncompliant with the laws in force between nations, humanity and the conscience of the international community.[64] However, the author noticed that situations associated with aviators evacuating from an aircraft might be different and not always related to an emergency. During the Great War, parachutes were used by spies to the same extent, and in the case of air operations in the

60 The first formation to introduce parachutes in its air force was the German air arm Luftstreitkräfte. C.G. Sweeting, *United States Army Aviators' Equipment, 1917–1945*, Jefferson 2015, pp. 115–119.

61 J.M. Spaight, *Air Power*…, London 1924, p. 239.

62 H.A. Gosnell, *The Hague Rules*…, p. 418; J.M. Spaight, *War Rights*…, p. 143.

63 E. Riesch, *L'attaque pendant la descente en parachute*, "Revue générale de droit aérien" 1932, p. 241.

64 J.B. Moore, *International Law*…, p. 242.

colonial regions also by airborne assault units (this is how the Royal Air Force operated as part of the air policy strategy). The German researcher believed that in the future, actions of sabotage groups, aimed at destroying certain categories of targets, would be carried out first and foremost by air. In this sense, the possibility of firing at people using a parachute was permissible.[65] In this respect, it was important to assess whether using a parachute served only to save lives, or also for other purposes (such an opinion was provided by, among others, E. Castrén).[66] It was noticed that from a military perspective, killing a crew member was more valuable than destroying his aircraft; however, the right to kill a pilot was limited by the prohibition of inflicting unlimited harm to the enemy. The author pointed out that due to the fact that a pilot descending from an aircraft would not always become a prisoner of war, it was not practical to apply the provisions of Article 23(c) of the 1907 Hague Regulations ("it is forbidden to kill or wound an enemy who, having laid down his arms, or no longer having any means of defense, has surrendered at discretion"). On the other hand, in an emergency, when the parachute is the only way to rescue oneself, the position of the aircraft crew is not different from that of the shipwrecked, who are entitled to special international protection, and possible violation of the prohibition is treated as a serious breach of the laws and customs of war.[67] Article 20 of the Hague Rules of Air Warfare was, in the author's opinion, too casuistic, limiting its material scope.[68] A similar comment was made by J. Kroell, who proposed changing the content of this provision, indicating that persons who clearly express intention to evacuate from an aircraft, including, among others, those who move towards the wing tip, should also be under its protection[69].

> Article 21
> The use of aircraft for the purpose of disseminating propaganda shall not be treated as an illegitimate means of warfare. Aircraft crew members do not lose their status as prisoners of war due to their participation in the above missions.

James W. Garner reports on the criminal trials of two British crewmen who were arrested and detained on suspicion of spreading hostile propaganda in February 1918, for dropping the proclamation of the President of the United States Thomas Woodrow Wilson. Under the influence of the British intervention (in the course of which threats of retaliatory measures were dispatched), the airmen were released.[70]

65 *Ibidem*, p. 243.
66 E. Castrén, *Ilmasota*…, p. 183.
67 *Ibidem*, p. 181.
68 E. Riesch, *L'attaque*…, p. 245.
69 J. Kroell, *Traité*…, p. 119.
70 J.W. Garner, *International Regulation of Air*…, p. 111.

5. The law of air bombing in the 1923 regulation

5.1. General remarks

Articles 22–26 of the 1923 rules constitute norms of groundbreaking and fundamental importance for the law of air warfare. Part III of the document devoted to air bombings drew special attention from the international community, including the doctrines of international law. From the perspective of the analysis of a 21st century researcher, it can be seen that the vast majority of studies which refer to the achievements of the 1923 commission of jurists focus solely on two articles – 22 and 24.[71] This emphasizes the importance of established findings and proposed regulation because there is no doubt that in the context of the air warfare law, the issue of air bombing is of particular value due to the destructive consequences of airstrikes.

5.2. Terrorist bombings

Article 22 of the Hague Rules of Air Warfare imposed a ban on conducting terrorist and "careless" bombings – unjustified by military necessity. It should be noted, however, that the provision qualifies as such only attacks conducted with the aim of "terrorizing the civilian population, destroying or damaging private property not of a military character, or injuring non-combatants". Consequently, only acting as a specific engaged party – by demonstrating so-called direct intent (*dolus directus coloratus*) and carrying out an attack to terrorize the civilian population would violate the stipulations of the above provision. It can be stated that bombing of a terrorist nature was, in fact, a qualified form of a general ban on attacking civilians or private property. Consequently, not every attack directed against non-combatants was necessarily a terrorist attack unless carried out with a specific intention.[72] John B. Moore's commentary on the work of the 1923 commission does not specify in any way what constituted the form of the intention, specifically what subjective and objective circumstances could testify to it (e.g., issuing an order initiating a saturating bombing of a town, abandoning the use of certain precautions, choosing a specific method and means of attack, etc.). Other attacks prohibited by the provision were the destruction of property belonging to the civilian population – in this context, it is worth paying attention to the genesis of the solution referring indirectly to the content of Article 23(g) of the 1907 Hague Regulations stating that it is forbidden "to destroy or seize the enemy's property,

71 Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge 2016, p. 102.

72 I. Henderson, *The Contemporary Law of Targeting*, Leiden 2009, p. 26.

unless such destruction or seizure be imperatively demanded by the necessities of war", as was rightly noted by E. Castrén and A. Meyer.[73]

The *dolus directus coloratus* requirement was not the only condition limiting a possible application of the provision. It was pointed out that it was important to differentiate terrorist attacks from side effects of legitimate attacks or "normal" consequences related to the very fact of conducting warfare.[74]

5.3. The criterion of a defended area and the criterion of a military target

The greatest achievement of the creators of Article 24 of the Hague Rules of Air Warfare was the decision to recognize Article 25 of the Hague Regulations of 1907 as not being adapted to the conditions of air warfare.[75] The criterion of the defended status of a settlement was abandoned. The decisive factor now was to determine whether the objects located within them were, by nature or by usage, military objects.[76] Departure from the application, in the context of aerial bombardment, of Article 25 of the Hague Regulations of 1907 was adopted in the international law doctrine with wide approval. James W. Garner pointed out that the test adopted under Article 25 of the Hague Regulations was "illogical and impractical" and led to "absurd conclusions", especially when an attempt to declare a given area undefended despite the presence of targets of military significance, made it impossible to attack it with aviation.[77] He also emphasized that aviation, by its very nature, was incapable of occupying a given area or calling on a given city or settlement to surrender (similarly to P. Whitcomb Williams's arguments).[78] Garner accurately

73 E. Castrén, *Ilmasota*…, p. 177; A. Meyer, *Völkerrechtlicher*…, pp. 138–139.

74 Comité International de la Croix-Rouge, *La Protection Des Populations Civiles Contre Les Bombardements: Consultation De Sir George Macdonogh*, Geneva 1930, pp. 64–65.

75 "The most important innovation of the Rules of Air Warfare was doubtless the discarding of the requirement that a locality must be defended if bombardment of it was to be legitimate" – H.M. Hanke, *The 1923 Hague Rules of Air Warfare: A contribution to the development of international law protecting civilians from air attack*, "International Review of the Red Cross" 1993, vol. 292, p. 21.

76 "It will be noticed that for aerial bombardment the test adopted in article 25 of the Land Warfare Regulations, that of the town, etc., being defended, is abandoned. The nature of the objective or the use to which it is being put now becomes the test" – J.B. Moore, *International Law*…, p. 243.

77 J.W. Garner, *Proposed Rules*…, p. 57.

78 "Defense was an adequate criterion when the enemy attempted to capture, to force surrender, but it quite misses the point now that the enemy wishes simply to destroy. The advisability, moreover, of placing anti-aircraft guns used to protect otherwise innocent towns against possible violations in the category of legitimate targets is seriously to be questioned" – P. Whitcomb Williams, *Legitimate Targets in Aerial Bombardment*, "American Journal of International Law" 1929, vol. 23, p. 573.

pointed out an important issue in the context of interpreting Article 25 of the Hague Regulations of 1907 – if the area in question had to be defended, it would be necessary to determine to what extent it could be defended against an air attack, taking into account not only the presence of anti-aircraft artillery but also intercepting fighters.[79] In the same spirit, J.M. Spaight articulated his thoughts, who drew attention to the problem of cities located beyond the rear of the front lines and, at the same time, exposed, in the light of the 1907 Hague Regulations, to the consequence of air bombing from fighter aviation tasked with providing air defense.[80] Elbridge Colby emphasized that the solution specified based on Article 25 of the Hague Regulations of 1907 was so flawed that if had already been undermined even before the outbreak of the war itself, both by practitioners and the content of the instructions of the land armies of the United Kingdom and the United States.[81] This was confirmed by A.S. Hershey, recognizing the complete dissimilarity between operations performed by naval and land forces.[82] Alex Meyer observed that the prohibition specified under Article 25 of the Hague Regulations of 1907 could not in any way fulfill the premise of bombing with destructive character (*Bombardements der Destruktion gegen militärische Objekte*) and could not apply to independent air operations.[83]

5.4. Impracticability of the undefended area test in the context of air warfare

Roland Bechoff was one of the first *ius in bello* experts to highlights that Article 25 of the Hague Regulations of 1907 did not clearly specify whether its provisions made it possible to attack a given location, taking into account the act of "defense"

79 J.W. Garner, *Proposed Rules*…, p. 70.

80 "It will be still more difficult in future to tell whether a place is defended or not, for defence against air attack will tend to take the form of aerial counteraction rather than of artillery defence, and a squadron or flight of defending aircraft, perhaps based on some fairly distant acrodrome, may suddenly appear above a town which is entirely open so far as ground defence is concerned, and deny the raiding aircraft force access to that town, which cannot then truly be said to be undefended" – J.M. Spaight, *Air Bombardment*, "The British Yearbook of International Law" 1923, vol. 21, p. 23.

81 E. Colby, *Aerial Law and War Targets*, "American Journal of International Law" 1925, vol. 19, p. 70. "Even if this be true, the Article appears, nevertheless, to respond inadequately to existing conditions, because of the difficulty in determining what constitutes an undefended place in aeial warfare, and because of the absence of any provision acknowledging the right to direct attack, in places regarded as either defended or undefended, upon structures or things which by reason of their military importance the enemy may reasonably endeavor to destroy" – C.C. Hyde, *Land Warfare*, Washington 1918, p. 51.

82 "Though H. R. 25 may be said still to constitute the formal law pertaining to aerial as well as land bombardment, it is wholly unsatisfactory, at least as far as the former is concerned" – A.S. Hershey, *The Essentials of International Law and Organization*, Chicago 1927, p. 660.

83 A. Meyer, *Völkerrechtlicher*…, pp. 135–136.

performed by the anti-aircraft artillery installation.[84] As a matter of fact, the criterion of defensibility could be read in the literal wording of Article 25 of the Hague Regulations of 1907, understood not only the *sensu stricto* as defense against enemy land forces occupying a given location but also *sensu largo* as a defense against an attack in any other form, including an air attack. At the same time, the lack of linkage between the test resulting from the in-force provisions in the Hague Convention of 1907 with the real value of a given facility in the context of military operations led to bizarre consequences.[85] The above doubts were perfectly presented by R. Wymann, who indicated that a city or town might be defended against an attack by land troops but might not have defensive measures against military aviation. The American author developed the criterion of defense in the context of *sensu largo*, without limiting it solely to the existence of ground-based air defense, but also drew attention to fighter aviation. In this respect, it was insufficient to rely only on the vertical approach to defensive measures (anti-aircraft artillery), it was necessary to address the issue in a horizontal context (the presence of fighter aircraft).[86] This obviously led to a situation in which air bombing was not allowed, despite the presence of enemy ground forces, and even despite converting a city into a fortified area, "but defended only against the attack of ground forces".[87] Joseph Kroell indicated that due to the presence of air defense and fighter aviation, potentially the areas located far from the front lines could also become the target of an air attack because they had the status of being defended against an air attack (the above argumentation was also confirmed by A. Züblin).[88] Gregor Schwarzenberger approved of the above pattern, pointing out that "it appears immaterial against which type of warfare existing means of the defence of a place are directed".[89] Thus,

84 R. Bechoff, *L'Aviation et les lois de la guerre*, "Revue générale de droit aérien" 1932, vol. 9, p. 532.

85 "Undefended seems to imply susceptibility to immediate occupation, and no object of air attack is likely to fulfill this implicit requirement. Had other indicia been written in, the rule itself would have gone by the boards with the inevitable development of air warfar" – C.P. Phillips, *Air Warfare and Law: an Analysis of the Legal Doctrines, Practices and Policies*, "George Washington Law Review" 1953, vol. 21, p. 322.

86 "That the test of 'undefended' was inadequate, particularly for air warfare, was clearly shown by the results of military operations during the Great War. The defense against aerial attack is not primarily dependent upon anti-aircraft artillery and machine guns on the ground, but is probably more dependent upon counteraerial attacks by the defended locality's pursuit planes which patrol and strive to protect vast territories" – F.E. Quindry, *Aerial Bombardment of Civilian and Military Objectives*, "Journal of Air Law and Commerce" 1931, vol. 2, p. 484.

87 W.M. Wherry, *Aerial Warfare in International Law*, "Contemporary Law Pamphlets" 1939, vol. 21, p. 3.

88 J. Kroell, *Les pratiques de guerre aérienne dans le conflit italo-éthiopien*, "Revue générale de droit aérien" 1936, avril–juin, p. 191; Comité International de la Croix-Rouge, *La Protection Des Populations Civiles Contre Les Bombardements*, Geneva 1930, p. 235 ff.

89 "It is submitted that it suffices if a word is definable in good faith, and that this is possible in this case. A place is defended if it is capable of opposing an enemy attack. It appears immaterial against which type of warfare existing means of the defence of a place are directed.

an ammunition factory located in the enemy's support area could not be targeted by an attack (since the test under Article 25 of the Hague Regulations of 1907 is also applied to individual targets), if it was not defended, while a town of a predominantly civilian nature could be subjected to bombing if protected by just a single machine gun.[90] An identical model of interpretation of the Hague Regulations of 1907 was proposed by S.E. Edmunds.[91] Josehp Kroell, while analyzing the course of the Italian invasion of Ethiopia in 1935–1936 from a legal point of view, pointed out that the shelling of aircraft is *prima facie* evidence of the "defended nature of a given location".[92] The above conclusions are well summarized by Z. Rotocki's commentary, who indicated that the Hague Regulations of 1907 were not constructed to deal with strategic bombing, but only with its tactical dimension, limited to the direct zone of combat contact between the assailant and the defender.[93] It is worth closing this section with a clever remark by W.T. Mallison, who concluded that the regulations regarding air bombing were based on standards taking into consideration the technical capabilities of land artillery, which at the beginning of the 20th century was a more precise means of combat than air bombing.[94]

5.5. Consequence of recognizing a given area as defended

The most serious conclusion resulting from the interpretation of Article 25 of the Hague Regulations of 1907 in relation to the law of air warfare was a statement whereby in the case of recognizing a given area as defended, the entire built-up

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Admittedly, an enemy may find it difficult or impossible to ascertain the defended or undefended character of a place" – G. Schwarzenberger, *The Law of Air*…, p. 127.

90 "How could a pilot determine whether a city was defended? Even the absence of antiaircraft emplacements was insufficient, since the city might be defended by interceptor aircraft. But there was a logical paradox. A manufacturing center for some critical war material deep in the enemy's rear would be immune to destruction if it was not defended, but a city of no military value with thousands of people and one antiaircraft gun could be bombed to the ground. Therefore, Article 25 failed its most basic test because it was illogical. Not only could an enemy use it to protect his most vital assets, he could also use it to justify inhumanity. It was unworkable, since the criteria for defining a defended city were too vague. Moreover, if rules are to commend themselves to observance by fighting men, they must be based as much on considerations of military expediency as upon considerations of humanity" – R.H. Wyman, *The First Rules of Air Warfare*, "Air University Review" 1984, no. 1.

91 "But as there was no definition of an 'undefended town' – as the presence of a single soldier might be sufficient to constitute it a defended town-bombardment by aircraft was practically no more restricted by law than bombardment by land batteries" – S.E. Edmunds, *Aerial Domain and The Law of Nations*, "St. Louis Law Review" 1923, vol. 8, p. 93.

92 J. Kroell, *Les pratiques de guerre aérienne*…, p. 190.

93 Z. Rotocki, *Polish Directives of 1939 concerning Aerial Bombardment in the Light of International Rules of Air Warfare*, "Polish Yearbook of International Law" 1970, vol. 3, p. 148.

94 W.T. Mallison (ed.), *Studies in the Law of Naval Warfare: Submarines in General and Limited Wars*, "International Law Studies" 1966, vol. 58, p. 177.

area could be bombarded (a stance taken by, among others, Fauchille, Spaight, Oppenheim, Hyde and Batty).[95] Louis Rolland pointed out that the bombing of defended and fortified cities was difficult to assess unequivocally, because, on the one hand, one should discern the military need to bomb an entire urban area, and, on the other hand, the reasons for protecting the civilian population from total destruction. Lester Nurick highlights that the right to destroy a defended area was invoked, among others, in an ultimatum dated October 10, 1944 addressed to the defenders of Aachen.[96]

5.6. Ninth Hague Convention on Naval Bombardment vs. air operations

Paul Fauchille, in his concept of the law of aerial bombardment in 1917, argued that the 1907 conventions established two regimes guided by the principles of shelling towns (the so-called occupation bombardment) in land warfare and "naval bombardment" in maritime warfare. Although, due to the similarity between the characteristics of air operations and naval operations, especially in relation to bombing, the maritime warfare regime should be properly applied to military aviation operations, apart from this commonsense approach, nothing in the text of the provision of Article 25 of the Hague Regulations of 1907 or in the preparatory work on the conventions indicated the possibility of adopting such a solution. The interpretation resulting from Article 2 of the Ninth Hague Convention of 1907, despite its entire normative spectrum being *prima facie* more adapted to the nature of air warfare, was not defect-free. First, the provision required that an appropriate request be submitted to the local authorities in the first place and, if

95 "The attacking force need not limit bombardment to the fortification or defended border only. Public buildings and private houses can be bombarded, as has been the practice in order to impress on local authorities the advisability of surrender" – G. Phillimore, *Bombardments*, "Grotius Society" 1915, p. 61; "In case of bombardment, the attacking force is not required by The Hague Regulations to confine its operations to fortifications. Subject to the limitations noted, such a force is free to destroy any edifices, public or private; and it may be expected so to direct its fire as to cause the reduction of the bombarded place by the surest and quickest process" – C.C. Hyde, *International Law: Chiefly as Interpreted and Applied by the United States*, Boston 1922, p. 305; "It must be specially observed that no legal duty exists for the attacking force to restrict bombardment to fortification only. On the contrary, destruction of private and public buildings through bombardment has always been and is still considered lawful, as it is one of the means to impress upon authorities the advisability of surrender" – L. Oppenheim, *International Law: A Treatise: Vol. II: War and Neutrality*, London 1912, pp. 158–159. See also: M.W. Royse, *Aerial Bombardment and the International Regulation*, New York 1928, pp. 151–158.

96 L. Nurick, *The Distinction Between Combatant and Noncombatant in the Law of War*, "The American Journal of International Law" 1945, vol. 39, p. 684.

that request was not complied with, it permitted taking independent action. It is difficult to expect that this requirement could in any way apply to military aviation. Secondly, Article 1 of the Ninth Hague Convention of 1907 did not contain a clause that might correspond appropriately to the Hague Regulations of 1907 – that is, the prohibition of bombing undefended settlements in "any way" – and from the preparatory work on the convention it did not follow that the convention also regulated air operations, even those carried out in cooperation with naval forces. A "salvage" interpretation of the existing law was attempted by P.H. Windfield, who assumed that the targets indicated under Article 2 of the Ninth Hague Convention of 1907 would always be subject to air bombing regardless of the status of a particular locality.[97] A similar proposal was submitted by H.F. Manisty, who in a detailed argument revalued the concept of an undefended location as a built-up area, unfortified and inhabited by civilians operating in peaceful conditions, which features no plants, factories, workshops or military bases. The status of a locality would not be changed by the existence of railway stations or land road intersections, as long as they were predominantly used by the civilian population, or by the presence of government buildings.[98]

Bruce M. Carnahan indicates two details of the preparatory work performed in 1907. The first was the fact that the Ninth Hague Convention on Bombardment by Naval Forces in Time of War did not contain the phrase "whatever means" which was characteristic for Article 25 of the Hague Regulations of 1907 – due to the different composition of the plenary bodies working on the regulations. Arthur Kuhn[99] also drew attention to the above circumstance. The second reservation was made by the German delegation during the conference, which indicated that buildings whose destruction was required by military operations should not be covered by the ban – and the catalog of these objects was placed in Article 2 of the Ninth Hague Convention of 1907, recognizing that under this interpretation the regimes of all types of bombardment could be unified.[100]

Several other representatives of the doctrine advocated the direct application of the provisions of the Ninth Hague Convention of 1907. Rolland joined the opinions of Spaight and Fauchille expressed on the subject of applying the provisions of the Ninth Hague Convention of 1907 to aerial bombardment. The French researcher emphasized that in undefended areas, located at the rear of the front line, lay vital components of the adversaries' war effort, and the development of

97 P.H. Windfield, *Aircraft Attacks*, "The Law Magazine and Review" 1915, vol. 257, p. 267.

98 H.F. Manisty, *Aerial Warfare and the Laws of War*, "Transactions Grotius Society" 1921, vol. 33, p. 84.

99 A.K. Kuhn, *The Beginnings of an Aerial Law*, "American Journal of International Law" 1910, vol. 4, p. 121.

100 "The apparent inconsistency between the law of sea bombardment and the law of land and air bombardment can thus be reconciled" – B.M. Carnahan, *The Law of Air Bombardment in its Historical Context*, "Air Force Law Review" 1935, vol. 17, p. 45.

military aviation allowed combatants to attack elements of the enemy's economy (factories, plants) or direct war effort in the form of sites of military concentration.[101] Edouard d'Hooghe, the chairman of the International Aviation Committee, expressed a similar opinion in this respect, pointing out that the prohibition against bombing undefended areas did not apply to facilities that were constantly or temporarily working for the adversary's war effort, listing the following as legitimate targets: armed forces personnel, war ministries, warships, docks, arsenals, military food warehouses, strategic points of rail and road infrastructure, as well as locations of armaments production.[102] George Thomson, who analyzed the operations of the Allied aviation during World War I, indicated that it had adopted the rules governing maritime bombing as the leading legal regime.[103] However, it seems that despite the fundamental veracity of the above conclusion in a purely formal context, the literal interpretation of both the Hague Regulations of 1907 and the Ninth Hague Convention of 1907 determined the need to recognize the cited interpretation only as a position of non-binding doctrine. Moreover, an attempt to build a normative link between the regulations being in force in land and partially naval warfare and the realities of air warfare was in this respect contrary to the essence of air operations, as operations whose purpose was inherently to destroy specific targets.[104]

5.7. Definition of a military target in the light of Article 24 of the 1923 Hague Rules of Air Warfare

Article 24 para. 1 was a breakthrough solution in the history of *ius in bello*. Abandoning the criterion of the defense capability of a given location, it was decided to assume that the legal object of military operations was destructive action directed

101 L. Rolland, *Dans le conflit 1914 et le droit des gens*, "Revue générale droit international public" 1916, p. 548.

102 E. d'Hooghe, *Droit Aérien*, Paris 1914, pp. 32–33.

103 G. Thomson, *Aerial Attack and Bombardment*, "Juridical Review" 1936, vol. 48, p. 50.

104 "The primary feature is that the land and sea principle of the 'defended' status of the target is entirely abandoned. Certainly no change could be more reasonable. One of the two main legitimate reasons for bombardment by troops or ships is to make possible the capture of a place. Unless the place is defended, the bombardment for this purpose is unnecessary and therefore prohibited. It is well judged that any bombardment by aircraft can accomplish little directly toward the capture and occupation of enemy territory, in fact nothing by itself at the present time. Accordingly whether the objective be defended or not has little to do with this aim of aerial bombardment even though the sole defense might consist of anti-aircraft guns. The principal legitimate function of aircraft apart from combat with enemy aircraft and scouting, is the destruction of military objectives; which is, of course, sometimes the function of land and sea forces also" – H.A. Gosnell, *The Hague Rules*…, p. 419.

against military objectives.[105] In this respect, not only the wording itself was revolutionary, but also its definition in an abstract and not casuistic way, as in the case of Article 2 of the Ninth Hague Convention of 1907. In fact, this concept was manifested more or less precisely in the doctrine of World War I era, as well as in the general outline of the operations of the Allied aviation during this conflict.[106] This definition clearly indicated that the destruction of a given target should bring a clear military advantage to the combatant, which meant the need to concentrate air operations on obtaining a real, rather than indirect, specific military success, by weakening its military potential.[107] One supporter of the so-called theory of channeling war energy against targets, the elimination of which brings a specific strategic-tactical profit, was M.W. Royse.[108] The above concept excluded the possibility of including civilians in the scope of warfare, not only for humanitarian reasons, but also for purely utilitarian ones, related to the need to conserve war energy for the purpose of destroying targets in a way that actually contributed to winning the conflict. James M. Spaight noticed that in the commentary on the work of the commission it was not possible to find a clear definition of "air bombing".[109] However, it seems that a closer definition of this concept is not necessary and ultimately includes all manifestations of military aircraft activity of a kinetic nature directed against targets on land or at sea. For example, air bombing included not only dropping bombs, but also launching other types of missiles in the form of, for example strafing, in which an attack is carried out using on-board weapons (machine guns or cannons).

Despite the breakthrough in adopting an abstract definition of a "military objective", Article 24 para. 2 explicitly limited the discretion of combatants' target selection, reducing it only to an enumeratively closed catalogue of military objectives. The above included: "military forces, military works, military establishments or depots, manufacturing plants constituting important and well-known centres for the production of arms, ammunition or characterized military supplies, lines of communication or of transport which are used for military purposes." However, it should be noted that the condition provided for by Article 24 para. 1,

105 "It will be noticed that for aerial bombardment the test adopted in article 25 of the Land Warfare Regulations, that of the town, etc., being defended, is abandoned. The nature of the objective or the use to which it is being put now becomes the test" – J.B. Moore, *International Law*…, p. 243.

106 "Authority and practice alike tend to substitute the idea of the 'military objective' for that of a 'defended' place in aerial bombardment" – A.S. Hershey, *The Essentials*…, p. 660.

107 "The essential thing was that the belligerent effort should be directed against objectives whose damage or destruction was in accordance with the principles of warfare already accepted" – W.L. Rodgers, *The Laws of War Concerning Aviation and Radio*, "American Journal of International Law" 1923, vol. 177, p. 635.

108 Also called force distribution theory or concentration theory, see: F.E. Quindry, *Aerial Bombardment*…, pp. 480–482; H.S. Leroy, *Limitation*…, p. 20.

109 J.M. Spaight, *Air Power*…, London 1924, p. 213.

which imposed, also in relation to the existing category of targets in para. 2, an obligation to determine each time the existence of a clear military advantage resulting from their elimination was still in force. In conclusion, the definition proposed by the commission of jurists was of a hybrid nature, being a link between a casuistic enumeration in the form of a closed catalogue of legal air attack targets and an abstract "flexible" definition leaving a certain margin of discretion for the commander of a combat operation.[110] The above-mentioned definition was particularly advocated by J.W. Garner, who considered the military objective test as the only "logical, […] reasonable" solution in the context of the law of aerial bombardment.[111] It should be pointed out that this comment is all the more valuable because it comes from a researcher of *ius in bello*, who had demonstrated the lack of adaptation in the provision of Article 25 of the 1907 Hague Regulations to the conditions applicable in air warfare.

5.8. Division into tactical and strategic bombing

Article 24 para. 3 also introduced a division regarding the location of a given target in relation to the front line. Areas located in the rear, which could be attacked as part of the so-called strategic bombing, were basically protected and, according to the provision, belligerents were not allowed to attack them from the air. The only exception in this matter was the presence of military objectives listed in Article 24 para. 2, although it was unacceptable to bomb these targets if the only method of attack was a carpet bombing raid.[112] *A contrario*, losses among non-combatants were permissible only in the event of a direct presence of a civilian population within the military facility itself.[113] In the case of areas located in the immediate vicinity of the front line, the above restrictions were eased. Bombing of a so-called tactical nature was permissible if justified by military concentration, albeit with the obligation to take into account the danger that might arise for the civilian population during bombing. This distinction was positively evaluated by J.M. Spaight, indicating that in areas located in the vicinity of the front line, bombing might be of a less discriminating and more widespread nature. At the same time, he emphasized that, in his opinion, it was forbidden to bomb any military target located within a built-up area, if it could not

110 "In contrast to the current U.S. analysis, the 1923 Air Rules may be seen as inflexible and exclusive" – H. Reinhold, *Target Lists: A 1923 Idea With Application for the Future*, "Tulsa Journal Comparative and International Law" 2002, vol. 10, p. 42.

111 J.W. Garner, *International Regulation of Air*…, pp. 118–120.

112 J.M. Spaight believed that the concept of indiscriminate bombing should be understood as prohibiting the bombing of legitimate military objectives if it could not be carried out without simultaneous widespread destruction among military facilities, which in turn leads to similar effects as in the case of classic blanket bombing.

113 W.M. Wherry, *Aerial Warfare*…, p. 4.

be carried out without serious and extensive destruction of civilian infrastructure. According to P. Whitcomb Williams, the above restriction would lead to a situation in which the defending party would deliberately relocate the civilian population or other civilian facilities in order to "shield" military objectives.[114] Spaight read the provisions of Article 24 para. 1 in such a way that as an initial provision it was still applicable to bombing areas directly located near the location of conducting hostilities as well as at the rear of the front. For example, besieging a given area meant that military concentration justified a more extensive bombing of a given area, but still within the limits specified by Article 24 para. 1 of the Hague Rules of Air Warfare. Therefore, the author concluded that the assessment of the legality of bombing was directly related to its effects.[115] It is worth emphasizing that many authors argue that the obligation to estimate the danger that might arise for the civilian population, provided by Article 24 para. 4, was in fact the first exemplification of the rule of proportionality in the form of positive law in history.[116]

6. Flaws of the 1923 Hague Rules of Air Warfare

Article 24 of the 1923 Hague Rules of Air Warfare was not void from legitimate criticism. The adoption of a hybrid definition of a military target was considered a methodological error by E. Castrén, which stemmed from an at-

114 Interestingly, in the pages of his own article, the author proposed changes in the content of Article 24 of the 1923 rules, recognizing that military objectives should be attacked under all circumstances and regardless of their location. P. Whitcomb Williams, *Legitimate Targets*…, pp. 578–579.

115 "In other words, the provision makes the legitimacy of a bombardment dependent upon its results. It is by those results that the question will be judged and indeed necessarily judged, whether the bombing force has, in fact, complied with the requirements of the rule of not" – J.M. Spaight, *Air Power*…, London 1924, p. 217.

116 H. Reinhold, *Target Lists*…, p. 13; "The underlying principle of this rule is that whatever injuries the civil population may be subjected to, they should be merely incidental or accessory and the military damage must be compensatory, that is, sufficiently great to justify the sufferings caused those who are not legitimate objects of attack. It will be noted that in neither zone is bombardment totally forbidden, nor in either is it allowed without restriction. The principal difference is that in one a larger right of bombardment is permitted than is allowed in the other. The distinction is founded on considerations of both reason and logic, not to say humanity" – J.W. Garner, *Proposed Rules*…, pp. 72–73; M. Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, "California Wester International Law Journal" 2002, vol. 33, p. 12; J. Rabkin, *Proportionality in Perspective: Historical Light on the Law of Armed Conflict*, "San Diego Journal of International Law" 2015, vol. 16, pp. 304–305.

tempt to combine concepts with conflicting contents. The Finnish author also argued that the phrase "distinct military advantage" is underspecified.[117] Frank E. Quindry, despite pointing out that, in principle, he agrees with the concept of a military target proposed by the Commission of Jurists in the contents of Article 24 para. 1, argues that the list of approved targets is not consistent even with those that were accepted by the combatants during World War I.[118] James M. Spaight noted that addition of the fifth category of targets (communication lines intended for military use) was necessary due to the lack of a clear foundation of the belligerent law to attack military objectives in similar cases. In the context of railway stations, it was argued that it is justified to treat railway stations located in the zone adjacent to the front line as legal targets, due to their role of provisioning and transport, while in the context of stations located outside the area of military operations, this was permissible only to the extent to which the so-called right to legal destruction allows (interesting Spaight's view – law of devastation).[119] Spaight questioned the provisions of Article 24 para. 3 referring to known places of armaments production, recognizing that certain branches of the economy may be excluded from the above definition, e.g., steelworks or mines, despite their obvious effectiveness for the needs of the economy. A similar position was expressed by M.W. Royse, raising the lack of considerations for the primary elements of the production process in the form of, for example, locations where raw materials were extracted and processed.[120] Paul Whitcomb Williams, in turn, noticed the lack of precision in relation to the phrase "well-known centres engaged in the manufacture of arms, ammunition, or distinctively military supplies", pointing to the excessive restriction of the above solution imposed on, in fact, a strongly industrialized state.[121] In general, critical voices can be reduced to postulates related to the excessive narrowing of the catalog of targets based on Article 24 para. 2 of the 1923 rules and the lack of sufficient precision accompanying certain concepts, such as "distinct military advantage", "military concentration is sufficiently important to justify such bombardment" or "not in the immediate neighborhood of the operations of land forces".[122]

William H. Parks was a particular critic of the 1923 rules, pointing out to 1) the lack of definition of the very concept of a military target, 2) defective categorization of military objectives, 3) transfer of responsibility for the accompanying losses to the attacker instead of the defender, and 4) the failure to take into account the situation of so-called quasi-combatants, consequently calling the document

117 E. Castrén, *Ilmasota*…, pp. 241–243.
118 F.E. Quindry, *Aerial Bombardment*…, p. 489.
119 J.M. Spaight, *Air Power*…, p. 230.
120 M.W. Royse, *Aerial Bombardment*…, p. 226.
121 P. Whitcomb Williams, *Legitimate Targets*…, p. 577.
122 N. Ronzitti, *The Codification*…, p. 7; J. Kroell, *Traité*…, p. 123.

a "complete failure and a forgotten document".[123] Nathan A. Canestaro indicated that Article 24 made a "departure from the customary law" crystallized during World War I, by transferring the responsibility of the attacker for the collateral losses and assessing the effects of the attack based on its effects rather than its intention.[124] A critical analysis of the 1923 Hague Rules of Air Warfare was presented by O. Hoijer. The author emphasized that the need to introduce a new dedicated solution arose from the incorrect provisions of Article 25 of the Hague Rules, which prohibited attacks on legitimate military objectives in circumstances of air warfare.[125] At the same time, he criticized the distinction between the legal situation of the targets located on the front line and in its rear zone. Firstly, the author demonstrated that it was not possible to determine the warfare zone in a geographical manner. He rejected the possibility of designating it as within the range of artillery fire, justifying that in the circumstances of modern warfare, the entire area of the state being party to a conflict may be the subject to hostilities, and the combatants must be guaranteed the right to attack targets of military significance also located beyond the front line. The author pointed out that there was no practical and acceptable rule that would allow for distinguishing areas closer to the front from areas located outside the zone of direct warfare and in this spirit, he considered the distinction applied by Article 24, para. 2 of the 1923 Hague Rules of Air Warfare to be invalid. The author's second comment concerned the definition of military facilities in the form of an enumerative list. While, in Hoijer's opinion, the very concept of relying on the theory of a military target was quite correct, the inclusion of a list of targets whose destruction was permissible under wartime conditions was imprecise and inconsistent. He noted that certain categories of infrastructure, such as, e.g., known armaments production centers, are the basis for later mutually exclusive interpretations during an armed conflict.[126]

Eberhard Spetzler pointed out that the defects of Article 24 of 1923 Rules were the following: 1) the restriction of the attack possibility to solely and only military personnel, leaving the status of the so-called quasi-combatants outside the scope of the provision, 2) the problematic restriction of the execution of attacks only to known industrial centers, 3) the interpretation of Article 24, para. 1 (defining what a clear military advantage is), 4) the creation of an enumerative list of exclusive military objectives.[127] Especially in the latter respect, the author considered that the attempt to create a closed catalogue of military objectives will always

123 "Rapidly the 1923 Hague Air Rules drifted into obscurity, adopted by no nation, and completely ignored by most aviation historians" – W.H. Parks, *Air War and the Law of War*, "Air Force Law Review" 1990, vol. 32, pp. 33–35.

124 N.A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, "Vanderbilt Journal of Transational Law" 2004, vol. 37, p. 440.

125 O. Hoijer, *Les bombardements aériens*, "Revue de droit aérien" 1932, vol. 1, p. 824.

126 *Ibidem*, p. 827.

127 E. Spetzler, *Luftkrieg und Menschlichkeit*, Göttingen 1956, p. 175.

be considered a significant legislative flaw of any subsequent and future attempt to define the concept of a military target, postulating in this respect the need to simultaneously indicate an exemplary list of military objectives.[128] The German author also emphasized that the proposed definition within the first sentence of Article 24, para. 1 of the 1923 draft was in this respect a much more adequate solution, which simultaneously combined legal and military considerations related to the waste of resources and means when attacking targets that contribute nothing to the enemy's military operations ("Ein Kampf gegen friedliche Objekte wird in solcher Lage nichts nur als Kriegsrechtsverletzung, sondern auch als Munition Verschwendung automatisch vermieden"). In this respect, Spetzler approved the theory of a military target (or a military objective, as it was preferred then) proposed by A. Meyer, who pointed to the need to demonstrate the existence of a causal link between the destruction of an object and its impact on the chances of the enemy conducting warfare.[129] The above pattern was contradicted by the actual practice of military operations during World War II carried out by the RAF.[130] In the opinion of the German author, area bombing was fundamentally at odds with the essence of conducting air operations – only when focused on military facilities would it bring the desired results.[131] While dealing with the status of the so-called quasi-combatants, Spetzler highlighted that these people undoubtedly contributed to the military success of an adversary with their activities, but that this could not completely undermine their status as a civilian population. In turn, he emphasized that legitimate military facilities could be attacked at any time and in all circumstances, including attacks in a fundamentally non-military environment, not justifying unintended and incidental losses among noncombatants.[132] Spetzler believed that the adoption of an absolute standard in this respect was unrealistic, as even the most obvious military objectives *per se* could be deliberately placed near civilian facilities.[133] The German researcher pointed out that the main difference between indiscriminate bombing and an attack directed against military facilities is the existence of a specific proportionality, in which military rationale does not outweigh the losses among the civilian population.[134]

The rules did not specify the issue of the category of the so-called quasi-combatants, nevertheless most of the authors considered that the natural fact that workers would be present in armaments factories could not warrant granting

128 *Ibidem*, p. 175.
129 *Ibidem*, p. 181.
130 *Ibidem*, p. 183.
131 *Ibidem*, p. 184.
132 *Ibidem*, p. 192.
133 *Ibidem*, p. 193.
134 "Dass die Angriffswirkung über die Grenze des militärischen Objekts nicht über Gebühr hinausreichen darf, ist für den Begriff es gezielten Angriffs im Gegensatz zum unterschiedslosen Bombenkrieg selbstverständlich" – *ibidem*, p. 194.

them rights characteristic of the civilian population performing purely peaceful activities.[135] James M. Spaight, following Prof. Rolland, recognized that the status of the workers employed in armament factories is indirect – on the one hand, they are not part of the armed forces and thus cannot be attacked on the basis of their status alone, and on the other hand, due to their employment for that time, they become a legitimate military target.[136] In 1938, Spaight stated that, in his opinion, international law had to recognize the existence of a third class – otherwise the principle of distinction would not play any role in a future armed conflict.[137]

7. Reception of the 1923 Hague Rules of Air Warfare in the International Law Doctrine

Despite the justified criticism of some of the 1923 solutions, in principle the international law doctrine welcomed the ideas proposed by the commission of jurists. The allegations voiced by W.H. Parks, who completely undermined the value of the Hague draft, presumably assessing it from the perspective of the lack of acceptance of the 1923 Rules in the form of positive law, were definitely too far-fetching. It is clear that the Hague Rules of Air Warfare have more or less serious normative and interpretative flaws, but as E. Castrén correctly noted, almost every *ius in bello* document is equally a source of criticism and ambiguity, and the work of the commission of jurists itself was a significant progress in the law of air bombing.[138] Many authors expressed a similar belief, considering the 1923 document as a balanced and reasonable attempt to codify the law governing air bombing. The distinction between zones of direct combat contact and areas located outside these zones was considered justified due to the circumstances of conducting combat operations in front line areas, where the combatant should have greater freedom of attack in relation to the entire built-up area, which is also usually a place of active enemy resistance.[139] Morton W. Royse emphasized that the consequence

135 J.W. Garner, *International Regulation of Air*…, p. 117.

136 J.M. Spaight, *Air Power*…, p. 211.

137 "International 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 tenable without some qualifications. It must recognize – unless and until air raiding beyond the battle zone is barred by international agreement – that there is now an intermediate class; the class of armament workers" – J.M. Spaight, *Non-Combatants and Air Attack*, „Air Law Review" 1938, vol. 372, pp. 375–376.

138 E. Castrén, *Ilmasota*…, p. 42.

139 *Ibidem*, p. 232.

of the distinction mentioned pursuant to Article 24, para. 3 of the Hague Rules of Air Warfare would be to assume that in the area of the immediate vicinity of land troops operation, localities could be attacked without major restrictions, due to the fact that the civilian population could be considered a category of combatants, arguing that criticism of other authors was unauthorized in the light of common law applicable to defended cities.[140] Spaight argued that the deployment of, for example, anti-aircraft artillery installations in areas with significant concentrations of noncombatants directly burdened the defending party.[141] As a consequence, this leads to a change in the status of the location from undefended to defended, which in turn leads to the possibility of adopting a "classic" doctrine of land bombing.[142] Alex Meyer pointed out an enumerative listing of military objectives, through the use of a closed catalogue of military objectives proposed in the form of the Hague Rules of Air Warfare, was impossible.[143] His main objection in this respect was that in the case of the qualification of various targets, too much depended on the actual purpose, which is a variable value, not lending itself well to clear-cut determination. However, the author did not disqualify the definition contained in Article 24, paras. 1 and 2, arguing that doubts in this regard should be removed by practice and judicial decision.

It is also important to take a holistic view of the achievements of the 1923 commission. Many authors saw the 1923 Hague Rules of Air Warfare as the most important attempt to regulate the law of air warfare, which was undertaken in the interwar period. It was underlined by W.M. Gibson that the 1923 Hague Regulations, in the section dealing with the rights and obligations of a neutral party in air warfare, are declaratory, not constitutive – because in their outline they are a faithful reproduction of the already existing practice of neutral states, established during World War I.[144] James W. Garner, commenting on the progress in the global legislation on the conduct of air warfare, pointed out that the distinctiveness of air warfare from the existing regulation of the legal network applicable in naval and land warfare forced the adoption of a separate dedicated regulation (similarly to R. Berchoff).[145] However, the commission sought to create a normative grid based on pre-existing norms, by adapting regulations in the first place, instead of a simple analogy. Garner found this to be the most reasonable solution, pointing out that the committee used the above system wherever such adaptation

140 M.W. Royse, *Aerial Bombardment*…, p. 228.

141 J.M. Spaight, *Air Power*…, pp. 247–253.

142 *Ibidem*, p. 254.

143 A. Meyer, *La protection par le droit des gens de la population civile contre les attaques aériennes*, "Revue droit aérienne" 1939, p. 50.

144 W.M. Gibson, *L'Aéronautique et le droit international de la guerre*, "Revue générale de droit aérien" 1935, vol. IV, p. 241.

145 "La guerre aérienne ayant ses caractéres propres, aucune assimilation ne peut être faite avec la guerre terrestre et maritime" – R. Berchoff, *L'aviation*…, p. 533.

was understandable and possible.[146] Raafat claimed that the work of the 1923 commission of jurists was designed to harmoniously link the norms of international law with the technological development of air forces. Drawing up his study in 1934, he stated that the rules possessed the status of being partially forgotten in the context of changes related to the disarmament process taking place in the 1930s (at the Geneva Conference on Disarmament). At the same time, he pointed out that during a period of international tension, the states, the parties to the conference, agreed to give air warfare a legal status ("Il est grand temps cependant que les puissances se mettent d'accord pour donner a la guerre aérienne un statut legal").[147]

As A. Meyer pointed out, the 1923 commission differed from other concepts and ideas of regulating the law of air warfare in that it was the only one to have the status of an official body created by representatives of states.[148] For J. Kroell, a scholar of the law of air warfare in the interwar period, the Hague Rules of Air Warfare were a form of "statement on new rules, referring to the Hague achievements due to the lack of their adoption by relevant states".[149] At the same time, he argued that the introduced solutions of 1923 resulted in the correction of the existing provisions necessary for descriptive purposes, as a kind of transposition – a link between the 1907 Hague Regulation and the law of air warfare ("raison, par conséquent de ce que les Regles de 1923, constituent dan leu ensemble un travail d'adaptation et de transpotions"), while constituting an undeniable value as an expression of general principles ("elles conservent néanmoins une valeur indéniable, comme étant l'expression de principes généraux déjà plus ou moins implicitement admis").

For M.W. Royse, the 1923 document was an expression of a compromise between respect for the need to protect the lives and property of noncombatants and recognition of the effective nature of air bombing as an effective means of conducting warfare.[150] Undoubtedly, the rules acted as a kind of "safety valve" preventing the deployment of aviation on a mass scale. The military objective doctrine was intended to act against terrorist attacks, aimed at directing the energy of combatants towards military facilities. In this sense, in the author's view, Article 22 of the Hague Rules of Air Warfare was an expression of the position of

146 "The Commission also very properly recognized at the outset, that whatever rules were adopted they ought to begin with a definite and precise statement of certain objects for which bombardments by air should not be recognized as legitimate, and no difficulty was experienced in reaching an agreement as to what these purposes were" – J.W. Garner, *International Regulation of Air*…, p. 115.

147 W. Raafat, *La guerre aérienne et le droit des gens*, "Revue générale de droit aérien" 1934, p. 706.

148 A. Meyer, *La protection*…, p. 43.

149 J. Kroell, *Incidents de guerre aérienne dans le confilt bolivo-paragquayen*, "Reveu générale de droit aérien" 1935, vol. 1, p. 298.

150 M.W. Royse, *Aerial Bombardment*…, p. 212.

world opinion, but not an unambiguous sanction of sufficient magnitude.[151] In turn, Article 24 of the 1923 Rules was based on the doctrine of military objective through a balanced approach to the effectiveness of bombing and departing from the criterion of the defended nature of the location expressed on the basis of the 1907 Hague Regulation. Spaight, commenting on the Hague Rules of Air Warfare, emphasized that the reality of war required the development of a dedicated code of air warfare. However, this did not mean that the norms developed by the commission of jurists' were not adapted, often through only slight modification, and derived from already existing standards – especially on the subject of naval warfare.[152] The legislative technique adopted as part of the creation of the 1923 Rules did not exclude the possibility of references to other *ius in bello*, norms, both in relation to norms of a treaty-like and customary nature, as well as general principles of international law. Spaight included in the above references all provisions regarding the treatment of prisoners of war, parlimentaires, the wounded and sick, which under Article 62 of the Hague Rules of Air Warfare shall be applied accordingly in the context of air warfare.

Åke Hammarskjöld emphasized the precision of the 1923 draft of the commission of jurists as a valid example of legislative technique. At the same time, he pointed out that, in his opinion, the ban on bombing areas beyond the direct front line should be enriched with additional elements related to personal protection and a clear indication that these were inhabited areas (*les personnes et les agglomérations*), also proposing a clear definition through the geographical demarcation of the zone of direct warfare. The Swedish author highlighted that there was no doubt about the legality of bombing military objectives located beyond the front line, which was fully sanctioned by international law.[153] In his opinion, the Hague Rules of Air Warfare of 1923 were correct in principle (especially to the extent that they replaced the distinction between the defended area and the theory of military objectives), while he questioned the detailed provisions of Article 24. As regards the list of military objectives, he rejected entrusting combatants with making assessments of which production centers could be the subject of an armed attack. He also stressed the lack of definition of the extent to which railway lines could be used, and according to him, Article 24 para. 3 directly encourages the combatants to intentionally relocate military objectives near civilian population centers.[154]

Howard S. Leroy argued that the rules of 1923 are a prudent and comprehensive code of air warfare, representing, together with the efforts of the Institute of International Law in the interwar period, the "avant-garde" of international

151 *Ibidem*, p. 221.
152 J.M. Spaight, *Air Power*…, p. 36.
153 Comité International de la Croix-Rouge, *La Protection*…, p. 46.
154 *Ibidem*, p. 47.

law in this respect.[155] The importance of the commission's work as the *opinio iuris* of the international community was emphasized by W.M. Wherry, who indicated that the principles established by the commission are not only grounded in reason but also indicate the right direction of the development of international law, because the history of wars shows that when each of the belligerents may suffer the consequences of using certain weapons to the same extent, it contributes to the possibility of developing an international consensus on the adoption of prohibitions.[156] A similar opinion was also expressed by a Polish researcher, Z. Rotocki, a member of the Department of the Law of Nations of the Faculty of Law and Administration of the University of Łódź.[157] The author emphasized the fact that the 1923 Hague Rules of Air Warfare were not adopted as an international treaty does not invalidate their legal significance – Rotocki described the efforts of the 1923 commission as an official report that aimed to codify the existing standards of international law applicable in air warfare. Remigiusz Bierzanek expressed his opinion on the matter, arguing that the rules of 1923 obtained a similar status as the London Declaration of 1909 – a document not ratified, but considered as binding by states. Commenting on the fact that the rules of 1923 were not ratified by any of the states, he argued that this was due to the conservatism of the international community related to the accelerated development of aviation technology and the recognition of an attempt to establish a dedicated code devoted to air warfare. It was considered to be an unnecessary repetition of the principles already applicable in land and naval warfare.[158] However, citing the numerous cases of indirect implementation of the 1923 rules in the form of instructions, orders, decrees and a broad understanding of their value by the international community, he considered them to have a significant normative impact. The Polish author argued that it was a widely recognized document of international law, which in the pre-war period was considered to settle the right and practical direction for the development of the law of air warfare. Czech authors commenting on the rules of 1923 emphasized that while the rules constituted an important point of reference, they nevertheless featured semantic flaws hindering their interpretation.[159]

155 "This Commission of Jurists of the five great powers met in the Peace Palace from December 11, 1922, to February 9, 1923, and formulated a well-planned and comprehensive code for the limitation of air warfare" – H.S. Leroy, *Limitation*…, p. 25.

156 W.M. Wherry, *Aerial Warfare*…, p. 3.

157 "Despite the fact that The Hague Regulations were not incorporated into a form of binding agreement, they were undoubtedly an expression of prevailing legal conviction. It was an official effort aimed at explaining and formulating the rules evolved in the practice of war operations. It is therefore possible to say that The Hague Regulations formed an attempt at codifying the existing principles of the customary law of air warfare" – Z. Rotocki, *Polish Directives*…, p. 153.

158 R. Bierzanek, *Commentary, 1923 Hague Rules for the Control of Radio in Time of War*, [in:] N. Ronzitti (ed.), *The Law of Naval Warfare. A Collection of Agreements and Documents with Commentaries*, The Hague 1988, p. 402.

159 J. Ondřej, P. Šturma, V. Bílková, D. Jilek, *Mezinárodní humanitární parvo*, Prague 2010, p. 213.

The Italian researcher of the law of air warfare, R. Sandiford, emphasized that historical attempts to build uniform standards based on the provisions regulating naval and land warfare were not devoid of significant flaws that do not take into account the circumstances in which air operations are conducted.[160] As part of the above conclusion, the author also questioned the originality of the solutions presented on the basis of the 1923 rules, recognizing that they were in fact copies of the earlier provisions occurring under the 1907 Hague Regulations or the standards of positive law applicable in naval warfare.[161] However, this did not change the author's position on the importance of the document considered to be a monumental achievement of legal thought in the context of the law of air warfare, determining the further direction of the development of this field.[162]

David Johnson argued that, in his opinion, the rules of 1923 could not be treated as a document of international law with any legal force, possessing only the authority of experts.[163] At the same time, he pointed out that, contrary to the work of the Hague Conference of 1899 and 1907, the commission of jurists constituted a numerically balanced group of lawyers and technical delegates. As a result, the document created by them was complete and dedicated, prepared by experts supported by the representatives of the air force, which allowed for a creation of a harmonious and coherent regulation.[164] A similar opinion on the status of the rules was expressed by L.C. Green, who argued that the document of the jurists of 1923 "does not constitute a law or its expression, however, it plays a fundamental role in the development of international law of air warfare and on this account cannot be completely ignored".[165]

On the basis of all of the above-mentioned positions, it should be pointed out that the doctrine of the interwar period considered the 1923 Hague Rules of Air Warfare as a document of high legislative quality. Attention was correctly drawn to the existence of its many flaws, mainly related to the vague definition of a military target. For A. Meyer, despite the lack of transformation of the Hague Rules

160 "Les différentes opinions trouvaient leur justification dans l'analogie entre l'avion et le navire, et dans les caractéristiques de la navigation maritime et aérienne. Mais cetteassimilation, contestée d'ailleurs par l'Institut de Droit international dans sa session de Madrid de fòli, ne manquait pas d'inconvénients, car en fait la situation de l'avion est bien différente de celle du navire – R. Sandiford, *Évolution du droit de la guerre maritime et aérienne*, "Hague Academy of International Law" 1939, vol. 68, p. 662.

161 *Ibidem*, p. 667.

162 "Toutefois, ces règles sont un monument juridique très appréciable, qui marquera, dans l'évolution du droit de la guerre aérienne, une étape de grande importance et Presque décisive pour les principes adoptés, dont nous parlerons très brièvement tout à l'heure, surtout à l'endroit des bombardements et de la participation de l'aéronef aux operations de la guerre maritime" – *ibidem*.

163 D. Johnson, *Rights in Air Space*, Manchester 1965, p. 39.

164 *Ibidem*, p. 42.

165 L.C. Green, *Essays on the Modern Law of War*, New York 1985, p. 139.

of Air Warfare from a draft by a group of outstanding lawyers to the dimension of positive law, the work of this group cannot be treated only as "a permanent and important scientific value", but it is a significant reference point for the standards of the law of air warfare in a future armed conflict.[166] However, it is worth emphasizing that, for example, in the opinion of lawyers publishing in the "Revue générale de droit aérien", it was pointed out, first of all, that national governments did not approve the text of the 1923 rules as the international law treaty, highlighting the opposite practice of states, as exemplified by armed conflicts in China, Ethiopia or Spain. On the other hand, the authors of the interwar period emphasized that the document resulting from the work of the jurists was not entirely an original study but had its normative value in the already existing rules applicable in air and naval warfare (such an opinion was expressed by, among others, J. Kroell and R. Sandiford). The opinion of some of the authors differed – e.g. one of the greatest specialists in the law of air warfare, J.W. Garner, pointed out in a lecture given in 1936 that, in his assessment, there was no international law of a conventional nature regulating the manner of conducting air warfare that did not refer to the existence of the 1923 rules.[167]

Contemporary doctrine appreciates the impact of the actions of the commission of jurists on the development of the law of air warfare and the international humanitarian law in general, especially in relation to the definition of a military target.[168] Enno Mensching emphasizes the legacy of the 1923 rules for the law of air warfare, and B. van Dijk describes them as "transformative impact".[169] A more critical position is expressed by C. Wilke and H. Doutaghi, who considered the rules to have been formulated under dictation of the states with the most extensive air force, omitting the perspective of the potential victims of air campaigns,

166 "Wenn auch die von der Juristenkommission ausgestellten und von ihr den Regierungen zur Annahme empfohlenen Entwurde bisher von keiner Regierung angenommen worden sind, also praktisch bisher kein Wirksamkeit erhalten haben, so wird die Bedeutung der Arbeiten der Juristenkommission dadurch nicht demindert; es wird haher auch der Entwurf über die Luftkriegsregeln, abgesehen von seinem dauernden wissenschaftlichen Wert, den Kriegspartien in kunftlitchigen Kriegen in Fragen des Luftkriegsrechts vielfach als Grundlage dienen können" – A. Meyer, *Völkerrechtlicher*…, p. 8.

167 J.W. Garner, *The Outlook for the Law of War and of Neutrality*, "The Grotius Society: Papers Read Before the Society in the Year 1936" 1936, vol. 22, p. 5.

168 M.N. Schmitt, *Air Warfare*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 122; G.D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge 2010, p. 524.

169 "Der Haager Kommission blieb zunächst zugute zu halten, die unterschiedlichen Ansätze zu einem Kompromiss zusammengeführt und einen ersten Vertragsentwurf für die Regulierung des Luftkriegsrechts vorgelegt zu haben, der trotz ausbleibender Ratifikation nachwirkende Bedeutung entfalten sollte" – E. Mensching, *Luftkrieg und Recht: Zur historischen Rolle des Humanitären Völkerrechts in der Einhegung der Luftkriegsführung*, Baden-Baden 2022, p. 255. B van Dijk, *Preparing for War: The Making of the Geneva Conventions*, Oxford 2010, p. 210.

creating many grounds for justifying "collateral damage" in relation to the civilian population (for technical reasons or as a result of later interpretations, e.g. in relation to the so-called quasi-combatants).[170]

8. The Doctrine of International Law and the Theory of Military Objective

The emergence of a hybrid definition of a military objective as part of the 1923 document prompted outstanding researchers of the law of air warfare to look into the issue of identifying the legitimate object of air operations. The Finnish researcher E. Castrén noticed that defining the above-mentioned concept was the most important challenge of the law of air warfare.[171] Castrén saw the source of the distinction in the provisions of the 1909 London Declaration, dividing certain categories of goods into relative and absolute (i.e., items being subject to confiscation).[172] According to the researcher, the law regulating the bombing regime should distinguish between personal and non-personal targets. In his opinion, it was necessary to make a clear distinction between the personnel of the armed forces and the civilian population, as the paramount principle governing international humanitarian law. Castrén therefore proposed the following definitions:

1) persons who, by virtue of their rank or official status, participate in military operations or have an opportunity to participate or manage military actions and those whose participation may cause damage to the enemy are considered to be members of the armed forces;
2) definition of military objectives: those that by their nature are absolute or quasi-absolute military facilities, are used or intended for use, either for military purposes only, or at the same time alternatively also for civilian and military purposes.[173]

170 "The regulatory framework and the subsequent discussions by British and US legal and military professionals tacitly excluded non-European non-combatants. The ink on the *Hague Rules* had not yet dried when commentators started to make the case that munitions workers – and maybe also jam factory and steel mill workers – cannot enjoy civilian protections while at work because their labour contributed to the war effort. In addition, the Hague Rules offered belligerents a range of excuses for civilian harm on account of technological errors and imprecision" – C. Wilke, H. Doutaghi, *Conceptualizing the legacy of the 1923 Hague Rules of Aerial Warfare*, "Leiden of Journal of International Law" 2024, vol. 37, p. 109.

171 E. Castrén, *Ilmasota*…, p. 241.

172 Declaration on the Law of Naval Warfare, London, February 26, 1909.

173 "Sotilaalliseksi henkilö objekteiksi luetaan: 1) ne, jotka virallisen asemansa peusteella tavalla tai toisella osallistuvat tai joiden on maara osallistua vhollisuuksiin tai niiden johtoon,

Castrén maintained the distinction between absolute and relative targets of military importance. Permanent targets of military importance include: forts, warships, barracks, military ministry buildings, military airports, all means of combat (armored forces, artillery), ammunition and gunpowder depots, and all industries involved in armaments production. The Finnish researcher noticed that in many cases industrial plants can be located in centers and population centers. For the author, the legality of the bombing would depend on the military advantage that would be obtained as a result of bombing and in relation to the losses of the civilian population.[174]

For comparison, the definition of A. Meyer was as follows: "military objectives are all persons and objects that have a sufficient impact on the possibility of success in combat operations, understood as an impact of a normal nature and under normal circumstances". Meyer's theory focused primarily on emphasizing the necessity of the so-called adequate link between the status of a given person and military activity, understood as contributing to the success of the adversary.[175] Dieter Fleck considers the above construction to be "masterly circumscription".[176]

In the context of military objectives, J.M. Spaight argued that international law distinguishes between personnel and materiel. Spaight argued that in the con-

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ja 2) muut, joiden toiminasta toiselle sondankavijapoulelle voi aiheutua valitononta vaaraa muut sotilassliset objektit (edaimet ja elottomate sineet kinnteat ja irtaimet): 1) ne, jotka jo luonteeltaan ovat yksinomaan tai paaasiallisesti tarkoiteut edistamman sotilaallista esineet, joita tosiasialliseti kaytetaan tai aiotaan sellaisinaam tai valmistuksen jalkeen kayttaa joko yksinomaan sotilaallisiin tai samalla kertaa taikka vuoronperaan naihin ja rachanomaisiin tarkoituksiin (n.s) sekaluoontoiset objektit" – E. Castrén, *Ilmasota*…, p. 256.

174 *Ibidem*, p. 226.

175 A. Meyer, *Völkerrechtilicher*…, p. 82; *idem*, *La protection*…, pp. 46–49. Meyer made a distinction between peaceful and non-peaceful military objectives on the battlefield. The author also noticed the problem of personal distinction between military objectives. In his opinion, these were all persons who were part of the military personnel and everything important for the war effort of the adversary. This definition did not only include members of the armed forces, but also people working in armaments factories (while at work) and other people who participated in hostilities. At the same time, the author opposed the total blurring of the line between combatants and non-combatants in highly industrialized societies, which could lead to the assumption that every civilian was a legitimate target of air bombing conducted at the rear of the front line. At the same time, Meyer rejected the view that the civilian population could never become the object of hostilities (this solution is based on the view that in certain situations civilians can participate in hostilities – this is wrong in my opinion because then civilian population loses its status). Recognizing that the principle is not to make civilian population the object of direct attack, he rejected the possibility of adopting the view based on absolute protection of the civilian population by introducing a ban on warfare or air warfare. According to the author, the expression of the protection of civilian population is the theory of a military target, which was a necessary merger of civilian population immunity and military interests.

176 D. Fleck, *Strategic Bombing and the Definition of Military Objectives*, "Israel Yearbook on Human Rights" 1997, vol. 27, p. 45.

text of bombing non-military objects, the 1923 commission did not address this matter in a constructive manner. He pointed out that the practice of the Allied states during World War I supported adoption of the doctrine of military target as an acceptable object of military operations. At the same time, he fundamentally questioned the practical distinction between war zones and areas located at the rear of the front. The author argued that the theory of a military objective in the course of conducting an air operation was very much also active in a situation in which an air force performed strikes within the direct range of the front line.[177] In the case of areas located away from the combat zone, this rule should be more absolutely required. Attacks against military objectives in certain situations may carry some risk to the civilian population, but Spaight believed that these effects should be only of an accidental nature.[178] The British author, following Prof. Rolland, believed that the status of workers employed in armament factories was indirect – on the one hand, they were not part of the armed forces and thus could not be attacked only on the basis of their status, and on the other hand, due to the fact of their employment, for the duration thereof, they became a legal military objective.[179]

Joseph Kroell, making the above remarks in context of the air warfare between Bolivia and Paraguay, considered it compliant with international law and morality to bomb areas of industrial concentration, located at the rear of the front and within the borders of undefended cities and villages. In the light of Article 24 of the Hague Rules of Air Warfare, he analyzed the legitimacy of carrying out attacks on tannin factories, pointing to their nature as a dual-use object, recognizing that Bolivia was allowed to attack businesses with a view to gaining a potential military advantage. The author emphasized the importance of the problem, postulating that at the next diplomatic conference the issue related to the possibility of bombing factories and industrial structures with a generally civilian purpose, but also operating for the needs of the armed forces, should be considered.[180] In this case, the Hague Rules of Air Warfare were treated as a baseline study ("les travaux préliminaires et les études de base existent déjà; ce sont le Rapport général de la Commission International des Juristes de La Haye").

One of the authors of the analysis prepared under the aegis of the ICRC in the 1930s, the Swiss researcher A. Züblin, considered formulating the actual framework of air bombing in an unambiguous and clear manner to be the greatest challenge of the law of air warfare.[181] The Swiss officer pointed out that there was no doubt about the existence of military necessity in favor of attacks against objects

177 J.M. Spaight, *Air Power*…, p. 207.
178 *Ibidem*, p. 210.
179 *Ibidem*, p. 211.
180 J. Kroell, *Incidents*…, p. 233.
181 Comité International de la Croix-Rouge, *La Protection*…, p. 235.

and targets that work to the advantage of the enemy's war effort. Swiss scholar indicated that those targets might be bridges, ammunition depots, main railway stations, as well as chemical production plants and power generation facilities. In this respect, the Swiss author argued for the need to adopt a different criterion based on a definition of a negative nature, indicating what types of facility were not considered to be subject to protection under international law.

It should be noted that the theses proposed by Castrén, Spaight, Meyer and Kroell in fact referred to an attempt to construct an acceptable definition the scope of which covered the so-called dual-use objects. What is more, they sought to classify various types of targets of a relative, contextual nature as military ones too, which included the possibility of dynamically qualifying new activities on the battlefield (including the activity of people who were indirectly working for the enemy). It should be noted that while the above definitions are generally absent in contemporary literature and jurisprudence, the views cited seem advanced and similar in their content to the provisions of the current Article 52 AP I.

9. Other issues addressed under the 1923 Hague Rules of Air Warfare

9.1. Protection of cultural assets

Articles 25 and 26 of the 1923 Hague Rules of Air Warfare revised the existing norms of Article 27 and Article 5 of the Hague Regulations of 1907 on the Laws and Customs of War on Land and the Ninth Hague Convention of 1907 on Naval Bombing, respectively. The obligation – whereby during the bombing of a given area, the commander of the aircraft ought to take all available measures to protect historic objects, places of religious worship, public facilities, as well as shelters for the ill and injured – was upheld. The novelty, introduced by the provision, was to emphasize the requirement to properly mark specially protected areas with Red Cross markings (in the case of facilities protected by applicable regulations), as well as to protect other objects by using a new rectangular marking, divided diagonally into two triangles in black and white. Regarding night bombing, the combatants were obliged to mark facilities that would be protected in the night-time. Article 28 of the 1923 Rules was mainly based on the postulates of the Italian delegation, arguing for the need to increase the protection of historic sites or monuments. The main point of the article was to impose the obligation to refrain from using the above facilities as well as their surroundings for military operations. Primarily, each of the states was entitled to designate the so-called zone of

protection – a specific protection zone, notified to third states. The boundary of the area was a circle with a diameter of 500 meters, marked with signs visible from the air. It was prohibited to deploy any military structures or targets of military significance within the zone of protection.

9.2. Espionage in air warfare

Article 27 of the Hague Rules of Air Warfare was, according to the commentary to the 1923 regulations, a simple transposition of Article 29 of the 1907 Hague Regulations.[182] In this respect, it is worth mentioning American delegation's stance, which presented a different concept of a regulation, bearing in mind the danger of the treatment of reconnaissance aircraft crews performing reconnaissance missions in the rear of the front as spies. The submitted version stated that "personnel activities performed by a properly marked enemy aircraft, public or private, are not treated as an act of espionage". The final shape of the article was different and more similar to the version existing under the Hague Regulations of 1907, considering to be spies only those people who were on board an enemy or neutral aircraft, operating in disguise or on false pretenses and collecting or trying to collect information in the area controlled by combatants, with the intention of delivering them to the enemy. Article 28 of the 1923 Rules provided that the act of espionage committed by the crew or passengers of an aircraft should be assessed in the light of the premises in force in the Hague Regulations of 1907, and in accordance with Article 29 of the Hague Rules of Air Warfare a reference to the regulations in force in land warfare was introduced.

9.3. Authority over enemy and neutral aircraft as well as persons on board

The committee acknowledged that the reality of modern air transport allows for the possibility of mutual interference of civil and military air force, especially the appearance of unauthorized aircraft in the war zone. In this regard, the priority of combatants to protect the needs of their military operations was recognized, and for this reason they were provided with the opportunity to warn unwanted flying objects and prevent their passage in the combat zone. The above provisions should be seen as sources of the possibility to establish specific air zones where air navigation is prohibited. Article 30 of the 1923 Rules envisaged that in a situation

182 "Article 27 is a verbal adaptation of the first paragraph of article 29 of the Regulations, so phrased as to limit it to acts committed while in the air" – J.B. Moore, *International Law*…, p. 248.

where the presence of a neutral aircraft could threaten a military operation, the commander of an operation had the authority to prohibit flying near his military operation or, alternatively, request a change of flight path. The sanction for failure to comply with the order of the military authorities was possible shelling. Article 31 provided for the possibility of requisitioning a neutral private aircraft, which was in the possession of the occupying army, with full compensation. Article 32 provided for the possibility of confiscating an enemy public aircraft, without the need to establish a prize court. Article 33 perpetuated the principle that non-combatants of the enemy should not be made the object of unnecessary attack, and also introduced the possibility that enemy private and public aircraft under the jurisdiction of their state, but of a non-military nature, could be fired upon unless they went to the nearest airport. Another principle applied on the basis of Article 34, where the appearance of belligerent non-military aircraft, whether public or private over the enemy's territory or within the area of hostilities authorized the other party to fire upon the aircraft. Article 35 emphasized that neutral aircraft entering the airspace of the belligerents and intercepted by a military aircraft must land at the nearest possible airport or risk being attacked – however, they could not be confiscated pursuant to Article 31 of 1923 Rules.[183]

9.4. Cases of shooting down civil aircraft belonging to belligerents during World War II

"On August 24, 1938, a Douglas DC-2 passenger plane belonging to the China National Aviation Corporation, manned by crewmen from the United States, was attacked by a group of Japanese fighters during a commercial flight and, as it was heavily damaged, it was forced to land near Macao (the so-called Kweilin incident). It was the first case of shooting down of a civilian passenger aircraft in the history of armed conflicts. On January 30, 1942, a Quantas flying boat was shot down by Japanese fighters during the evacuation of the civilians from Java. Another famous case was the shooting down of a Douglas DC-3 aircraft belonging to the Royal Dutch Indies Airways (KNILM) which was carrying military aviators, civilians fleeing capture by Japanese troops, as well as a load of diamonds of great value over Western Australia on March 3, 1942.[184] On August 13, 1942, an Air France passenger airliner making a commercial flight from Marseille to Algeria was shot down by a Hawker Hurricane fighter of the Royal Air Force. On April 4, 1943, a British Overseas Airways Coop-

183 "If warned of the approach of such military aircraft, it is their duty to make a landing; otherwise they might hamper the movements of the combatants and expose themselves to the risk of being fired upon" – *ibidem*, p. 253.

184 T. Womack, *The Dutch Naval Air Force Against Japan: The Defense of the Netherlands East Indies, 1941–1942*, Jefferson 2006, p. 139.

eration aircraft called Lockhead Lodestar was shot down over the North Sea during a passenger flight from Stockholm. A similar case occurred on August 27, 1943, when a Douglas DC-2 plane was shot down during a commercial flight between Aberdeen and Stockholm. On May 17, 1944, near Belgrade, Allied fighter planes shot down a Junkers Ju-52 belonging to Lufthansa, operating a passenger flight between Belgrade and Sofia. On 27 September 1944, a Focke-Wulf Fw 200 of Lufthansa flying along the Stuttgart – Barcelona route was shot down by an RAF night fighter over France. On April 20, 1945, while making the last flight from the besieged Berlin, a Junkers Ju-52 of Lufthansa was shot down by Soviet aviation".[185]

When assessing the above cases, it should be stated from the perspective of the 1923 Rules that, in accordance with Articles 33 and 34, the situation of non-military aircraft belonging to the belligerent states is distinguished depending on where a given aircraft is intercepted. In this respect, the important aspect was the presence of an aircraft within the airspace, i.e., the state of the aircraft's registration. In this case – e.g., interception – this aircraft was liable to be fired upon if it did not attempt to land at the nearest airport (Article 34). In the case of private aircraft located 1) within the jurisdiction of an enemy state, 2) in the immediate vicinity of this jurisdiction and outside the jurisdiction of their own state, 3) in the immediate vicinity of military operations of the enemy, both on land and at sea, they may be fired upon. The *ratio* of the distinction was dictated by the possibility of performing regular transportation services within their own territory, under which aircraft that operate regular commercial flights should be protected from the possibility of attack by an immediate attempt to land.[186] These restrictions did not work in the case of flights outside the area of their own jurisdiction – there was a presumption of a non-commercial purpose of the flight and therefore a non-military aircraft was flying into a hostile or potentially hostile airspace. Interpretative doubts arise from the use of the phrase "jurisdiction" – the commentary on the 1923 Rules refers this element more to the exercise of control over a specific territory than to the legal title to exercise territorial power by belligerents. The limitation of the so-called dangerous airspace only to the area of direct military operations in relation to land or sea operations was unclear as well. It is worth noting that the incidents listed above can be divided into:

1) incidents within the area controlled by the state – the owner of the aircraft: the Kweilin incident, the shooting down of the Ju-52 of Lufthansa over Serbia;
2) incidents within areas beyond the control of the belligerents – over the high seas – an incident related to Air France near the coast of Algiers or British aircraft over the North Sea;

185 Data on shoot-downs can be found on page Aviation Safety Network, n.d., https://asn.flightsafety.org (accessed: 12.06.2025).

186 "Non-military aircraft of belligerent nationality, whether public or private, should not in general be exposed to the risk of instant destruction, but should be given the opportunity to land" – J.B. Moore, *International Law*…, p. 252.

3) incidents within the direct zone of military operations – e.g., Lufthansa's Fw 200 flight to Barcelona over France or the evacuation of a Quantas aircraft from Java to Australia.

What is important is that attention should be paid to the status of aircraft and the nature of the above incidents. Almost all aircraft had a civilian origin and purpose, being in the service of commercial airlines or temporarily acting in a transportation capacity. However, there is no reliable data on the exact origin and nature of both passengers and the objects carried by these aircraft. In some cases (such as during the evacuation by KLM and Quantas planes from Dutch Indies in 1942), in addition to civilians, there were also members of the Allied armed forces on board. From the perspective of the belligerents, there was a certain interpretative doubt – on the one hand, the attacked aircraft had no combat purpose (it had civilian markings of belonging to the adversary state register), and on the other hand, there were doubts as to the actual purpose of the flight (commercial or intelligence) and the nature of the cargo (civilian or the presence of military personnel on board). As indicated earlier, the 1923 Rules stipulated that a mere flight of a non-military aircraft near the zone of military operations or under the control of the enemy equated to the possibility of considering the flight as potentially hostile, regardless of the *prima facie* commercial purpose of the flight. The practice of states during World War II indicated that the belligerents of all the parties involved perpetrated attacks against civil aircraft marked with the registration signs of a belligerent state's register. There was no diplomatic protest in this regard – the only reaction to the destruction of a civilian passenger ship was the diplomatic note of the US ambassador to Japan of August 26, 1938, in response to the Kweilin incident. It condemned the destruction of a "commercial" aircraft and the risk to life of the "American crew" as well as other "non-combatants on board a civilian and unarmed aircraft, conducting a regular passenger service". In response, the Japanese Ministry of Foreign Affairs stated that the Chinese aircraft "found itself in the Japanese operational zone" and "behaved in a manner characteristic of military aircraft", while recognizing that the above circumstances (i.e., an attempt to escape from the pursuit) "justify the actions of the Japanese military aircraft."[187]

9.5. Final provisions of the 1923 Hague Rules of Air Warfare

Chapter VII of the Hague Rules of Air Warfare was an outline of the regulation that was met with the greatest resistance of the Dutch delegation. According to the representatives of the Netherlands, the regulations regarding the right to visit and search could not be extended by analogy to military aircraft, which,

187 International Law Situations with Solutions and Notes 1938, p. 23–24.

from international practice and custom, are only available to warships of belligerent states.[188] The rest of the delegations did not agree with the above views and decided to adapt Article 49, the principle under which a private aircraft was subject to a visit, search and seizure by a military aircraft belonging to the combatants. More controversy was aroused by the issue of the possibility of exercising a similar right in relation to merchant ships. Specific technical problems, which made a possible inspection extremely burdensome for a merchant ship, potentially forcing it to change its previously adopted course[189] were pointed out. The delegations were in dispute about the essence of the law *per se* (France argued that the rules should prohibit the possibility of military aircraft exercising the law unless they were able to meet the norms applicable in naval warfare. The United Kingdom pointed out that the problem should be compared more to the issue of the possibility of exercising the right of detention and search by submarines. The Japanese side argued that aviation technology did not permit creating such a right), which ultimately precluded adopting an appropriate solution in this respect.

The final rules were of significant value. Article 61 indicated that the term "military" meant all types of armed forces – air forces, land forces and naval forces. This was intended to prevent distinguishing the legal situation – there were doubts related to different legal regimes regulating the use of aviation by the navy and land troops. An example of the above distinction was, among others, the issue of air bombing or, e.g., the exercise of the right to visit and search. Article 62 indicated that, except for the situations specified under Chapter VII of the 1923 Rules, air personnel involved in military operations were subject to the laws and customs of war to the same extent as personnel of the land armed forces and were protected by all relevant declarations and conventions.[190] There were additional proposals submitted, not included in the final draft. The one worth pointing out is the Dutch proposal, which envisaged the imposition of responsibility for damages on the state

188 "The standpoint adopted by this Delegation is that the custom and practice of international law is limited to a right on the part of belligerent warships to capture after certain formalities merchant vessels employed in the carriage of such commerce. No justification exists for the extension of those rights to an aircraft, which is a new engine of war entirely different in character from a warship and unable to exercise over merchant vessels or private aircraft a control similar to that exercised by a warship over merchant vessels" – *ibidem*, p. 265.

189 *Ibidem*, p. 266.

190 "Regard must be had to the last paragraph of the Convention to which the Land Warfare Regulations are attached, that cases not provided for are not intended, for want of a written prohibition, to be left to the arbitrary judgment of military commanders. In all such cases the population and belligerents are to remain under the protection of the rule of the principles of the law of nations, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience" – *ibidem*, p. 284.

whose military personnel perpetrated violations.[191] In addition, the introduction of criminal provisions was also considered, according to which the perpetrators of acts contrary to a given provision could be punished as war criminals.

10. Report of ICRC experts from 1930

In 1930, the ICRC asked selected experts to present an analysis regarding the possibility of precisely defining the principles of international war law protecting civilian populations from the effects of artillery attacks or bombing of all kinds.[192] One of the consultants was the Swedish researcher Å. Hammarskjöld, who emphasized the existence of the Hague Regulations of 1923 as part of the legal status within which the analysis was conducted.[193] The author also devoted part of his reflections to the role of customary international law, whose reflection may be found in unratified conventions. In his opinion, however, the fact that the convention was signed and then not ratified was a sign of a given state's unwillingness to be bound by a given norm of international law. In this assessment, it was based on a custom as a reflection of the treaty norm, due to the conflict with the Martens clause (customary law functions alongside the convention norm). In this regard, he gave as an example the 1909 London Declaration, which was widely signed by states, but not ratified. The proof of the desuetude in relation to the Hague Declaration of 1899, extended at the Hague Conference in 1907, was the preparation of the Hague Rules of 1923, which, in the author's opinion, were *de lege ferenda* postulates and did not constitute a positive law. This was the only regulation that referred to air warfare – understood as taking place far beyond the lines of the front.[194] The rules listed in Articles 22–24 of the Hague Rules of Air Warfare, were considered by the author as an element of the general principles of international law, which the commission adapted to the conditions of independent air warfare (understood as exceeding the range of 40 km, i.e., that of long-range artillery). At

191 "The belligerent Party who, intentionally, or through negligence, violates the provisions of the present rules is liable to pay compensation in case damage is caused as a result of such violation. Such Party will be responsible for all acts committed by members of his armed forces" – *ibidem*, p. 287.

192 Comité International de la Croix-Rouge, *La Protection*…

193 Åke Hammarsjöld (1893–1937) – Swedish diplomat, member of the Hague Academy of International Law, judge of the Permanent Court of International Justice since 1936, brother of Dag Hammarskjöld, later Secretary-General of the United Nations – Comité International de la Croix-Rouge, *La Protection*…, p. 14.

194 *Ibidem*, p. 34.

the same time, he emphasized that the power of the 1923 document was weakened by the fact that it was only a draft, which might be grounds for questioning the rules as derived from general international law. He perceived, however, the possibility of assuming that the rules of 1923 were the crystallization of the norms of international law in relation to air warfare ("si l'on peut soutenir que le règlement de 1923 a cristallise dans une certaine mesure, en les adaptant aux conditions modernes, les regles du droit international general").[195] The above could be confirmed by solutions that were completely innovative. As a fundamental example in this regard, solutions protecting cultural monuments were pointed out. The Swedish researcher emphasized that in the case of strategic air warfare, there were no positive law norms – they could only be decoded from general principles and customary international law.[196]

Another opinion on this matter was issued by G. McDonald, who emphasized that the test of the undefended area in the context of the Ninth Hague Convention of 1907 was different from the laws and customs adopted on the basis of land warfare, due to the circumstance related to the inability of a war fleet to occupy a given land area and subject it to occupation.[197] This reasoning should also be valid in relation to aviation and constitute the basis of the law of air bombing. According to the author, in the context of terrorist bombings, there was no doubt that aviation in this regard was one of the most effective means that could have an impact on the civilian population's morale. In the context of the definition of a military objective, the author agreed in this regard with Castrén that formulating a universally acceptable definition was extremely difficult.[198] McDonald pointed out that the basis of international law applicable to war was the principle of distinguishing and protecting civilians from deliberate attacks directed against them. However, in the context of direct combat zones, the protection of civilian populations was marginalized.[199]

Morton W. Royse indicated that when deciding on the use of a given means or weapons on the battlefield, states had never considered the social (i.e., humanitarian) outcome of fielding a given type of weaponry but were only motivated by its efficiency. Royse pointed to three principles that were the main premises influencing the decision to limit or prohibit a given type of weapons: 1) when a given weapon became obsolete (e.g. poisoned arrows), 2) when the introduction of a rule did not lead to a diversification of the situation of states, 3) when a weapon or method of conducting military operations was not effective enough (example: The XIV Hague Declaration of 1907 on the prohibition of discharging projectiles

195 *Ibidem*, p. 48.
196 *Ibidem*, p. 44.
197 *Ibidem*, p. 58.
198 *Ibidem*, p. 66.
199 *Ibidem*, p. 67.

and explosives from balloons). According to the American author, there are difficulties in determining the protection of civilians, especially in the context of incidental air attacks. Another controversial aspect was the line between legally exerting an influence on the population of a given state – a side effect of any armed conflict – and terrorizing the civilian population. The 1922 French manual and the 1926 American manual assumed the impact of parallel air operations both in strictly military space – through the destruction of military objectives, and in the moral perspective – through the indirect impact of operations directed against facilities located in urban centers.[200]

Vittorio Scialoja emphasized that the test specified under Article 25 of the 1907 Hague Regulations covered not only the issue of determining the factual circumstances of defending the area in question, but also "its potential ability to defend itself".[201] According to the author, the minimum standard of the protection of civilians during sieges should be a rule that prohibits deliberately directing artillery fire at residential areas.[202] The author emphasized the need to modify the 1907 Hague Regulations to the extent to which, in the context of land warfare, they excluded the possibility of bombing military objectives located within them.[203] In the author's opinion, there are no specific differences in the context of air bombing and land bombardment, only the inaccuracy of aeronautical engineering results in civilians and property being also targeted alongside military objectives.[204]

Maurice Sibert pointed out that there was no doubt about the legality of air warfare and air bombing.[205] Amendment of Article 25 of the 1907 Hague Regulations was intended to implement solutions to protect the civilian population of undefended localities against new methods of warfare. This sought to adapt the requirement that air attacks should not affect undefended areas, as in the case of land artillery operations.[206] In actual fact, this equated to marginalizing the role of aviation in future armed conflicts to only that of "airborne artillery". Maurice Silbert criticized the reckless analogy, the lack of elementary logic on the part of the delegates and the arbitrary limitation of the guarantee provided for civilian populations by introducing the test of an undefended locality and ignoring the fate of non-combatants located in localities engulfed by hostilities.[207] The author pointed out that the test arising from Article 25 of the 1907 Hague Regulations regarding the distinction between defended and undefended cities was impossible to apply in practice since the existence of anti-aircraft artillery led to the assumption that

200 *Ibidem*, p. 85.
201 *Ibidem*, p. 119.
202 *Ibidem*, p. 120.
203 *Ibidem*, p. 121.
204 *Ibidem*, p. 122.
205 *Ibidem*, p. 133.
206 *Ibidem*, p. 137.
207 *Ibidem*.

the entirety of a given combat area was undefended.[208] Silbert also addressed the complete nonsense of obliging the belligerent intending to launch bombs to apply a prior warning.[209] He also noticed the lack of grounds in customary law to outlaw the practice of night raids.[210]

Walter Simons pointed out that, given that aviation was a new method of warfare, there was an objective difficulty in determining a practice that could be an element of a binding international legal custom. According to the former German Foreign Minister, the rule applicable to land bombing had already lost its force before the outbreak of World War I ("Diese Regel hatte schon vor dem Weltkrieg ihre Bedeutung verloren"). Both defended and undefended cities had so-called *erlaubten und unerlaubten Zielen* (authorized and unauthorized targets). Even then, the practice permitted attacking targets that were important for the war adversary's effort (*militärische Zwecke*). Simons confirmed the existence of the difference between land and sea bombing, as based primarily on the technical distinction between modes of conducting warfare.[211]

Expert opinions submitted at the request of the ICRC reveal a significant polarization of positions preparing the opinion on the existence of a norm regulating air bombing *per se*, as well as the scope of permissible attack, the definition of a military target and the normative values of the 1923 regulations. It is worth noting that the above document was submitted to delegates of the World Disarmament Conference in 1932–1934.

11. Prague Congress of 1922. Air warfare and international aviation law

During the discussion on the shape of international aviation law after World War I, the issue regulating the use of aviation during an armed conflict was raised in the course of the 20th Congress of International Aviation Law, held from 25 to 30 September 1922 in Prague. As part of the deliberations, one of the speakers' points was the law of air warfare (*le droit de la guerre aérienne*). Professor Hobza appealed to the participants not to leave the issue of legal regulation of aviation operations during armed conflict outside the scope of international aviation law. The researcher noted the lack of readiness among the international community to

208 *Ibidem*, p. 151.
209 *Ibidem*, p. 164.
210 *Ibidem*, p. 165.
211 *Ibidem*, p. 187.

discuss the evolution of the laws and customs of war during peacetime.[212] Among other things, it was necessary to find an alternative to Article 25 of the 1907 Hague Regulations in the context of air attacks, by preparing a separate, dedicated regulation. Hobza recognized that the international law regulating the conduct of warfare has a character of *leges imperfectes*, recognizing that only the creation of a set of general norms would allow the acceptance and application of norms by combatants, sanctioned in a binding form for states. The professor indicated that, in his opinion, the law of air warfare should be constructed on the basis of the laws and customs applicable to land and naval warfare, although it should take into account the following: 1) protection of civilian populations against the effects of air operations, 2) limitation of permissible means and methods of conducting armed combat, 3) unification of certain rules of warfare, 4) guarantee of enforcing norms. In point 1 of his proposal, Hobza advocated, following Cpt. Wallace's draft to essentially ban attacks against inhabited areas, with the exception of targets of military significance. In point 2, by limiting the scope of permissible damage to the enemy, he proposed prohibition of attacks against hospital; facilities, the use of poison, as well as measures causing extensive injuries (*des materies propres a causer des maux superflus*). The postulates were completed with a vote on the need to specify in detail what a hostile and neutral aircraft was, as well as the need to establish a permanent international criminal court, without which any established rules would be solely theoretical by nature.[213] This was, in fact, the last position related to the law of air warfare expressed in the forum of discussion related to international aviation law.

12. World Disarmament Conference of 1932–1934 in Geneva

Article 8 of the Covenant of the League of Nations required member states to strive for global disarmament, with the aim of achieving a minimum level of armaments compatible with "national security" and "enforcement of international obligations".[214] The development of detailed plans was entrusted to the Council of the League of Nations. As early as the mid-1920s, E.P. Warner advocated the

212 Cinquième congrès international de législation aériene du Comité juridique international de l'avation, Prague 1922, p. 222.

213 *Ibidem*, p. 225.

214 Peace Treaty between the Allied and Associated Powers and Germany, signed at Versailles on June 28, 1919 (Journal of Laws of 1920 No. 35, item 200).

need for disarmament not only in the context of naval but also air armaments, recognizing that a reduction in air warfare would serve to reduce tension in international relations.[215] Part of the inspiration for this stance was the imposition of restrictions on defeated Germany as part of the 1919 Treaty of Versailles, which were, however, considered insufficient.[216] The issue of air warfare was one of the fundamental aspects of global disarmament and was discussed in detail during the World Disarmament Conference in 1932–1934. The Geneva Conference was the third consecutive attempt to explicitly limit the armaments of states (following the 1922 Washington Conference and the 1930 London Conference). Previous efforts of the international community had been only partially successful in the context of naval warfare, by limiting the tonnage and armament of heavy warships (the introduction of the 5: 5: 3: 1.75: 1.75 ratio, determining the proportions of the navies of the United States, the United Kingdom, Japan, Italy and France, respectively). In 1930, it was decided in London to extend the ban to, among others, the prohibition of adaptations of mounting heavy armament on board aircraft carriers, as well as to introduce restrictions on the construction of ships below 10,000 tons of displacement and artillery weapons (division into light 155 mm caliber guns and medium 203 mm caliber guns)[217]. At the subsequent disarmament conference, it was decided to regulate the possibility of further reduction in the arms race rather radically, including not only naval disarmament, but also other types of armament, including those of aviation and land forces. Already during the preparatory work for the conference, the German proposal to outlaw air warfare was rejected at the plenary meeting of the participating states in 1929[218]. In the United Kingdom, the main point of reference for the problem of disarmament was Stanley Baldwin's famous statement entitled *A Fear for the Future* in front of the House of Commons on November 10, 1932, in which the British politician stressed that there was no effective protection of civilians from an attack by aviation, recognizing that "the bomber will always get through" and the only effective form of defense is attack.[219] In November 1932, the British Air Ministry issued a memorandum in response to E. Beneš's proposal of June 1932 by attempting to introduce restrictions on the number of aircraft of smaller states,

215 "The reduction or limitation of preparations for air warfare is important primarily as a step owards the suppression of friction between nations, and in particular towards the elimination of that mutual fear which, while it exists, makes a steady march towards war almost inevitable" – E.P. Warner, *Aerial Armament and Disarmament*, "Foreign Affairs" 1925, vol. 4, p. 626.

216 "Neither in method of enforcement nor in specific nature of the technical restrictions imposed do the rules laid down under the Treaty of Versailles serve as a direct basis for an agreement for the limitation of aerial armaments" – *ibidem*, p. 632.

217 Limitation and Reduction of Naval Armament (London Naval Treaty), Treaty signed at London, April 22, 1930.

218 "A German proposal for the abolition of bombing was rejected by a majority vote" – D.J. Shorney, *Britain and Disarmament*, Doctoral Thesis, Durham 1980, p. 321.

219 T. Mason, *British Air Power*, [in:] J. Olsen (ed.), *Global Air Power*, Washington 2011, p. 22.

banning the construction of aircraft with a payload of more than three tons. The note also contained a provision according to which air attacks could be directed only and exclusively against military objectives.[220] In a similar spirit, one of the French government's original proposals of February 1932 was expressed, proposing a ban on air bombings within 10 kilometers of the front line, excluding air and artillery concentration sites, applying as the basic legal regime the provisions of the Ninth Hague Convention of 1907 on Naval Bombardments.[221]

James M. Spaight, commenting on the events of the World Disarmament Conference in 1932–1934, called it a fruitless attempt leading to an dead-end.[222] It should be noted that the number of concepts and ideas related to the regulation of air operations exceeds the researcher's capability. Of the more interesting points, it is worth paying attention to the following:

1. The French proposal to place all bombers under the management of the League of Nations – in parallel with the remaining heavy armaments as part of the so-called internationalization process of both civil and military aviation. The draft envisaged the creation of an international military grouping that would perform functions preventing the possibility of the conduct of warfare by states and would also be an intervention reserve in the event of aggression by one state against another. In a sense, it was a proposal to create a permanent military contingent, in a form similar to the solutions later included on the basis of the Charter of the United Nations.[223]
2. A proposal for a total ban on the use of military aviation put forward by the German side and accepted by Litvinov, the Soviet Commissar for Foreign Affairs.[224]
3. The so-called Beneš resolution – a proposal by the President of Czechoslovakia to prohibit any form of air attack against civilians and to prohibit any other form of air bombing, excluding aviation placed under international management. Other postulates included a reduction in the number of heavy artillery pieces, a total ban on chemical warfare and incendiary weapons, as well as the creation of a Standing Commission on Disarmament with control powers over the parties to the convention.[225]

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220 I.M. Philpott, *The Royal Air Force 1930 to 1939: An Encyclopedia of the Inter-War Years. Volume II: Rearmament 1930 to1939*, Barnsley 2008, p. 12.

221 R. Bechoff, *L'Aviation*…, p. 536.

222 See: J.M. Spaight, *Air Power in the Next War*, London 1938.

223 *L'Aviation à la Conférence de Désarmement*, "Revue générale de droit aérien" 1932, pp. 268–293.

224 R. Bechoff, *L'Aviation*…, p. 537; W. Raafat, *La guerre*…, p. 755.

225 "Air Forces; (a) absolute prohibition of all air attack against civil populations; (b) abolition of all other form of aerial bombing, under certain conditions, the chief of which is that civil aviation should be subject of international regulation" – J. Van Beek en Donk, *Steps in Disarmament*, *Disarmament in 1932*, "The Yearbook of the Disarmament Information Committee" 1932, p. 12.

4. The postulate of the British government – a proposal to ban air bombing as a method of warfare, excluding zones located in colonial zones as part of the so-called air policing.
5. Proposals of other states to at least partially or completely ban air warfare or air bombing.[226]
6. A proposal of the United States alternatively aimed at proposing solutions regulating the conduct of air warfare or introducing limits on the size of the air forces of certain states.[227]
7. An alternative French proposal aimed at distinguishing the possibility of bombing based on proximity to the front line.

The proposals of the states participating in the conference were subject to the analysis of the so-called Air Commission, which considered the possibility of implementing the submitted proposals, although skeptical about the idea from the very beginning.[228] The delegations argued that the issue of determining the possibility of a ban on air warfare encountered serious difficulties due to its generally political nature, the inability to prevent the use of civil aviation for military operations,[229] as well as objective difficulties arising from the adoption of a ban on offensive air operations. The last point in particular was emphasized by the Polish participant in the commission, Count Raczyński. The Polish delegate emphasized that the conference defined the factors affecting a state's economy necessary to maintain its ability to conduct warfare. The categories of war objectives included: 1) destruction of the enemy's armed forces or their attrition, 2) destruction of

226 "These proposals, some twenty in all, might be classified as follows: abolition of military aviation (Denmark, Germany, Hedjaz, Hungary, Spain, Sweden, Turkey); abolition of bombing aeroplanes (Afghanistan, Belgium, China, Italy, Portugal, Switzerland); prohibition of bombardment from the air (Austria, Haiti, the Netherlands, Switzerland); prohibition of bomb-dropping by aeroplanes (Latvia); prohibition of armaments particularly aggressive in character (Finland); prohibition of offensive armaments, notably those presenting special danger to civilians (Norway)" – *Records of the Conference for the Reduction and Limitation of Armaments, Series D, Volume 3, Minutes of the Air Commission February 27th – June 24th, 1932*, Geneva 1936, p. 14.

227 "The Air Commission recommends that, in view of its unanimous findings as to the grave threat to civilians from aerial bombardment, the General Commission should consider what effective action could be taken, as a part of any comprehensive scheme for disarmament, to do away with this threat, whether through the control of bombing from the air, the restriction on the number and size of aircraft available for aerial bombardment, or through other measures affecting aviation" – *ibidem*, p. 75.

228 *Ibidem*, p. 7.

229 On the basis of the provisions of the Treaty of Versailles, Germany was deprived of the possibility of developing military air force (Article 198 et seq.). As part of a secret agreement with the Soviet Union, concluded on the occasion of the 1922 Rapallo Treaty, the German side gained access to Soviet training grounds where it could develop prohibited aviation technologies. In turn, the aircraft intended for military use were built as high-speed mail or passenger aircraft (Ju-52).

entities operating for the enemy's benefit, such as factories, railway stations, power generation assets, 3) means of land and air transport, allowing for the movement of military units, 4) interruption of the enemy's supply continuity, as well as 5) lowering their morale. The Polish delegate emphasized the importance of military aviation for achieving strategic goals. Raczyński noticed that in the context of air bombing, there were objective difficulties in distinguishing between air operations aimed directly at terrorizing civilian populations and attacks on military objectives, which might result in a collateral attack on civilians.[230] The Polish representative stressed that the Hague Conventions of 1899 and 1907 did not provide for the development of aviation and there was currently no established regime protecting the civilian population against the effects of air bombing.[231] Other delegations were presenting drafts in order to determine the nature of military aviation, which would identify combat aircraft whose propagation would be prohibited. The Belgian delegation pointed out that in 1929 another definition of a military aircraft had been proposed, defining it as one bearing visible signs of belonging to the air force, armored or capable of repelling an enemy in another way, manned by a military crew and remaining in active military service.[232] Determining the nature of the aircraft was considered a remedy that would make the will to disarm military aviation a reality.

However, this was not the only sphere of possible changes. The sub-commission report considered restricting aircraft armament, recognizing that most examples of such could be used offensively, as well as easily mounted on board civil aviation aircraft. The commission assessed that air bombing was the greatest threat to the protection of civilians, but the degree of danger would be directly dependent on the means used to carry out a particular air operation and the method that would be employed to use a specific means.[233] Bombs and projectiles containing asphyxiating, incendiary and explosive substances were considered expressly.[234] In this context, the delegations indicated a general intention to recog-

230 "A study of the third criterion adopted by the General Commission also led back to the question of air bombardment, which in time of war constituted a direct menace to the civil population, whether in the form of terrorisation by premeditated air attack on the civilians themselves or on an objective which is of a military nature but is situated in the immediate vicinity of civilian dwellings" – *ibidem*, p. 12.

231 "The Hague Conferences of 1899 and 1907 had not foreseen the progress which aviation was to make, and had thus not established special legislative measures providing for the protection of civil populations against air bombardment. The defect must be remedied, but the Polish delegation could not consider this measure alone sufficient" – *ibidem*, p. 12.

232 *Ibidem*, pp. 13–14.

233 "The aircraft forming part of the air armaments of a state which can be regarded as the most threatening to the civil population are those capable of the most effective direct action by the dropping or launching of means of warfare of any kind; this efficacy depends primarily upon the nature of the means of warfare employed and the manner in which they are employed" – *ibidem*, p. 16.

234 "Among these means the Sub-Committee specially mentions poisonous gases, bacteria

nize the above-mentioned weapons as prohibited (excluding explosive bombs).[235] In the subsequent part of the proceedings, the commission tried to determine whether it could write a draft prohibiting the use of offensive types of weapons. The possibility of working on a new law of air warfare was also discussed, along with the appeal of the Swiss delegation, which emphasized that the international community categorically condemned actions aimed at undermining the morale of the civilian population, calling them a "strategy of terror".[236]

Another issue discussed at the plenary forum of the Geneva Conference in July 1932 was the content of the previously mentioned resolution of the President of Czechoslovakia of July 20, 1932, whose Article 1 concerned the prohibition of conducting air bombing:

> The Conference, deeply impressed with the danger overhanging civilization from bombardment from the air in the event of future conflict, and determined to take all practicable measures to provide against this danger, records at this stage of its work the following conclusions:
> 1. Air attack against the civilian population shall be absolutely prohibited;
> 2. The High Contracting parties shall agree as between themselves that all bombardment from the air shall be abolished, subject to agreement with regard to measures to be adopted for the purpose of rendering effective the observance of this rule.[237]

The above proposal essentially contains a set of standards such as disarmament and *ius in bello*. Article 3 introduced a ban on the use of gas and incendiary munitions, while Article 5 provided for the obligation of conference participants to formulate rules of international law relating, among others, to air bombing.[238] In

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and incendiary and explosive appliances" – *ibidem*, p. 17.

235 "The delegations of all states had agreed that chemical, bacteriological and incendiary warfare must be abolished. That being so, the means for carrying out such warfare must also be abolished, for it was open to question whether the Conference, by merely issuing prohibitive regulations, would have done anything really concrete. It must not be forgotten that most states had been represented at The Hague. Nevertheless, certain events had taken place in the world since then" – *ibidem*, p. 107.

236 "The French document pointed out that attacks on the civil population were contrary to international undertakings, but all States had not signed these undertakings; moreover, persons fully qualified to do so had assured him that certain military instructions expressly laid down that terror could be spread among civil populations by means of air bombardment. This, called the 'strategy of terrorisation', was nothing short of pure barbarism" – *ibidem*, p. 84.

237 Records of the Conference for the Reduction and Limitation of Armaments, Series B. Minutes of the General Commission, Volume 1, February 9th – July 23rd 1932, Geneva 1932, p. 154.

238 "Rules of international law shall be formulated in connection with the provisions relating to the prohibition of the use of chemical, bacteriological and incendiary weapons and bombing from the air, and shall be supplemented by special measures dealing with infringement of these provisions" – *ibidem*, p. 156.

the light of the commentary on the resolution, the above difference between the terms "airstrike" and "air bombing" was not clearly elucidated – only the need to introduce a complete ban on air bombing was raised, recognizing that even activities of a legal nature led to a simultaneous attack on the civilian population and could not be allowed (statement of Litvinov, the Soviet Commissar for Foreign Affairs).[239] The representative of Switzerland addressed the importance of the document issued by the International Committee of the Red Cross, which was submitted with a thesis on the need to completely ban air warfare.[240] This idea was supported by the majority of delegates representing smaller states. The powers participating in the work of the previous conferences on disarmament submitted more or less direct objections. The Japanese delegation noticed that the ban on air bombing could not be detached from disarmament in terms of other means of combat.[241] The United Kingdom stressed the inability to effectively prevent the development of civilian technology. The German side pointed out that the only acceptable form of the ban was the complete prohibition of the possession of an air force by any state, including training structures, considering the demands set out in the Beneš resolution as insufficient.[242] France pointed out that the resolu-

239 "The clause prohibiting air attack against the civilian population was, of course, to be welcomed, but it, like the clause on chemical and bacteriological warfare, was more relevant to the sphere of the humanisation of war i.e., of the Red Cross-than to the problems of disarmament, since it did not, in itself, mean the reduction of military aircraft, even by a single unit. In theory, it could hardly be said that the right of bombarding the civilian population had ever been recognised or asserted by anyone. When the civilian population suffered in the last war as a result of aerial bombardment, the latter had usually been directed against military objectives and prompted by military and strategical considerations. So long as military aircraft, or at all events bombing aircraft, were not absolutely prohibited, there could be no guarantees whatever for the civilian population" – *ibidem*, p. 165.

240 "The outset of the Conference, the International Committee of the Red Cross had submitted several documents. It had been asked by all the national Red Cross organisations to concentrate its efforts and studies on the question of the prohibition of bombardment from the air. In accordance with those instructions, the International Committee had examined all the aspects of the problem and had submitted to the Conference a document the fundamental conclusion of which was that aerial bombardment in all its forms should be totally, strictly and absolutely forbidden. He urged the Conference to give the closest attention to this document, which was the outcome of a long, patient and conscientious study" – *ibidem*, p. 170.

241 "The Japanese delegation considered, on the other hand, that the question of the total prohibition of air bombardment should be considered in its relation to other armaments and other methods of warfare" – *ibidem*, p. 171.

242 "The chapter relating to air forces appears to satisfy a desire expressed by the German delegation, among others-namely, the complete prohibition of bombardment from the air. In the German view, however, this measure should take the form of the complete abolition of military aviation, which would, at the same time, constitute its guarantee. The resolution, on the contrary, merely prohibits, as between the contracting States, the launching of bombs, does not provide for the complete abolition of bombing appliances and does not prohibit either the preparation of those appliances or the training of personnel. So long as

tion should at the same time take into account the French postulate for the internationalization of aviation.[243] The Soviet Union refused to support the resolution due to the lack of acceptance for the amendments proposed by Litvinov.[244] In the conclusion, the majority of conference participants voted in favor of the resolution (among others, the United States, the United Kingdom, France, Belgium, the Netherlands, Japan, Poland and other smaller states – a total of 41 votes in favor). The USSR and Germany voted against the resolution, with the following abstentions: Italy, Turkey and Hungary.[245]

Unfortunately, the creativity of the members of various types of plenary bodies operating at the Geneva Conference of 1932–1934 did not contribute in any way to the progress of the law of air warfare, while constantly emphasizing the suitability of the solutions proposed in 1923.[246] This was highlighted, among others, by the Polish technical delegate, Col. J. De Beaurain, who pointed out that the issue of protecting the civilian population from the consequences of waging unlimited air warfare had already been considered by outstanding lawyers who had formulated important conclusions in this respect.[247] The possibility of banning air bombing was considered a key element of the entire disarmament process, and the failure to do so ultimately contributed to the failure of the conference.[248] Despite the above, the conference proceedings once again confirmed the need to comply with the principle of distinction in air warfare as a cardinal element.[249]

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those gaps exist, the rules laid down in the resolution in this connection must necessarily remain problematical. Hence the terrible danger which threatens civilian populations in particular will remain" – *ibidem*, p. 187.

243 *Ibidem*, pp. 196–197.

244 *Ibidem*, p. 203.

245 *Ibidem*, p. 205.

246 G. Thomson, *Aerial*…, p. 55.

247 "Lastly, he drew attention to the fact that the problem of protecting civilians against aerial bombardment had been dealt with by a special committee composed of eminent jurists, which formulated important opinions to which reference had been made during the discussion. It would thus be astonishing if the technical experts of whom the Commission was composed were incapable of reaching definite and conclusive results through their examination of the problem, to which the Sub-Committee's work made a first and important contribution" – *Records of the Conference for the Reduction and Limitation*…, p. 89; Janusz De Beaurain was an engineer and soldier of the Polish Legions during World War I. On November 5, 1918, he made the first flight in the history of Polish military aviation. He later held many command and management positions. From 1929 to 1935, he was the technical representative of the Republic of Poland at the disarmament conferences in Geneva. He was the deputy commander of the air force until 1939. He remained without assignment during World War II.

248 "The prohibition of air bombardment was the keystone of air disarmament. If air bombardment were not abolished, it was useless to sacrifice the independence of civil aviation" – *ibidem*, p. 103.

249 "The results of the Conference to date, to which I promised to refer, are to be found in the general commission's resolution, appearing at page 13 of the Report. It will be seen that

13. International Law Association (ILA)

13.1. The ILA air warfare draft from Buenos Aires, 1922

In 1922, during the 31st session of the International Law Association (an institution existing since 1873) in Buenos Aires, the possibility of adopting new solutions in the field of air warfare law was discussed. The author of the draft was a US aviation Captain, W. Elliot. The solutions were to partially serve as a starting point for the discussion taking place at the Washington Disarmament Conference of 1922–1923 and the work of special commissions appointed to revise the laws and customs of war in the context of new means of combat.

Article 1
Air warfare is defined as an armed attack made during the war by combatants against targets on land, sea, and in the air.

Article 2
Airstrikes against towns are not allowed except for military objectives.

Article 3
The concept of a military target is understood to denote military depots, factories and military installations and establishments, railway lines, railway stations and bridges used for military purposes and purposes related to conducting military operations.

Article 4
Airstrikes to terrorize civilians are prohibited.

Article 5
Airstrikes against hospitals and hospital ships are prohibited.

Article 6
It is forbidden to attack merchant ships unless a merchant ship opens fire. A military aircraft may exercise the rights to board, search and detain a merchant ship and use weapons against a merchant ship if such a ship resists detention or attempts to escape.

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this degree of agreement has been reached – Air attack against the civilian population shall be absolutely prohibited; The High Contracting Parties shall agree as between themselves that all bombardment from the air shall be abolished, subject to agreement with regard to measures to be adopted for the purpose of rendering effective the observance of this rule" – Australian House of Representatives, *Disarmament, Report of Geneva Conference*, 30 September 1932, 13th Parliament 1st Session.

Article 7
If a locality is attacked by the ground forces of the combatants and enemy resistance occurs during its occupation, the combatant has the right to call on air force as support during the attack.

Article 8
In matters not covered by the above provisions, the laws and customs applicable in naval and land warfare apply.[250]

The draft by Cpt. Elliot was created chronologically earlier than the Hague Rules of Air Warfare, but it contains many similarities to the latter. Seemingly, the biggest difference between the provisions is the lack of a clear distinction between the war zone and the rear front line zone. The apparent nature of this distinction is contained in Article 7, which emphasized that in the event of a siege to a built-up area or an attack on it, the combatants may use the support of air forces. This meant assuming that in such circumstances the scope of the bombing covers the entire locality, so long as it actively resists seizure. In other situations, an attack on inhabited areas was in principle unacceptable, with the exception of attacks against military objectives, defined in a manner similar to the catalogue of military objectives specified under Article 2 of the Ninth Hague Convention of 1907 concerning Bombardment by Naval Forces. It must be pointed out that the target of the attacks could only be dehumanized objects (the draft does not contain any reference to armed forces personnel). In addition, interestingly, the draft contains provisions about airstrikes, not air bombing. This distinction has some important justification – it should be noted that bombing is undoubtedly the most far-reaching means of conducting air warfare, but not the only mode of action which is vertical in nature. The second method of action is the so-called strafing – that is, an attack from a low-flying aircraft using on-board weapons. In this situation, the use of the term "attack" is more appropriate with regard to the conditions of conducting air warfare than narrowing down to the term "bombing". Therefore, the draft by Cpt. Elliot should be treated as a kind of bare minimum of combatants' duties undertaken as part of air warfare.

13.2. Stockholm Conference of 1924

In the final provisions of the resolution of the Air Law Committee at the ILA during the conference in Stockholm in 1924, Cpt. Elliot's draft was supplemented by additional elements drawn by H.F. Manisty, resulting from the report published in 1923 covering the Hague Rules of Air Warfare.[251] Article 2 of the regulation stipulated

250 *31rd International Law Association Report Conference of 1922*, pp. 222–225.
251 *33rd International Law Association Report Conference of 1924. Report of the Aerial Law Committee*.

that air warfare is an attack or bombardment carried out during the war from the air by combatants as a result of using aircraft against targets on land, at sea and in the air. Article 3 repeated the ban on conducting air operations against inhabited areas, with the exception of offensive operations of ground troops. Article 4 prohibited attacks of terrorist nature directed against civilians. Article 5 completely remodeled the former Article 3 of the Buenos Aires regulations. It supplemented the definition of military objectives by allowing the recognition of armed forces personnel, understood as armed forces fighting on the front line and only supporting units directly contributing to the war effort of the state, as a legitimate target – the committee representatives were afraid that the extension of the provisions with further categories may lead to shaking the foundations of the principle of discrimination.[252] This provision was essentially a faithful reflection of Article 24, para. 2 of the 1923 Hague Rules of Air Warfare,[253] except for the provisions of Article 5 of the committee's report missing a fragment on "commonly known places of armaments production" as determinants in identifying the targets of aerial bombardments. Influenced by the work of the commission of jurists in Article 5, a ban on indiscriminate bombing was added if the situation made it impossible to make a distinction. Article 6 provided that an aircraft (including a private one) belonging to the combatants may be incorporated into the armed forces, upon which it would then be subject to the relevant provisions of the law of war. Article 7 of the resolution stated that in the event of attacks on an inhabited area by a belligerent aiming to occupy it and at the same time defended by the other party, the use of aviation is permissible as an element supporting the attack, provided that the other laws and customs of war applicable to naval and land warfare were respected. The Articles 12 and 13 presented a novelty by stating that those guilty of violating the regulations in force in air warfare should be treated as prisoners of war, and the belligerent state had a duty to compensate the victims, indicating the possibility of determining the extent of the responsibility by legal proceedings at the request of the state representing the victims by the Permanent Court of International Justice.

During the discussion on the content of the draft prepared by H.F. Manisty, the problem of air bombing at night was raised, proposing the introduction of

252 "The difficulty has been to find a formula for restricting the objectives for aerial attack, and this Committee now recommend the definition contained in Article 5 of the new draft regulations as one which will limit aerial attacks to the forces in the field and only such auxiliary services as are directly concerned in the operations of war. It is felt impracticable to forbid the use of the aerial weapon against such services, but it is submitted that this definition will debar any belligerent from aerial attack for the purpose of terrorising the civil population" – *ibidem*, p. 114.

253 "It requires a very close examination to see very much difference in the definition as drafted by Mr. Manisty, but there is an essential difference. I think that the real point is the definition of the Hague Jurists Commission, Article 24. The definition there differs slightly from the definition of Article 5 in our Report, and I think it will be for the Conference, if they think fit, to consider which is the better definition, although very strong reasons can be given for the adoption of Article 5 as it appears on p. 6 of our Report" – *ibidem*, p. 131.

a ban on operations against built-up areas after dark, which was opposed by most researchers.[254] An interesting discussion concerned the obligation, introduced under Article 24 of the Hague Rules of Air Warfare, to refrain from aerial bombardment in a situation in which a given area can be bombed indiscriminately. According to some discussion participants, this might have rewarded the party that had intentionally located factories and armament installations in city centers, taking advantage of the proximity of a civilian population.[255] Other ideas concerned the creation of a special international commission and an international convention ordering and verifying the relocation of military installations away from city centers.[256] The transcripts of the Air Law Commission reveal serious doubts among the committee members as to the permissible scope of defining what a "military objective" is, for fear of its covering entire urban areas.[257]

In 1930, the Air Law Committee at the ILA proposed amendments to the text of the 1919 Paris Convention, regulating the rules of communication and air navigation. Despite the postulates to include the issue of neutrality in the case of an armed conflict (in particular the prohibition of overflights performed by aircraft belonging to belligerent states over the territory of neutral states), this comment was not met with the approval of the other participants, who stated that "the purview of laws of aerial warfare and did not properly fit into a. Convention governing the rules of aerial navigation in peace time"".[258]

13.3. Draft of Air Bombing Convention – Amsterdam 1938

The issue of air bombing was revived at the 40th session of ILA in Amsterdam in 1938, at which the *Report of the Committee on the Protection of Civilian Populations against New Engines of War* was presented.[259] Within the expert team,

254 "The motion was put to the Conference and declared lost" – *ibidem*, p. 132.

255 *Ibidem*, p. 133.

256 "This would necessitate the creation of embattled areas distant from large towns for the production of munitions, but if that step were taken by an International Convention it would forbid such attacks as took place on London on the pretext that the Admiralty or railway termini were not fair military objectives. As Mr. Barratt has pointed out, if we carry out the rule as suggested now we shall encourage munition factories being built in the heart of great cities, and thereby give the belligerent an unfair advantage if he cannot attack those munition factories, whereas if they are treated as military works away from centres of population, then they are quite fair objectives for aeroplane attack" – *ibidem*, p. 134.

257 *Ibidem*, p. 135.

258 *36th International Law Association Report Conference of 1930. Report of the Aerial Law Committee*, p. 253.

259 *40th International Law Association Report Conference of 1938*, Protection of Civilian Populations against New Engines of War, Report of the Committee on the Protection of Civilian Populations Against New Engines of War, *Protection of Civilian Populations against New Engines of War*.

chaired by the well-known researcher of the law of air war of the interwar period, A. De Lapradelle, a draft convention was prepared to ultimately improve the level of protection for the civilian population in the event of a future armed conflict, and which established the expectations concerning the widespread use of new combat means, including military aviation. The outline of the document was based on three fundamental pillars. The first was that the goal and object of an hostilites is the weaking the forces of the adversary (Article 1). The second was the prohibition against directly attacking civilian populations, and the third principle was the unacceptable treatment of civilian infrastructure as a target in the light of military objective doctrine.[260] As indicated in the report, the draft of the convention was, in fact, based on the entire achievements of the *ius in bello* created during the so-called Great Hague Codification of 1907, the Hague Rules of Air Warfare of 1923, postulates submitted during the Geneva Disarmament Conference of 1932–1934, as well as the Monaco draft of 1934 described below.

The analysis of the draft should begin with the provisions of Article 1, which stated that a civilian population consists of all persons who are not part of the belligerent's armed forces.[261] It is worth noting the content of Article 2 of the 1938 ILA draft, which defined under what circumstances a given location held the undefended status. Adopting the general principle expressed on the basis of Article 25 of the 1907 Hague Regulations, the provision stipulated that the requirements for recognizing a given locality as undefended were 1) the lack of the presence of armed forces, 2) the lack of military installations, barracks, arsenals, factories, repair facilities, airports and elements of the aviation industry, shipbuilding, naval depots, forts and field fortifications existing within a city. The provision was based on the list specified in Article 2 of the 1907 Ninth Hague Convention and had the nature of an enumerative listing. Attention should be paid to the absence of communication lines, as well as railway stations and bridges in the list. As part of the discussion, the absence mentioned above was subjected to significant criticism by the participants of the session in Amsterdam, who mentioned the incompleteness of the list of military objectives and the lack of reference to the issue of the so-called quasi-combatants.[262] Article 3 constituted a ban on the bombing of defended localities if military objectives could not be clearly identified, referring to the prevention of the possibility of negligent bombing (this was a direct

260 *Ibidem*, p. 39.

261 *Ibidem*, pp. 41–54.

262 "These machines are made by the civilian populations behind the lines, and I would submit that the civilian who makes munitions, who produces coal from the mines, who produces iron ore from the mines, who is in charge of an oil installation, who is in charge of transport, is just as important, from the military point of view, as a man in the fighting line. It seems to me that the first thing that has to be done is to give a definition of civilians, and who are the people that we are trying to protect" – *ibidem*, p. 64.

reference to point 3 of the resolution of the Assembly of the League of Nations of September 30, 1938). Article 4 directly adopted Article 22 of the 1923 rules. Article 5 para. 1 stipulated that air bombing was not allowed unless it was directed against the enemy's armed forces or communication lines used for military purposes, while para. 2 determined the unacceptable nature of zone bombing. Articles 6 and 7 imposed, among others, a ban on the use of incendiary ammunition, excluding anti-aircraft, illuminating and non-incendiary ammunition, as well as ammunition in which the incendiary action is only a side effect. Article 10 allowed the formation of so-called security zones, i.e., areas where the civilian population should be protected against armed attacks in case of conflict. Articles 11–14 specified in detail the terms of acquiring the status of areas excluded from military activity, the composition of the population located within the zone (persons unable to perform military service), control by neutral powers, transfer of persons and goods located therein, as well as verification of the status of the zone by the Permanent Court of International Justice.

The regulation contained some inconsistencies, especially in the content of Article 5 para. 1, which stated that air bombing is always possible against the enemy's armed forces. Similar doubts were raised by Article 3 prohibiting the bombing of military objectives located within defended cities if they cannot be clearly distinguished.[263] Indeed, the 1938 ILA draft aimed to create a mixed bombing regime, based on both the "defended location" concept and the military target doctrine recognizing that a location may be regarded as undefended in status unless it has military objectives within its area. An important issue during the discussion was pointing out that the draft "is not a new idea of international law, it is part of the Hague Convention of 1907 and a recognized principle of international law that civilian populations cannot be made the subject of air bombing".[264] In the same tone, A. De Lapradelle, who was the only one to draw attention to the authority of the 1923 Hague Rules, argued that the Japanese government announced the above document as part of the binding international law in force in Japan ("Ce sont ces dispositions que maintenant le gouvernement japonais vient de déclarer commetant l'expression de sa propre conscience juridique"), thus recognizing the principles contained in the ILA document as reflections of the already applicable norm.[265]

263 *Ibidem*, p. 66.

264 "But the prohibition against bombardment applies in precisely the same way to open and undefended towns. When it is suggested that this prohibition is a novel idea introduced by this Committee, I would remind you that the principle was embodied in the Hague Convention and is today part of the international law that is recognised, so far as I know, by every nation. It is nothing new to say that the civilian population may not be bombarded. We are not laying down new principles of international law. In this convention we are making provision for giving effect to principles that are all admitted" – *ibidem*, p. 75.

265 *Ibidem*, p. 79.

14. ICRC Draft Convention of 1934

A joint commission of lawyers and physicians, gathering under the aegis of the International Committee of the Red Cross, adopted a draft document regulating the protection of civilians and the wounded from the effects of warfare.[266] Although the draft text is not mentioned as one constituting an element of the law of air warfare, the basic *ratio legis* of its creation was the need to separate special areas that would be excluded from the possibility of committing armed acts – including, in the first place, air bombing operations.[267] The draft document was divided into five chapters. The first one concerned defended cities. The second set out the principles of conducting humanitarian aid by non-combatants. The third one regulated the protection of prisoners of war. The fourth one referred to the protection of civilian populations. The fifth one contained sanctions for violating the provisions of the draft. The most important element of the first chapter was the creation of special protection zones excluded from any military activity (Articles 1 and 2) with the exception of military transit and industrial activity, other than the important and known armament production centers. Article 3 indicated that the status of a city should be declared to the warring party during peacetime, or alternatively after the beginning of hostilities, through diplomatic steps or through the institutions of the protecting powers. Pursuant to Article 4, the inclusion of the city in the protection zone entitles other states to protest in peacetime before the Permanent Court of International Justice, and in wartime before an international commission appointed by third states. Articles 5 and 6 specified the manner in which the inspection was to be conducted. Article 8 indicated that protection zones may also be extended to field medical facilities located near the front line, provided that, within a range of 500 meters, there are no facilities other than those permitted by the Geneva Convention, marked with appropriate signs and notified to the fighting party.

The fourth chapter of the proposal of 1934 assumed in Article 1 that the civilian population was excluded from being the object of hostilities. Article 2 provided that the civilian population included all persons who were not members of the armed forces. Article 3 defined the attitude towards civilians during an armed occupation. Article 4 is interesting on account of its specifications regarding what facilities and targets may be the object of conducting military operations. The provision included: 1) all military formations, 2) all combat means and military supplies, 3) all industrial facilities involved in the production of armaments, 4) all

266 Commission composée de membres du Comité permanent de Médecine militaire et de jurisconsultes, *Avant-projet de Convention adopté à Monaco, février 1934*, https://ihl-databases.icrc.org/fr/ihl-treaties/monaco-draft-conv-1934?activeTab= (accessed: 6.12.2020).

267 A similar concept was promoted at the 1934 Conference on Disarmament.

transport lines used for military purposes, excluding their usage for humanitarian purposes and restricted zones.[268] The provision highlighted repeatedly that civilian populations could not be the target of a war operation. In the event of military objectives being located in populated areas, the attacker would be obliged to perform the attack with considerations for the method, the effects of which would not extend beyond 500 meters from the military objective.[269] Article 5 stipulated that defended areas could be attacked using all permitted means of combat, and the combatant should make efforts to protect objects of religious worship, public utility and those protected by the provisions of the Geneva Convention. Article 6 stated that undefended built-up areas (as well as coastal areas) within which there were no military facilities might be transformed into protection zones, provided that prior notification was given. Article 8 contained a provision whereby the construction of protective measures against hostilities did not constitute a violation of the provisions of the draft, the observance of which was to be monitored by the Council of the League of Nations (Article 9). Chapter V specified the sanctions related to the violation of the draft as well as predicted the creation of independent committees (consisting of citizens of the protecting powers) handling the observation of the status of protected areas.

The 1934 draft should be considered to have been the international community's attempt to respond to the threats related to an air force's conduct of military operations in the rear of the front. This was another measure, as pointed out by A. Meyer, in addition to the attempt at completely prohibiting air bombing as well as the theory of military objective, devised to protect the civilian population from the consequences of unregulated air operations.[270] The main tool adopted by the committee in this regard was the attempt to create a new legal category, the so-called sanctuary cities, i.e. open cities that were excluded from the war zone of the adversary state, causing two-fold consequences. By declaring a certain area a protection zone, a given state could not carry out its own military activity in that area. However, the condition was to clearly state that a given locality had 1) the status of an undefended area, 2) no military objectives. This was an interesting distinction, being a kind of hybrid of the test specified in Article 25 of the Hague Regulations

268 "Peuvent faire l'objet d'un acte de guerre: 1° Toutes formations militaires autres que celles appartenant au service de santé; 2° Tout organe de combat et de ravitaillement direct des armées; 3° Tout établissement industriel employé à la fabrication d'armes, de munitions ou de fournitures militaires caractérisées; 4° Toutes lignes de communications ou de transports dont il est fait usage pour des buts militaires, hors le cas des villes sanitaires et de sécurité" – Commission composée de membres du Comité permanent de Médecine militaire et de jurisconsultes, *Avant-projet*…

269 "Dans les agglomérations où se trouvent des objectifs militaires, les moyens d'attaque des objectifs militaires situés au contact immédiat de la population devront être choisis et employés de telle manière qu'ils ne puissent étendre leurs effets au-delà d'un rayon de 500 mètres calculé à partir de la limite extérieure de ces objectifs – *ibidem*.

270 A. Meyer, *La protection*..., pp. 128–129.

of 1907 and Article 24 of the 1923 Hague Rules of Air Warfare. As a result, the area intended to be an open city had to be both a location open to potential occupation as well as a location that did not possess targets within its borders, the military value of which would justify directing an armed operation against them. The provision of Article 4 proposed its own list of military objectives of a fairly general nature, as well as introduced the obligation of a specific method of conducting air operations in a built-up area, recognizing that it was not permissible to carry out air attacks with effects exceeding a radius of 500 meters calculated from the external borders of a military target. In connection with the above, the draft represented the idea of rigidly defining the limits of indiscriminate bombing and attacks aimed at the destruction of a specific military facility, but due to technical imperfection, a margin of permissible dispersion of weapons was introduced. *Prima facie,* the regulation was not devoid of certain significant disadvantages such as, for example, allowing military transport across the area of protected cities. It also made a distinction with regard to sites located beyond the rear of the front line and those located on the front line of combat, where aviation was considered a permissible means of combat. The above distinction also suggested an implied consent of the commission members to permit carpet attacks in the event of laying siege to a city.

15. The League of Nations and the issue of air warfare

The Italian-Abyssinian war, which began in October 1935, marked one of the first serious tests of the League of Nations' ability to effectively respond to international crises related to the phenomena of aggression, intervention and civil wars that took place in the second half of the 1930s. Leaving aside the issues related to the effectiveness of the mechanisms used by the organization and the effectiveness of the then anti-war law, it should be noted that the issues of the air war conducted by the Italian air force over the territory of Ethiopia, the Japanese air force over the territory of China and the bombings taking place during the civil war in Spain were also the subjects of extensive discussion within the Council of the League of Nations and the Assembly of the League of Nations. Many of the commentaries directly concerned issues related to the law of air warfare, despite the fact that the League of Nations did not have a mandate to create international law applicable to parties in an armed conflict or to apply a binding interpretation of the *ius in bello* norms. Surprisingly, the League of Nations' achievements in this aspect are extremely rich and valuable from the perspective of a researcher, and at the same time almost completely ignored in the course of legal discussion.

The first conflict, which turned out to be a key test of the effectiveness of the League of Nations mechanisms as an institution whose goal was to ensure the cessation of aggression and war in international relations, was the Italian invasion of Ethiopia launched in 1935. Due to the glaring disproportion of forces and the quality of means used by the belligerents in the Abyssinian-Italian conflict, it should be stated with certainty that, at least in the air, this war was of an extremely asymmetrical nature. The Italian air force was used *en masse* to support the ground offensive, where events reported to the League of Nations took place. On November 16, 1935, the Ethiopian government, in an official note addressed to the Secretary-General, condemned the Italian airstrikes against undefended cities.[271] He notified of the same facts in subsequent notes of December 6, 1935.[272] On January 1, 1936, Emperor Haile Selassie in a telegram informed about the destruction of an ambulance belonging to the Red Cross by the Italian Air Force, as well as the use of combat gases as a means of bombing.[273] Due to violations of international law, Ethiopia officially applied to the League of Nations on January 3, 1936 for an independent investigation into, among others, cases of air bombing.[274] On January 6, 1936, the representative of Ethiopia once again notified the League of Nations about the continuation of airstrikes on medevac vehicles, extending the above message on January 20, 1936 with messages regarding air attacks on open cities.[275] In response to the Ethiopian government's allegations, Italy firmly denied them. On December 13, 1935, Rome informed the League of Nations that

271 "The Italian Government's 'right and capacity to fulfil a sacred trust of civilization' Ethiopia has consisted in denying its signature to the most solemn treaties, in inflicting upon the Ethiopian people a peaceful and unarmed people which was for months refused the right to prepare its defence-bombardments of undefended towns from the air, and in massacring women and children by the use, after long preparation, of thousands of tanks, machine-guns, field-guns and all the most murderous weapon" – *Statement Form the Ethiopian Government Concerning the Circular Note*, Dated November 11, 1935, Addressed by the Italian Government to All States Members or Non-Members of the League of Nations in connection with Application for Economic and Financial Measures, 16th November 1935, 17 League of Nations Official Journal 1936, vol. 15, p. 27.

272 Telegram Dated December 6, 1935, from His Majesty the Emperor of Ethiopia to the Secretary-General, C. 470.M.247.1935.VII, 17 League of Nations Official Journal 15, 1936, p. 29.

273 Telegram Dated January 1, 1936, from His Majesty the Emperor of Ethiopia to the Secretary-General, 17 League of Nations Official Journal 139, 1936, p. 242; Letter Dated January 6, 1936, from the Ethiopian Representative to the Secretary-General, 17 League of Nations Official Journal 139, 1936, p. 242; Letter Dated May 4, 1936, from the Swedish Minister for Foreign Affairs to the Secretary-General, 17 League of Nations Official Journal 564, 1936, pp. 644–646.

274 Request by the Ethiopian Government for an Impartial Enquiry into the Conduct of Hostilities, 17 League of Nations Official Journal 139, 1936, p. 240.

275 Letter Dated January 20, 1936, from the Ethiopian Representative to the Secretary-General, Transmitting a General Statement by the Ethiopian Government, 17 League of Nations Official Journal 139, 1936.

all air combat actions were directed exclusively against the concentration sites of Ethiopian troops. With regard to the air raid on one of the villages (Desje), it was reported that there were air defense centers that damaged Italian planes, questioning the undefended nature of the area. With regard to violations of the provisions of the 1929 Geneva Convention, Ethiopian troops were accused of the perfidious use of the Red Cross sign as an element intended to avert bombing by the Italian air force.[276] In a telegram of January 16, 1936, the Italian side informed about the capture of an Italian pilot Lt. Tito Minniti, who was then killed by Abyssinian troops after brutal torture.[277]

On April 9, 1936, in response to the increasing number of communications regarding the course of hostilities, the Council of the League of Nations appealed to the belligerents to take steps to comply with international agreements on how wars are conducted and the principles of international law. As part of the steps taken by the League of Nations, the ICRC was asked to submit information related to the violation of the Geneva Convention. In response, the Italian Red Cross statement of March 1936 once again denied that Italian aviation was targeting open or undefended localities, questioning the status of the inhabited area (due to the nature of building construction in Ethiopia) and stressing the fact that Italian aircraft were constantly shelled by anti-aircraft defense.[278]

This first serious international conflict after World War I (in parallel with the Japanese intervention in China) revealed the fundamental consequences of the defective construction of the norms protecting civilian populations against the effects of air bombing pursuant to Article 25 of the Hague Regulations of 1907, as well as the effects of failure to ratify the provisions rejecting the aforementioned test on the basis of the regulations being in force in the case of sieges in land war. The Italian side claimed the fact that every air attack met anti-aircraft artillery fire

276 "The Italian Government protests against the abuse of the Red Cross emblem by the Ethiopians, which has been repeatedly observed, and which subverts the whole foundation of any international Convention concluded with humanitarian objects" – *ibidem*, p. 30.

277 Letter Dated January 16, 1936, from the Italian Government to the Secretary-General, Rome, January 16, 1936.

278 "No open and undefended places were ever bombed, but only military concentrations and posts. It is common knowledge, moreover, that the so-called 'towns' in Ethiopia are mainly collections of tukuls, chiefly built of wood and mud, in these settlements, the armed men concentrated and kept up a sustained rifle and anti-aircraft fire against the Italian aircraft flying over the area. In any case, the long list of so-called towns bombed was completely imaginary Many of them do not exist, and on most of the dates given no bombing took place. In some cases, such as those of Adowa, Amba Alaji, Mai Mashish, Gondar, Dabat, Waldia, Kworam, Ashangi, Mertho and Seguerat, bombs were dropped upon concentrations of armed men outside the inhabited areas, and often some kilometres distant from them" – *Italian Red Cross Memorandum of the Italian Red Cross in Reply to the Note of the Ex-Ethiopian Red Cross*, Dated March 2, 1936, 17 League of Nations Official Journal 772, 1936, p. 778.

in response was sufficient evidence of the weakness of the adopted criterion. The second disturbing phenomenon was attacking Red Cross-marked objectives as an element of immediate retaliation resulting from accusations of the perfidious use of this protective sign. The third one was the killing of a military aircraft airman after he was captured by the local population, whereupon he was unequivocally denied the status of a prisoner of war, which, in turn, caused another retaliation in the form of launching combat gas munitions.[279]

The Italian-Abyssinian conflict was extensively commented by De Lapradelle. The author pointed out that at the time of events related to air bombing, the only provision of positive law directly related to the issue of air warfare was the convention norm resulting from Article 25 of the Hague Regulations of 1907. At the same time, the French professor, as the first researcher in the interwar period, emphasized the importance of the Italian side signing the 1923 Hague Rules of Air Warfare (this remark was made regarding the obligation to prosecute perpetrators of violations of the air warfare law).[280]

16. Resolution of the League of Nations of 1938 on aerial bombardment (Protection of Civilian Populations against Bombing from the Air in Case of War)

16.1. General remarks. The so-called Third Reich peace plan

In parallel with the ongoing armed conflict in Ethiopia, on March 31, 1936, the Third Reich, as part of the so-called peace plan (an expression of the political circles' fear of a possible response in connection with the remilitarization of the Rhineland), proposed that the future conference address the issue of air warfare in the context of the need to civilize it for the needs of greater protection of non-combatants and the wounded (through the prism of the Geneva Conventions). Hitler's plan in this regard proposed 1) prohibition of the use of gases, poisons and incendiary ammunition and 2) prohibition of the air bombing of built-up areas located beyond the line of the front determined by the range of medium-range artillery. The German

279 Analysis by the Committee of Jurists of the Documents Concerning the Conduct of the War in Ethiopia which have been Communicated to the Secretary-General of the League of Nations down to April 16, 1936, 17 League of Nations Official Journal 358, 1936, p. 365.

280 A. De Lapradelle, *La guerre italo-abyssine et le respect des lois de la guerre*, "Revue générale de droit aérien" 1936, p. 36.

proposal was in fact an attempt at short-term relaxation of the international situation around the Third Reich, linked, among others, to the organization of the 1936 Olympic Games in Berlin (it included a proposal to return to the League of Nations or to sign a 25-year non-aggression pact with France and Belgium).[281]

16.2. Air warfare in China and the League of Nations

A special reaction of the international community was caused by airstrikes against Chinese urban centers in the summer of 1937, in connection with the Japanese land invasion. On September 28, 1937, in the face of continuous bombing taking place in China, a resolution of the Assembly of the League of Nations condemned the bombing of open cities by Japanese aviation.[282] In a communication of the United States Ambassador in Tokyo to the Minister of Foreign Affairs of Japan of September 22, 1937, the ambassador recalled the Japanese government's position on the operations of its own aviation in China. According to this information, the activities of the Empire's air force were limited to military purposes only, and the subject of the Japanese government's action was not to make private property and non-combatants the direct object of an air attack.[283] The statement of the Minister of Foreign Affairs with a similar content was repeated in a note of September 29, 1937, informing about the Japanese air force conducting operations closely related to military objectives.[284] On September 27, 1937, in response to the situation in Nanjing, the State Department announced in an official press release that, according to the American government, area bombardment of a vast area inhabited by civilians, is an action contrary to humanitarian and international law.[285] In February 1938, a Chinese delegation informed about bombed cities and villages located near Canton.[286] On June 3, 1938, the Secretary of State repeated this position, recognizing the bombing of undefended cities as a barbaric method of combat, and area bombing as contrary to international law and the interests of humanity.[287]

281 D. Spingola, *The Ruling Elite*, Bloomington 2014, p. 65.

282 "The Assembly, taking into urgent consideration the question of the aerial bombardment of open towns in China by Japanese aircraft: expresses its profound distress at the loss of life caused to innocent civilians, including great numbers of women and children, as a result of such bombardments; declares that no excuse can be made for such acts, which have aroused horror and indignation throughout the world; and solemnly condemns them" – *Resolution Adopted on the Proposal of the Far-East Advisory Committee Set Up By the Assembly of February 24th 1933*, 168 League of Nations Official Journal Spec. Supp. 34, 1937.

283 *Papers Relating to the Foreign Relations of the United States*, Japan 1931–1941, vol. 1, p. 505.

284 *Ibidem*, p. 507.

285 Press Release Issued by the Department of State on September 28, 1937.

286 Letter Dated February 9, 1938, from the Chinese Delegation to the Secretary-General, 19 League of Nations Official Journal 242, 1938, p. 242.

287 Statement by the Acting Secretary of State, June 3, 1938.

16.3. Speech by Neville Chamberlain in the House of Commons on June 21, 1938

The statement of the Secretary of State of June 3, 1938 was the subject of an interpellation in the British House of Commons. In his speech on June 21, 1938, British Prime Minister Neville Chamberlain, in response to parliamentary questions on issues of international law and air bombing, indicated three elements. First of all, he argued that the norms of the law of air warfare were subject to the same rules as in the case of the land and sea warfare regime. Subsequently, international law prohibited deliberate attacks against civilians. Another principle, according to the British politician, was to limit the scope of permissible bombing only to legitimate military purposes that could be identified. A further premise was an order to exercise special care when attacking military objectives in order to limit the possibility of civilian casualties.[288]

16.4. Discussion within the Council of the League of Nations

The discussion on the situation in China and Spain provoked the reaction of the international community in the form of a general condemnation of the practices of Japanese aviation and the air forces of the Spanish nationalists.[289] On June 2, 1938, the Cuban government issued an official statement in which it protested against conducting the war in a manner inconsistent with international law and contrary to the elementary interests of humanity, in the form of unpunished air bombing of undefended cities.[290] On September 14, 1938, the Council of the

288 "I think we may say that there are, at any rate, three rules of international law or three principles of international law 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 those military objectives, so that, by carelessness, a civilian population in the neighbourhood is not bombed" – *Protection of Civilian Non-combatant Populations against Bombing from the Air in Case of War, presented by the Chairman*, 186 League of Nations Official Journal Spec. Supp. 9, 1938, p. 15.

289 *Appeal by the Spanish Government*, 19 League of Nations Official Journal 324, 1938, pp. 325–332.

290 "Entirely disapproving of the practice of some nations which, waging war by methods condemned by international law and contrary to the noblest sentiments of humanity and to every principle of civilisation, basely and with impunity bomb from the air defenceless populations and slaughter non-combatants, among whom are old men, women, and children" – *Air Bombardment of Non-Combatants*, Letter Dated June 2, 1938, from the Government of Cuba to the Secretary-General, 19 League of Nations Official Journal 637, 1938, p. 637.

League of Nations began a discussion at the request of the Spanish government of August 10, 1938 to adopt possible legal solutions for the *Protection of Civilian Populations against Bombing from the Air in Case of War*. The report presented to the attendees of the meeting at the beginning of the discussion presented the state of international law, referring to the Fourteenth Hague Declaration of 1907 and the Hague Regulations of 1907, indicating that the prohibition mentioned in Article 25 of this regulation was categorical and general. In the case of combat gases, the text of the Hague Declaration of 1899, Article 23(a) of the Hague Regulations of 1907, as well as the Geneva Protocol of 1925 were mentioned. The issue of the unanimous resolution adopted at the disarmament conference of July 23, 1932, as an element expressing *opinio iuris* of the contemporary delegations, and the resolution of the Assembly of the League of Nations of September 28, 1937[291] were also raised. Importantly, however, in both the report of the chairman and in the annex to the minutes from the meeting of the Council of the League of Nations, there was no reference to the 1923 document.

On September 14, 1938, the so-called third committee initiated a discussion on the possibility of starting work on adopting a solution that would guarantee greater protection of the civilian population in the event of aerial bombardment.[292] On September 17, 1938, a representative of the United Kingdom at a meeting of the Council of the League of Nations emphasized that despite the lack of codification of the law of air warfare in the form of positive law, His Majesty's Government was of the opinion that the adequate norms of customary law, derived from the law of land and sea warfare, had reached a degree of hardness so as to become part of international law applicable also in the case of aviation operations during armed conflict.[293] In

291 "The foregoing summary accordingly goes to show, first, the incomplete character of the positive provisions of international law on the matter and, secondly, the apprehensions of public opinion and Governments in this connection" – *Protection of the Civilian Non-combatant Populations against Bombing from the Air in Case of War…*, pp. 11–15.

292 "The problem of the bombing from the air of civilian populations has seriously occupied public opinion and Governments for a number of years; but despite various efforts-notably during the course of the Conference for the Reduction and Limitation of Armaments-the provisions of international law in this direction remain in an unsatisfactory state" – Second Meeting, September 14th 1938, *Protection of the Civilian Non-combatant Populations against Bombing from the Air in Case of War*…, p. 11

293 "It was only too true that there was at present no international code of law with respect to air warfare which was the subject of general agreement. Those humanitarian customs and usages of war on land and at sea which had grown into a body of international law had taken time to develop, and the problem now was how to extend to air warfare those same humanitarian considerations. His Majesty's Government in the United Kingdom had been giving earnest attention to this question, and, although its deliberations were not yet complete, it might be said that it regarded certain established principles of international law for land and sea warfare as applicable also to war in the air" – *Reduction and Limitation of Armaments. Protection of Civilian Non-combatant Populations against Bombing from the Air in Case of War, General Discussion (continuation)*, 186 League of Nations Official Journal Spec. Supp. 20, 1938, p. 20.

a speech given by the British Prime Minister on June 21, 1938 they were specified and adapted to the conditions of conducting air warfare. At the same time, the discussant drew attention to the problematic aspect of specifying the phrase "military objective". China's representative to the League of Nations, later a judge of the International Court of Justice, Wellington Koo, emphasized that deliberate destruction of property and killing civilians was the result of illegal air bombing. He considered it a gross violation of international law, treaty obligations, elementary principles of justice. He also recalled the violation of the provisions of the 1923 Hague Rules of Air Warfare by the Japanese side.[294] The representative of France pointed to the non-adaptation of Article 25 of the 1907 Hague Regulations to air conditions, raising the need to reactivate the idea of a new codification of international law, which would be limited to adapting the rules applicable in the context of the regime of land and sea war, recalling that the creation of international law was not the main role of the League of Nations.[295]

The Mexican government strongly condemned the practice of airstrikes against civilian targets, pointing to a similar conviction among the international community.[296] The same expectations were reported by delegations from Haiti, Hungary and the Netherlands. The Soviet Union expressed its readiness to participate in the discussion on the regulation of air operations, at the same time casting doubt on the effectiveness of the possibly developed principles and emphasizing that they did not exist at the time and would not prove effective enough in the future to protect civilian populations.[297]

One of the most interesting dilations regarding the issue of international law was presented by a Greek representative (Nikolaos Politis – one of the members of the Institute of International Law, Greek delegate to the League of Nations,

294 "M. Wellington Koo did not propose to enter into the legal aspects of the problem; it could not be overemphasised, however, that Japanese action had betrayed a total disregard for the principle of distinguishing between combatants and non-combatants – a principle the fundamental nature of which had been underlined at the 1922/23 Hague Conference by that great American authority on international law, Professor J.B. Moore" – *ibidem*, p. 21.

295 "The new international law had not yet been established, and, as the United Kingdom delegate had pointed out, 3 the old law had not attached to the question of bombing from the air such importance as had now been conferred upon it by the development of aviation and barbarous practices. The matter was dealt with in Article 25 of The Hague Convention of 1907, but inadequately, as everyone was aware" – *ibidem*, p. 22.

296 "Although the gravity of the problem was realised by all, and in spite of the urgent need for rallying the international will in order to find a solution, it had not been possible to conclude a convention for the regulation of bombing from the air. […] Unfortunately, the attempts to introduce such prohibition into an international instrument had gone no further than draft conventions" – *ibidem*, p. 23.

297 "To draw up even the most effective rules for aerial warfare was not sufficient; there still had to be some guarantee of their application in practice. No such guarantees existed at the present time; nor could they exist" – *ibidem*, p. 29.

Minister of Foreign Affairs). It concurred with the British Prime Minister's position on the illegality of airstrikes against civilian populations, tracing the origins of the prohibition to the 1907 Hague Regulations. The Greek delegate argued that Article 25 of the Hague Regulations of 1907 was based on the old, established customary law, mainly established on the basis of pragmatics, because the bombardment of an open city did not serve a military purpose but merely wasted ammunition. The author argued that the analysis of the current practice of states and the effects of air bombing in his opinion led to identical conclusions, indicating the military uselessness of air attacks against civilians. In his opinion, the global reaction confirmed the relevance of this provision to air warfare too – as evidence of the existence of international law applicable in the case of air warfare. This led to the assumption that a new law of air warfare was not required to sufficiently regulate the legal regime of air attacks.[298] At the same time, it should be acknowledged that there was a need to technically determine the scope of the permissible impact of air attacks on civilians to avoid "pretextual" bombing, and to distinguish between defended and undefended areas.[299] The Greek delegate considered that in this respect it was only permissible to remind the international community of the adequacy of the 1907 Hague Regulation.

The Spanish and, to some extent, Chinese government called on their representatives to adopt solutions that, in addition to condemning practices in the form of unrestricted air warfare, would also contribute to the creation of instruments hindering the development of aviation, including measures like the introduction of an embargo on all components necessary for the production and equipment of military aviation.[300] The Polish delegate, Tytus Komarnicki, expressed a reservation that the League of Nations should not judge the legality of certain activities related to the conduct of warfare in Spain unless they were unequivocally confirmed by an independent investigation by the bodies belonging to the organizations expressing their readiness to accept the general principles governing the

298 "There was therefore no need for a new rule of war to condemn bombing from the air. The rule already existed. It would suffice, and would be extremely useful, as a conclusion to the present discussion, for the Committee to call attention in the strongest possible terms to the existence of this rule and its necessity" – *ibidem*, p. 25.

299 "The important point was that practical regulations should be adopted to ensure respect for the rule in question, and to divest bombing from the air of civilians of all appearance of military utility, even as a pretext. The regulations should therefore be of an essentially technical nature in order to allow practical distinction to be drawn between open and other towns, between towns with military defences and those without" – *ibidem*, p. 28.

300 "[Spain] felt that it would be illogical merely to denounce once again the barbarity of the bombing from the air of civilian populations and to condemn it as contrary to humanitarian principles, while, at the same time, doing nothing to investigate every possible means of preventing recourse to such practices" – *ibidem*, p. 30.

operations of air warfare.[301] Finally, delegate Komarnicki argued that while the Polish delegation did not oppose the adoption of the recommendation, it believed that it led to the possibility of adopting differing and separate interpretations.[302]

16.5. Resolution of the Assembly of the League of Nations of 30 September 1938

On September 28, 1938, a version of the resolution on the principles of air bombing was presented to the participants of the discussion as part of the so-called third committee.[303] At the request of the Haitian delegate, the assembly considered the addition of another point regarding the obligation for states to recognize the status of special protection zones in the form of undefended open cities and medical zones whose bombing from the air was prohibited. The vast majority of delegations refused to accept the introduction of the above declaration, considering it to be a technicality (the United Kingdom, France), too general (the Soviet Union) or one that ran the risk of amibigous interpretation, potentially weakening the value of the resolution itself (Spain). In response, the Haitian representative pointed out that the prohibition of bombing of the civilian population was "indisputable provisions of positive international law". In doing so, he pointed out that any determination of which places were not to be bombed in particular should not be considered a "new norm of international law", but only a specification of the principles already existing.[304]

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301 "In his view, the rules to be laid down by the Committee should be entirely general in character. He was anxious to make it clear from the outset that he would be unable to accept any draft resolution which embodied any condemnation, however indirect, of any particular situation whatsoever since the Committee had not at its disposal information derived from impartial investigations conducted by the League of Nations" – *ibidem*, p. 31. From 1934 to 1938, Tytus Komarnicki was the representative of the Republic of Poland to the League of Nations; after 1939, he served in the diplomatic service of the Polish government in exile.

302 "The Polish delegation, while not opposing the adoption of the recommendation, made explicit reservations as to its expediency, in view more particularly of the present situation of the League of Nations. It considers that the application of this recommendation would give rise to varying interpretation" – *ibidem*, p. 33.

303 *Reduction and Limitation of Armaments and Protection of Civilian Populations against Bombing from the Air in Case of War*, Draft Report to the Assembly and Draft Resolutions and Recommendation prepared by the Drafting Committee: Examination and Adoption Sixth Meeting, Held on Wednesday, September 28, 1938, 186 League of Nations Official Journal Spec. Supp. 32, 1938, p. 32.

304 "The prohibition of the bombing of civilian populations followed from the indisputable provisions of positive international law. If, at the present time, they were being bombed, that was purely and simply a violation of the law. Taken as a whole, the treaties that had been mentioned proved that events taking place to-day were in flagrant contradiction with the rules of international law. The determination of places that were not to be bombed would not mean

A report was drawn up from the proceedings of the third committee and presented to the Assembly of the League of Nations. In this document, the public's belief in the need to limit the scope of air warfare was reaffirmed. At the same time, the aim of the submitted resolution was to confirm that the prohibition of bombing civilian populations was "an established foundation of international law, and the resolution refers to an already existing rule that should be respected by all governments."[305] On September 30, 1938, the Assembly of the League of Nations adopted a resolution entitled "Protection of Civilian Populations against Bombing from the Air in Case of War". The preamble of the resolution emphasized that the practice of not making civilian populations the subject of air bombing was an established principle of international law which should refer to detailed regulations of the principles of air warfare. The separation of these principles should be performed by the Conference on Arms Reduction, based on three assumptions: 1) prohibition of deliberate bombing of civilian populations, 2) allowing attacks only against legitimate military objectives which are identifiable, 3) attacking military objectives must be carried out in such a way as not to recklessly injure the civilian population.[306] The resolution was largely based on the assumptions contained in Prime Minister Chamberlain's statement of June 1938. This document had a non-binding dimension.[307] The Assembly

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that a new rule was being introduced into international law. There would merely be a specification, a determination, on the basis of the principle of utility and in the general interest of all the belligerents concerned, of places the bombardment of which would be of no advantage. Open towns and perhaps even great capitals would thus be saved from destruction, control being exercised by the International Red Cross" – *Reduction and Limitation of Armaments and Protection of Civilian Populations against Bombing from the Air in Case of War*, Draft Report…, p. 35.

305 *Reduction and Limitation of Armaments and Protection of Civilian Populations against Bombing from the Air in Case of War*, Report Submitted by the Third Committee to the Assembly, A.69.1938.IX, 186 League of Nations Official Journal Spec. Supp. 37, 1938, p. 46.

306 "The Assembly, Considering that on numerous occasions public opinion has expressed through the most authoritative channels its horror of the bombing of civilian populations; Considering that this practice, for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under the recognized principles of international law; […] I. Recognises the following principles as a necessary basis for any subsequent regulations (i) 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" – *Reduction and Limitation of Armaments and Protection of Civilian Populations against Bombing from the Air in Case of War*, Report Submitted…, p. 40. Also "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 neighborhood are not bombed through negligence" – F. Kalshoven, *Reflections on the Law of War: Collected Essays*, Leiden 2007, footnote 19, p. 439.

307 "The League of Nations adopted these principles in a non-binding resolution in 1938" – G. Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, "The International Lawyer" 2005, vol. 39, p. 739.

went on to recommend to the Council of the League of Nations to make efforts, in cooperation with the government of the United Kingdom, to disseminate the report of the commission of inquiry on air bombing in Spain and to make efforts to "establish an international committee that will develop a set of practices prohibited in air warfare under international law".[308]

16.6. International Fact-Finding Commission on Air bombing in Spain

The discussion at the Council of the League of Nations indicated the need to create a special commission for the investigation of facts related to air bombing cases, the findings of which should precede the proper subsumption of factual states. The above considerations coincided with the request of the Spanish government addressed to the United Kingdom and France for the establishment of a joint investigative committee, consisting of air force officers of both states, who inspected sites subjected to bombing in the areas controlled by the Republican government in the summer of 1938. On September 20, 1938, the International Fact-Finding Commission on Air bombing in Spain submitted a report on individual incidents.[309] On January 16, 1939, the second part of it was presented for the period from August to December 1938.[310] It should be noted that the investigating officers acted with meticulousness, as well as objectivity. For example, when assessing the case of the airstrike against Alicante in August 1938, attention was drawn to the "significant proximity" of civilians to military objectives, which, according to the commission, made it impossible to "unequivocally assess whether the attacks were carried out intentionally, with the intention of injuring the civilian population".[311] Individually, *per casua* retrospective analysis of the presence of targets with military significance within the locality was carried out, paying attention to transport lines, railway stations, the location of the armaments industry, war supplies, military personnel and comparing the location of the targets in relation to the places where the

308 *Protection of Civilian Populations against Bombing from the Air in Case of War: Action arising out of the Recommendation adopted by the Assembly on September 30, 1938*, 19 League of Nations Official Journal 869, 1938, pp. 881–882.

309 *Protection of Civilian Non-Combatant Populations Against Bombing from the Air in Case of War*, Letter Dated September 20, 1938, from the Spanish Minister for Foreign Affairs to the Secretary-General, Reports of the Commission for the Investigation of Air Bombardments in Spain, 186 League of Nations Official Journal Spec. Supp. 37, 1938, Annex 2, p. 38 (part I of the report).

310 *Air Bombardments in Spain*, Reports of the Commission for the Investigation of Air Bombardments in Spain, Note by Secretary-General, 20 League of Nations Official Journal 28, 1939, p. 28 (part II of the report).

311 *Ibidem*, p. 28.

bombs fell (craters).[312] On this basis, the likelihood of whether an attack has been made intentionally, erroneous or against legitimate military objectives was assessed. On the other hand, the commission also took into account the impact of weather conditions, the direction of the attack, the presence of anti-aircraft artillery, counteracting fighter aviation and possible "justified errors when directing the aircraft to the target".[313] It is worth emphasizing that the members of the commission indicated that they were not in the possession of intelligence reports, orders or reports from the attacking party and therefore their opinion was not categorical (with some exceptions when there was no reasonable explanation for bombing civilians).[314] Interestingly, according to the commission, military objectives included: 1) a military school,[315] 2) armed forces, 3) military stations – only if they were actually being used for military purposes at the time of the attack,[316] 4) military equipment depots,[317] 5) road-rail bridges.

Despite the modern format of the commission's work and the content of the recommendations resulting from the resolution of September 30, 1938 the Council of the League of Nations did not take any major action to adopt them.

17. Study by A. Henry-Coüannier

A French researcher of international law in the mid-1920s decided to conduct a specific scientific survey among theoreticians, practitioners and diplomats, asking for their opinion on the issue related to the legality of conducting air warfare. The vast majority of opinions expressed the following:

1) there was no clear difference between air bombing and artillery bombardment (Vandame, Richet, La Briere, Kuhn, Fauchille);[318]

312 Importantly, the Commission verified whether the railway stations had real military value (such as in the context of the attacks on the town of Torrevieja of August 25, 1938), *Protection of Civilian Non-Combatant Populations Against Bombing from the Air in Case of War*, Reports of the Commission…, p. 44.

313 *Air Bombardments in Spain*, Reports of the Commission for the Investigation…, p. 29.

314 *Protection of Civilian Non-Combatant Populations Against Bombing from the Air in Case of War*, Reports of the Commission…, pp. 42–43.

315 *Air Bombardments in Spain*, Reports of the Commission for the Investigation…, p. 30.

316 *Ibidem*, p. 29.

317 *Protection of Civilian Non-Combatant Populations Against Bombing From the Air in Case of War*, Reports of the Commission…, p. 40.

318 A. Henry-Coüannier, *Légitimité de la guerre aérienne. Opinions recueillies*, Paris 1925, pp. 1, 24, 30, 64–65, 118, 146–147.

2) states would not choose to outlaw an effective means of warfare such as air bombing, as had been proved by the example of World War I;[319]
3) bombardment of military objectives is also perfectly acceptable in relation to cities located far from the front line (Flandin, Roche, Bellot, La Briere);[320] De Card listed military formations, fortified areas, weapons and ammunition depots, provisioning centers and communication lines for the armed forces as military objectives;
4) air forces could carry out bombings within areas located in the zone of direct contact between land troops (understood as 15 km – determined by the range of medium-range artillery), outside this area (15–35 km) attacks could only be directed against strictly military objectives, such as: communication lines, supply routes, armed forces on the march, sites of concentrating infantry, artillery and air force, and, in the daytime, bridges and railway stations too. Beyond 35 km from the front line, air forces could operate only as part of reconnaissance (F. Allemens – one of the members of the Air Law Committee of the Association of International Law, argued that it was forbidden to attack towns with a population of more than 5,000 inhabitants at a distance of 20 miles from the front line where there were no military objectives[321], and Rollin believed that undefended cities located beyond the front line would always be defended);[322]
5) the deployment of military objectives in a deliberate manner within concentrations of civilian populations burdened the party to the conflict obliged to take the so-called passive precautions (Le Fur);[323]
6) air force operations should be based on the regime set out in the 1923 Hague Rules of Air Warfare (De La Ferronays, Gidel, Garner);[324] Cavaglieri believed that the task of the doctrine was to discuss the status of the rules extensively in order to bring them to their final approval in the form of an acceptable agreement;[325]
7) air force operations should be governed by regulations specifying the rules for conducting sea and land bombings (Blociszewski, Homborg, Rollin, Guibe, Pearce Higgins, Rolland, Hobza);[326]
8) occasional statements about the need to outlaw air warfare.[327]

319 *Ibidem*, p. 4.
320 *Ibidem*, pp. 7, 22, 46–47, 67.
321 *Ibidem*, p. 80.
322 *Ibidem*, p. 84.
323 *Ibidem*, p. 18.
324 *Ibidem*, pp. 32, 218–219, 242–244.
325 *Ibidem*, p. 86.
326 *Ibidem*, pp. 75, 77, 83–84, 101, 152–153, 162–163, 208–209.
327 *Ibidem*, p. 35, 150.

18. Attempts to ratify the 1923 Document

The planned convention covering drafts related to the use of radio and aircraft in the war was to consist of three initial articles. The 1923 Hague Rules of Air Warfare were to become annexes to the convention. The first one obliged the contracting parties to issue instructions to their own armed forces, in accordance with the annexes attached regarding the use of radio and aircraft in an armed conflict. The second one highlighted that the attached rules did not replace but complemented the existing norms of international law of war, inscribed into conventions, customs and are consistent with the conscience of the international community. The third article argued that the rules were to remain in force until July 1, 1933 and eighteen months before that date interested parties were allowed to submit a statement of intention to revise the provisions of the convention. The fourth article provides for the possibility of accession to the convention which can be enjoyed by states other than the contracting parties.

A dispatch of January 26, 1924 addressed by the US Secretary of State to the embassy in France stressed that the US government believed that the 1923 Hague Rules of Air Warfare represented "[…] a finer achievement with respect to the matters dealt with than could be anticipated from the action of any other international body, and that they mark a distinct step forward in promoting the work of international justice in time of war".[328] The manual emphasized that the ambassadors of the United States should draw the attention of the governments of the adopting states to the need to adopt a solution, stating that the United States together with the other contracting parties are ready to be bound by the proposed documents of the 1923 commission of jurists, also expressing the intention to authorize signatures on the 1923 convention containing the Hague Rules of Air Warfare.[329]

In a dispatch of April 19, 1924, the US ambassador in Tokyo received information from Japan's Minister of Foreign Affairs, Keishirō Matsui, "that the work of revising the rules of warfare promoted by the Commission of Jurists at the Hague is a matter for sincere congratulation in the interest of humanity".[330] The head of Japa-

328 "The Government of the United States is led to believe that the Rules as reported represent a finer achievement with respect to the matters dealt with than could be anticipated from the action of any other international body, and that they mark a distinct step forward in promoting the work of international justice in time of war" – *Papers Relating to the Foreign Relations of the United States*, 1925, vol. I, 700.00116/193, The Secretary of State to the Ambassador in France (Herrick).

329 "You are further directed to inform such Government that the Government of the United States is prepared, in conjunction with the several Powers mentioned above, to authorize the signature of Conventions such as those proposed" – *ibidem*.

330 *Papers Relating to the Foreign Relations of the United States*, 1925, vol. I, 700.00116/206, Enclosure – Translation, the Japanese Minister for Foreign Affairs (Matsui) to the American Ambassador (Woods), Tokyo, April 19, 1924.

nese diplomacy signaled the Japanese government's intention to be fully bound by the Hague Rules of Air Warfare, in accordance with the version of the convention proposed by the US government. This fact was reported in a dispatch of 23 April 1924 by the United States Ambassador (*The note in question sets forth the willingness of the Japanese Government to adopt the Rules relating to Aerial Warfare and the Rules relative to the Use of Radio in Time of War, prepared by the Commission of Jurists who met at the Hague from December 11, 1922, to February 19, 1923*).[331]

On July 18, 1924, the US Secretary of State asked the Ambassador in France to present the position to the French government. At the same time, the lack of response from the French side was mentioned, however, with a reminder of the positive attitude of this state towards the proposed regulation ("which this government considers highly important and a step which may have a far-reaching and beneficial effect in the future").[332] The secretary of state asked for the matter to be reintroduced to the French government, emphasizing the positive response of the Japanese side as a factor encouraging other states to adopt the convention containing the rules of 1923.[333]

On January 29, 1925, Benito Mussolini (then acting Minister of Foreign Affairs) stated in a note addressed to the United States Ambassador in Rome that the Italian government had read in detail the content of the American proposal and the text of the document drawn up by the commission of jurists.[334] It was emphasized that Italy would always support movements aimed at a humanitarian regulation of conducting hostilities. "As regards the principles involved, therefore, the Royal Italian Government would have no difficulty in acceding to the rules established in the conventions referred to."[335] At the same time, it was indicated that, due to advances in aviation and radio technology, the Italian government would like to review certain existing norms.[336]

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331 *Papers Relating to the Foreign Relations of the United States*, 1925, vol. I, 700.00116/206, The Ambassador in Japan (Woods) to the Secretary of State Tokyo, April 23, 1924.

332 *Papers Relating to the Foreign Relations of the United States*, 1925, vol. I, 700.00116/206, The Acting Secretary of State to the Ambassador in France (Herrick).

333 "The Department desires that you avail yourself of an early opportunity to bring this matter again to the attention of the Foreign Office, referring to the favorable action taken by the Government of Japan, and emphasizing this Government's sincere hope that the French Government will now find itself in a position to give an affirmative reply to the suggestion conveyed in the Department's instruction of January 26, 1924" – *Papers Relating to the Foreign Relations of the United States*, 1925, vol. I, 700.00116/206, The Acting Secretary of State to the Ambassador in France (Herrick).

334 *Papers Relating to the Foreign Relations of the United States*, 1925, vol. I, 700.00116/206, The Italian Minister of Foreign Affairs (Mussolini) to the American Ambassador (Fletcher).

335 *Ibidem*.

336 "However, in view of recent developments both in radio and in aerial navigation, and because of the progress likewise made in juridical matters, the Royal Italian Government thinks that it would be useful to review and complete the plans for conventions prepared at

On February 11, 1925, the Minister of Foreign Affairs of the Netherlands stated where the Amsterdam government stood regarding the proposed solutions. The Dutch government emphasized that, in principle, it agrees with the proposals submitted by the commission and the American side, pointing out that, during the work of the commission, the Dutch delegate postulated the introduction of the general rule of compensation for acts contrary to the 1923 Hague Rules of Air Warfare, with a jurisdiction clause referring any unresolved dispute to the mandatory jurisdiction of the Permanent Court of Arbitration in the Hague. This was approved in the general report but was not included in the main part. In the context of the regulation of air warfare, the Dutch government argued that the rules of 1923 could largely close the loopholes existing in international law and determine the development of the regulation of the law of nations in the direction desired by the international community. "For these reasons, the Netherlands Government always desirous of promoting the development of international law, would be happy to subscribe to most of the rules in question."[337] The objections raised by the Dutch government concerned the provisions on the rights of the belligerents towards neutral states, as well as the rules regarding the right to search and visit by an aircraft at sea, included in Chapter VII of the commission's work, recognizing that an aircraft should not have such a right.[338]

On March 10, 1925, the French Minister of Foreign Affairs informed the American side that the solutions of the commission of jurists partially reproduced the customary and treaty rules already contained in the 1907 regulation or the 1919 Paris Convention on the Regulation of Air Navigation or had already been adapted by the French side. In the remaining scope (the relation of

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The Hague. It might also be wise if, in connection with the control of the use of radio, there be included in the first of the conventions in question an opposite clause extending its provisions to include radiotelephonic communication, which has today assumed, as you are aware, a particular importance" – *ibidem*.

337 "[…] the Netherlands Government, always desirous of promoting the development of international law, would be happy to subscribe to most of the rules in question, and it thanks the American Government for having taken the initiative toward the conclusion of a convention which would set up these rules as provisions of law. The Netherlands Government, while still referring to the right it has reserved above to suggest modifications of form later, can agree to the greater part of the provisions of the project" – *Papers Relating to the Foreign Relations of the United States*, 1925, vol. I, 700.00116/206, The Netherlands Minister of Foreign Affairs (Karnebeek) to the American Minister (Tobin), The Hague, February 11, 1925.

338 "Her Majesty's Government cannot express its views regarding the contents of chapter VII of these rules, concerning the right of search, of capture, and of confiscation, before a new effort has been made to explain the sense, to fill the gaps, and to correct the faults thereof. Nothing justifies the extension of this right to aircraft, which constitute a new engine of war entirely different from that of a war vessel, and entirely incapable of exercising on merchant vessels or on private aircraft a control similar to that exercised by a war vessel on vessels of commerce" – *ibidem*.

the aircraft to ships and warships), they raised doubts as contrary to the basic standards of international law.[339]

The British side was the last to present its position. In a note of April 6, 1925, the HM Government indicated that the United Kingdom "has decided to await further international discussion on this question before formulating its views on the Report of The Hague Commission"[340].

Paul J. Goda indicates that in May of 1923, the Navy Secretary emphasized in a letter addressed to the Secretary of State that the 1923 draft would be treated as having a measurable practical value, regardless of whether it was to be ratified or not.[341]

18.1. Analysis of diplomatic correspondence

When assessing the statements of governments directly participating in the commission, several relevant circumstances should be noted. None of the governments directly contested the most important chapters of the 1923 Hague Rules of Air Warfare – objections in this matter were raised by the Dutch and French sides. The latter state also indicated that it considered some of the provisions of the regulation to be a kind of *superfluum* in relation to the standards of convention or customary law, as well as referring to its own legislation. However, it is difficult to look for a clear rejection of the entire Hague solutions of 1923 in the French position, when such an interpretation can be derived with regard to an extract from the correspondence related to the rights of military aircraft at sea or issues related to neutrality in air warfare. Only one state – the United Kingdom – refused to adopt an unequivocal position, without questioning the very essence of the proposed changes. Other

339 "The French Government recognizes the very deep interest which this suggestion possesses, but an examination of the rules that have been proposed has shown that most of them reproduce solutions which have already been adopted by France and included either in the International Conventions already in force, such as The Hague Convention of 1907, or amongst the practices of international law sanctioned by custom. Other proposals, furthermore, would not be without objection, because, on many points, the innovations which they imply are not in conformity with certain principles, such as the freedom of the seas, or are open to criticism from other points of view" – *Papers Relating to the Foreign Relations of the United States,* 1925, vol. I, 700.00116/206, The French Minister of Foreign Affairs (Herriot) to the American Ambassador (Herrick).

340 "I now request you to inform your Government that His Majesty's Government, while warmly appreciating the friendly and humanitarian motives which have prompted these proposals, have decided to await further international discussion on this question before formulating their considered views on the Report of The Hague Commission" – *Papers Relating to the Foreign Relations of the United States*, 1925, vol. I, 700.00116/206, The British Secretary of State for Foreign Affairs (Chamberlain) to the American Chargé (Sterling).

341 P.J. Goda, *The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War*, "Military Law Review" 1993, vol. 33, p. 97.

states participating in the commission of 1923, that is, the United States and Japan, explicitly expressed their will to be bound by the convention, including the standards of the new law of air warfare in its annexes, while Italy and the Netherlands confirmed that they agreed with the vast majority of the provisions, expressing their will to modify the content of a certain part of them – however, to the extent unrelated to the cornerstone of the regulations in the form of chapters II–IV.

There is no doubt that diplomatic correspondence can be a valid proof of *opinio iuris individualis*.[342] In a report on customary international law drawn up in 1950, the International Law Commission confirmed the special role of diplomatic correspondence as a proof of the practice pursued by states ("The diplomatic correspondence between governments must supply abundant evidence of customary international law").[343] Contemporary authors argue that the classification made by the ILC is a classic collection of sources of creating an international custom.[344] Nor should one lose sight of the fact that in the diplomatic correspondence of the state, declarations with the force of unilateral acts of a binding nature can be found (more on this in subchapter 23). However, it should be noted that within the framework of the above statements (examined both in the context of unilateral acts of the state and customary law), it is necessary to distinguish legal considerations from non-binding political declarations.[345]

From the perspective of legal positivism, however, one cannot ignore the obvious fact that none of the states ratified the 1923 rules. In addition, after the failure of the Geneva Disarmament Conference of 1932–1934, the role of the document was discussed to a lesser extent than in the 1920s, gradually agreeing to consider it as only a basic draft or a more constructive attempt at developing international law of air warfare. No serious attempt was made to ratify the document as a response of the international community to the bombing taking place in Ethiopia, Spain and China. As noted by H.S. Leroy, the awards made in the *Coenca* and *Kiriadolou* cases concerned a legal event that occurred before the introduction of the Hague Rules of Air Warfare of 1923, while the verdicts themselves were issued after the document had become circulated.[346] W. Friedman pointed out that the

342 T. Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, Cham 2017, pp. 103–104; K. Wolfke, *Custom in Present International Law*, Wrocław 1964, pp. 147–148.

343 Report of the International Law Commission to the General Assembly, *Ways and means for making the evidence of customary international law more readily available*, "Yearbook of the International Law Commission" 1950, vol. 2, p. 371, para. 71.

344 M.E. Villiger, *Customary International Law and Treaties: A Study of their Interactions and Interrelations with Special Consideration of the 1996 Vienna Convention on the Law of Treaties*, Dordrecht 1997, p. 5.

345 G. Den Dekker, *The Law of Arms Control: International Supervision and Enforcement*, Dordrecht 2001, pp. 62–63.

346 "Both of these claims arose prior to the formulation of The Hague Rules of 1923 while both decisions were pronounced following The Hague Rules of 1923" – H.S. Leroy, *Limitation*…, p. 28.

1923 rules were largely disqualified as a result of the opposite practice of states taking place in the Chinese and Spanish conflicts.[347]

It should be emphasized that the efforts of the international community, as well as, in a sense, the articulation of its voice manifested by the unanimous adoption of the resolution of the Assembly of the League of Nations of September 30, 1938, serve to demonstrate that not only scientists, publicists and scientific associations but also states recognized, at the very least, the principles set out in the above-mentioned document of the League of Nations as the rules constituting the legal foundation. As already mentioned, the mere existence of approving documentation which includes the exchange of diplomatic notes can only be proof of *opinio iuris*, which is not sufficient in the theory of customary international law. An essential element is to "measure" the practice of states – especially to analyze the impact of the 1923 rules on the internal legislation of particularly involved states (i.e., those possessing the most extensive air force in the interwar period). It should also be remembered that when further dividing the practice (*usus*) into verbal and physical elements, the mere placement of a given standard in the form of guidelines addressed to the air force may not be sufficient either if it is not accompanied by the actual dimension of practice.[348]

19. Examples of the implementation of the 1923 Hague Rules of Air Warfare into military regulations

19.1. Italy

By a royal decree of July 8, 1938, provisions defining the operating principles of the Italian armed forces in the conditions of a future armed conflict ("Approvazione dei testi della legge di guerra e della legge di neutralità") were adopted.[349] This

347 "And let us remember that the Hague Air Warfare Rules of 1923 are merely suggestions, never formally adapted, an in many ways, overtaken by developments of further seventeen years" – W. Friedmann, *International Law and the Present War*, "The Grotius Society, Problems of Peace and War" 1940, vol. 26, p. 224.

348 See the trial of Karl Doenitz before the International Military Tribunal, described in more detail in the chapter below.

349 Approvazione dei testi della legge di guerra e della legge di neutralità (Regio Decreto 8 luglio 1938 XVI, N. 1415, Pubblicato nel supplemento ordinario alla Gazzetta Ufficiale del 15 settembre 1938 XVI, N. 211).

document was analyzed by the Italian researcher R. Sandiford, who considered the legislation as an example of a direct inspiration from the solutions adopted on the basis of the 1923 draft, especially in relation to the law of aerial bombardment.[350] It was also emphasized in this respect that the Italian law was the first explicit act of recognizing the work of the commission of jurists as applicable law, which was implemented by the Italian legislator. Particularly important in this matter were the provisions of Articles 38–53 of the decree. Article 38 provided for a prohibition of attacking persons leaving an aircraft who found themselves in the situation of being shipwrecked.[351] Article 40 of the act ("bombardamento di objectivi militari") had a special normative value; it indicated that "it is permissible to attack targets whose partial or complete destruction benefits the conduct of military operations, directed in particular against armed forces, workshops, military establishments, military depots and means of transport used for the needs of the armed forces".[352] Article 41 of the act ("bombardamento di abitanti, di edifici e di fari") stipulated that "in the area of land operations and in the case of coastal towns, it is permissible to attack towns, settlements, villages and buildings if there is a sufficient presumption that the concentration of military forces there justifies the bombing".[353] A certain modification in relation to the content of the 1923 rules was the order to assess the risk to non-combatants in the process of making the decision to carry out an air attack ("an attack cannot take place, on account of the danger to which the civilian population is exposed" – "Tale facoltà non può essere esercitata, se non tenendo conto del danno, al quale viene esposta la popolazione civile"). Next, the article specified that it was permissible to destroy any radar and signaling installations, working to the advantage of the navy or air force. Article 42 of the decree contained a regulation analogous to Article 22 of the 1923 rules.[354] Interestingly, Article 46 of the regulations provided for the recognition of immunity of the so-called sanitary zones. Sandiford con-

350 "La loi italienne à pour caractéristique à l'égard de problems plus importants, tels que celui du bombardement et dé là participation de l'aéronef à la guerre maritime, qui seront considérés tout à l'heure, de s'inspirer, en grande partie, des Règles de La Haye et de proclamer des principes essentiellement pratiques pour la solution de questions déterminées" – R. Sandiford, *Évolution*…, p. 668.

351 "É lecito aprire il fuoco contro i nemici, che, fuori del caso di naufragio scendono con paracadute, isolati o in massa" – Approvazione dei testi...

352 "É lecito il bombardamento diretto contro obiettivi nemici, la cui distruzione, totale o parziale, torni a vantaggio delle operazioni militari, e, in particolare, contro le forze armate e gli accantonamenti militari, le opere e gli stabilimenti militari, le opere e gli apprestamennti militari, nonché i depositi, le officine, le installazioni, le vie e i mezzi di comunicazione atti a essere utilizzati per i bisogni delle forze armate" – *ibidem*.

353 *Ibidem*.

354 "Il bombardamento, che abbia il solo scopo di colpire la popolazione civile o di distruggere o danneggiare i beni non aventi interesse militare, é in ogni caso proibito" – *ibidem*.

sidered the above solution to be a great progress in the work on the codification of the law of air warfare.[355] Moreover, he pointed out that the Italian regulation did not distinguish between sea, air and land bombings.[356]

19.2. Japan

The Imperial Navy Department's official position issued in 1938 in response to the allegations of the League of Nations against the conduct of the Japanese air force in China emphasized that the air force of the Imperial Japanese Navy performed combat operations in accordance with the Hague Rules of Air Warfare of 1923.[357]

19.3. The United Kingdom

In 1928, the then Chief of Air Staff, Hugh Trenchard, argued that "There is no written international law as yet upon this subject, but the legality of such operation was admitted by the Commission of Jurists who drew up a draft code of rule for air warfare at The Hague in 1922–23. Although the code then drawn up has not been officially adopted it is likely to represent the practice which will be regarded as lawful in any future war".[358]

355 "Cela constitue, sans doute, un grand progrès vers une codification générale des règles pour la conduite de la guerre aérienne" – R. Sandiford, *Évolution*…, p. 669.

356 "La loi italienne sur la conduite de la guerre, par exemple, s'inspirant des principes de La Haye, ne fait pas de distinction entre les bombardements terrestres, navals ou aériens, mais elle fixe un régime différent selon que le bombardement est effectué dans la zone des opérations militaires ou en dehors" – *ibidem*, p. 671.

357 "Accordingly, the Japanese Naval Air Force has been unavoidably regulating its conduct consultation with the Draft of Rules of Aerial Warfare which was framed by a Commission of Jurists to Consider the Amendment of the Laws of War which met at The Hague in 1922–23 and in which Japan, the British Empire, the United States, France, Italy and Holland participated. The Convention Respecting Bombardment by Naval Forces in Time of War, which was signed in 1907, has also been referred to" – *Aerial Bombardment and International Law*, Publicity Bureau, Navy Department, "Tokyo Gazzette" 1938, vol. 1, p. 3; "They do reflect the only authoritative attempt to set down concisely the rules for air combat. Prior to World War II, certain nations did indicate their intent to adhere to these rules, notably Japan in 1938 in their China campaign, but by World War II their influence was minimal" – H. DeSaussure, *The Laws of Air Warfare: Are There Any?*, "International Law Lawyer" 1971, vol. 5, p. 531.

358 "As regards the question of legality, no authority would contend that it is unlawful to bomb military objectives, wherever situated. There is no written international law as yet upon this subject, but the legality of such operation was admitted by the Commission of Jurists who drew up a draft code of rule for air warfare at The Hague in 1922–23. Although the code then drawn up has not been officially adopted it is likely to represent the practice which will be regarded as lawful in any future war" – P.J. Goda, *The Protection of Civilians*…, pp. 98–99.

On August 22, 1939, the Air Ministry indicated in its instruction on sea and air bombing that the guidelines were based on "a reasonable interpretation of the 1923 rules" but could be modified further into the conflict depending on the conduct of the enemy (point 2). Point 3 of the document indicated that their content was developed together with the French side at the interdepartmental conference in April 1939. The guidelines also used a phrase characteristic of the Polish instructions of August 30, 1939, by using the paradigm of an attack only against "military objectives in the narrowest sense of this phrase", at the same time arguing that the military situation might allow for "the use of a broad definition of a military objective, in accordance with the provisions of the 1923 rules". Point 8 assumed that bombing was allowed solely against naval forces, warships, shipyards and naval equipment depots, ground forces, fortifications, barracks, airports, communication routes – provided that they were actually used for military purposes – military depots and fuel stockpiles. In addition, the instruction repeated the content of the resolution of the Assembly of the League of Nations of September 30, 1938, stating that "it is clearly illegal to recklessly bomb built-up areas without clearly locating and identifying them".[359] The detailed content of the instruction is a faithful reflection of the Polish text of the 1939 guidelines.

19.4. The Republic of Poland

Just before the outbreak of World War II, the General Inspector of the Armed Forces, Marshal Edward Śmigły-Rydz, issued an instruction to the Polish air force under the name *Guidelines for aerial bombardment*.[360] The following circumstances were stated in his order:

1) the content of the guidelines was agreed upon with Allied governments and was intended to prevent the Polish bomber aviation from taking actions contrary to international law;[361]
2) the guidelines emphasized that only military objectives could be bombed from the sea or air;[362] the guidelines gave the following as legitimate targets:

359 Air Ministry, *Instruction Governing Naval and Air Bombardments*, 22.08.1939, PRO AIR 8/283 [in:] H. M. Hanke, *Luftkrieg und Zivilbevölkerung*, Frankfurt am Main 1992, pp. 303–309.

360 Sztab Główny, L.Dz 687/Mob/S.Lotn/39, L.26/Teka. 1/Subt.5 in: H. Kujawa, *Księga lotników polskich, poległych, zmarłych i zaginionych w latach 1939–1945. Tom I. Polegli w kampanii wrześniowej, pomordowani w ZSRR i w innych okolicznościach podczas okupacji* [*Book on fallen and missing in action Polish Aviatiors in 1939-1945: Falen during September Campaing 1939, murdered in USSR and during occupation in different circumnstances*], Warszawa 1989.

361 "I present the guidelines for air bombing to be carried out. These guidelines, agreed upon with the English and French governments, are intended to prevent us from engaging in activities contrary to international law" – Sztab Główny, L.Dz 687/Mob/S.Lotn/39, L.26/Teka. 1/Subt.5 in: H. Kujawa, *Księga*…

362 For more on the concept of a military target, see point 8.1.

naval forces and their infrastructure, land forces units and fortifications, aviation and military airports with ammunition depots, communication lines, provided that there was a "reasonable assumption that they were of a military nature", sites of armaments (except for factories) and liquid fuels stockpiles;[363]

3) the guidelines prohibited attacks on civilians as contrary to international law, while ordering the identification of military facilities;[364]
4) the guidelines prohibited indiscriminate bombings that could strike both military and civilian targets simultaneously;[365]
5) the guidelines stipulated taking into account the rule of proportionality and, for example, did not allow attacks on small military units if disproportionate to the loss of civilian population;[366]
6) the guidelines introduced a strict regime of accountability for violations of the order.

A broad commentary on the above document was offered by Z. Rotocki and R. Bierzanek, who considered the instruction of August 30, 1939 addressed to the Polish bomber aviation as an example of an official government stance confirming the binding nature of the rules of air warfare in force in the years 1939–1945, established on the basis of the 1923 Hague rules.[367] It should be noted that the 1939 instruction, in fact, proposed the most restrictive theory of a military object and assumed other restrictions related to the minimization of the effects on the civilian population to a greater extent than those proposed in the draft of the commission of jurists and the resolution of the Assembly of the League of Nations of September 30, 1938.

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363 "Only the following targets, strictly military in the narrowest sense of the word, can be bombed from the sea or air" – Sztab Główny, L.Dz 687/Mob/S.Lotn/39, L.26/Teka. 1/Subt.5 in: H. Kujawa, *Księga*…

364 "The bombing of civilians is illegal under international law" – *ibidem*.

365 "The bombing should be guided by a reasonable presumption that only these facilities suffer damage and that the civilian population in the vicinity will not be bombed by oversight. It is illegal under international law to bomb areas in the hope of encountering facilities justifying this bombing, which are known to exist in such areas, but the exact place of their dislocation is not known" – *ibidem*.

366 "Small units in quarters, a military unit passing through the city, or an army located on a commercial quay (in a port) – are undoubtedly targets of a military nature, although bombing such facilities in a city could cause a disproportionate danger to the civilian population in relation to the military significance of this action, and thus would not be justified" – *ibidem*.

367 "It does not require for its better understanding an investigation into the intentions of parties and causes of its appearance, and in conformity with the passage quoted at the outset, in the opinion of Poland, it is an expression of valid regulations in the sphere of air war rights" – Z. Rotocki, *Polish Directives*…, p. 164; R. Bierzanek, *Commentary, 1923 Hague Rules*…, p. 403.

19.5. Third Reich

The guidelines of July 20, 1939 of the Minister of Aviation and the Commander-in-Chief of the Lutfwaffe (*Der Reichsminister der Luftfahrt und Oberbefehlshaber der Luftwaffe Generalstab der Luftwaffe*) entitled *Instructions For Air Warfare Commanders* (*Anweisung für die Führung des Luftkrieges auf Grund der anliegenden Thesen*), signed by W. Jeschonnek, contained an indication that they were based on the general principles of international law that apply in air warfare ("Sie berücksichtigten die allgemeinen völkerrechtlichen Grundsätze, die für den Luftkrieg Geltung haben").[368] The theses formed the basis of the rules applicable to the Luftwaffe in the event of war both in relation to the opponent as well as neutral parties ("Die Thesen derben Richtlinien für die Rückführung der Kampfhandlungen, für das Verhalten, wenn Hoheitsrechte neutralem Staate brüht werden und für die Behandlung feindlicher und neutraler Zivilluftfahrzeuge und Handelsschiffe").[369] Rule No. 19 stipulated the legality of using incendiary ammunition against enemy aircraft. Rule No. 20 indicated that an air attack is permissible only against important military objectives ("Luftangriffe sind nur gegen militärisch wichtige Ziele zulässig").[370] According to the commentary on the order, the justification for the phrase "an important military target" is the need to emphasize that only objects important from the point of view of waging war for the enemy may be subjected to destruction, e.g., elements of industrial economy. Rule No. 21 prohibited attacks on persons and objects protected by the 1929 Geneva Convention. Rule No. 22 stressed that air raids with the intention of terrorizing the civilian population and injuring non-combatants were prohibited – the commentary, however, preserved an exception in this regard, which was a decision issued by the air force commander. Rule No. 23 prohibited bombing for the sake of enforcing a contribution. Rule No. 24 introduced an obligation to observe whether an attack on a military facility caused significant losses among the civilian population which were not proportional to the military benefit achieved. In addition, it was indicated that, as part of the precautionary measures, the size, type of target and conditions prevailing during the attack should be taken into account and no strikes should be made that prevent limiting the attack to a military objective. Rule No. 25 repeated the stipulation of Article 26 of the 1907 Hague Regulations. Rule No. 26 indicated that it was legal to attack cities and settlements located on the front line, provided that there was a reasonable assumption that military concentration was a sufficient basis for bombing, given the danger to the civilian population.

368 Document 18, Obdl Anweisung zur Fuhrung des Luftkrieges, 20.07.1939 (30.09.1939) BA/MA RW 5/v.336 in: H.M. Hanke, *Luftkrieg*…, p. 297.

369 *Ibidem*, p. 298.

370 *Ibidem*, p. 299.

19.6. France

The author of this work does not know the exact content of the French documents, but it should be noted that France voted unanimously in favor of the resolution of the League of Nations of September 30, 1938, French air force officers participated in the commission's work on aerial bombardment in Spain, and the French side declared that the provisions constituting, among others, the definition of a "military objective" were in fact part of the positive law applied by the armed forces of the republic (one of the arguments against the ratification of the 1923 rules).[371] Both the British and Polish guidelines of August 1939 clearly indicate that their content was established in agreement with France.

19.7. The United States of America

When determining the position of the United States government on air bombing, some research difficulties are encountered. On the one hand, in the context of aerial bombardments in China and Spain, the official authorities of that state clearly protested against the treatment of civilians as the target of aerial operations. However, the content of military instructions is not clearly articulated in the available sources. It is worth noting that one of the most important academic texts that shaped the views of American lawyers on the laws and customs applicable in international law is the "International Law Situations" magazine, published by the Naval War College in Newport, Rhode Island from the end of the 19th century. It should be noted that this document does not officially represent the position of the United States government and ultimately cannot serve as an exclusive proof of the *opinio iuris* on a specific legal phenomenon. On the other hand, it is worth mentioning that during the interwar period, the magazine was published by an official body – a US Navy school (whose rector was a senior officer) and may be an important "signaler" of the official legal view on the use of aviation during an armed conflict. In the 1912 edition, this magazine dealing mainly with the legal aspects of conducting warfare at sea devoted part of its chapter to the use of aircraft during the war.[372] In the text, one can find the approval of the need to entitle members of balloon crews to prisoner-of-war status, as well as a commentary on Article 25 of the Hague Regulations of 1907.[373] The changes introduced at the second peace conference in The Hague in the

371 A trace of the above concept can be found in an article by R. Homburg, *Les règles de la guerre aérienne*, "Revue juridique internationale de la locomotion aerienne" 1922, vol. 6, p. 413.

372 International Law Situations with Solutions and Notes 1912, p. 56.

373 *Ibidem*, p. 58.

original text of 1899 also included the issue of conducting air operations, although they only concerned undefended areas, excluding fortified and defended ones.[374] There are no positive law norms prohibiting the use of military aviation for reconnaissance purposes or prohibiting neutral states from preventing a hostile use of their own airspace.[375] Similarly, there is no established principle that prohibits the use of aviation to bomb defended and fortified areas. The authors of the commentary were of the opinion that there were no premises that would prohibit the use of aviation as a legal combat tool, due to the similarities of naval, land and air operations, reproducing the conclusions of the Institute of International Law from 1911 in that regard.[376]

The "International Law Situations" did not address the issue of progress in the law of air warfare until 1930. The magazine argued that the aviation law of both war and peace should be normatively based on the provisions in force in naval warfare rather than in land warfare, while pointing out that a straightforward transposition of these standards, without an appropriate conversion that took into account the specificity of aviation operations, was erroneous.[377] During this period, it was believed that a ban on conducting air operations was a utopian idea, and the issue of distinguishing between a projectile fired by a land gun or a naval gun and an object dropped from an aircraft was not considered legally relevant.[378] Aviation, and in particular air bombing, was considered an act that would affect the opponent's morale, both in relation to the civilian population and the personnel of the armed forces. However, the need to stipulate this interaction within the limits of the law was addressed. The magazine, without referring in any way to the Hague Rules of Air Warfare, supported the military objective theory, recognizing that making the above classification was relatively simple, recognizing the following as military objectives: 1) naval, air, land bases, 2) warehouses and supply locations, 3) armament factories regardless of their location (coastal, on the front line or in the interior of a given state) and making a distinction based on status (defended, undefended).[379]

374 *Ibidem*, p. 59.

375 *Ibidem*, pp. 85–86.

376 *Ibidem*, p. 75.

377 „Some of the writers also properly point out that while there may be analogies these should not be regarded as anything more than analogies. To regard the laws as identic would lead to serious errors" – International Law Situations with Solutions and Notes 1930, p. 99.

378 The means of delivery of an explosive shell, whether by, aircraft or by gun, does not constitute the measure of its legality" – *ibidem*, p. 100.

379 "That aircraft may be used as an agent to weaken the civilian as well as the military morale of an enemy seems to require no proof, but in both cases this conduct must be kept within the law. Military objectives as legal objects of attack by land or naval forces, may be fairly easily classified. Objectives of the same nature must be admitted as legitimate for aircraft; e.g., military, naval, and aerial bases, supply bases, ammunition, manufactories etc." – *ibidem*, p. 103.

The 1938 edition of "International Law Studies" (later known as "International Law Situations") mentions air warfare in the legal context only when discussing the facts related to the landing of a military aircraft belonging to the combatants on neutral territory. The commentary on the right to use military aircraft during armed conflict only includes reference to the inadequacy of the defensibility test of a location in the context of the Hague Convention of 1907 and information about abandoning this criterion under the 1923 rules.[380] It should be noted that the theses referring to military necessity in the context of air operations clearly signaled the admission of another concept of a military objective, which would also take into account the impact on the civilian population and its ability to sustain the adversary's armed resistance.[381] In 1939, the "International Law Situations" argued that "there is no military advantage in bombing a civilian population, and its resistance will not be broken by the moral impact of the air force".[382]

The Manual of Rules of Land Warfare (*FM 27-10*) published in 1940 also contained instructions on the principles of aviation functioning (until the end of World War II, aviation had the status of a branch belonging to the navy or army – United States Army Air Forces, USAAF).[383] Rule 45 of the instruction adopted the content of Article 25 of the Hague Regulations of 1907, indicating that the ban on attacking undefended cities also applied to aviation. The American guidelines considered fortified locations as defended areas, as well as sites occupied or used for transit by enemy troops – in such a situation, bombing was permissible in any case, including air attacks. The content of the guidelines is, in fact, extremely laconic and refers only to the provisions set out in the framework of the Second Peace Conference in The Hague – it is worth noting that the document does not refer to the theory of a military objective at all.

20. Did the 1923 Hague Rules of Air Warfare obtain customary status before September 1, 1939?

Heinz M. Hanke pointed out that only the adoption of the 1923 rules balanced the discourse of the doctrine of international law in such a way that the draft of the commission of jurists began to be treated as the essential foundation of the law

380 International Law Situations with Solutions and Notes 1938, pp. 7, 9–11.

381 *Ibidem*, p. 7.

382 *Belligerent and Neutral Rights in Regard to Aircraft*, „International Law Situations" 1939, p. 5.

383 United States War Department, Army Judge Advocate General, *Rules of Land Warfare FM 27-10*, Washington 1940.

of air warfare.[384] According to the German author, almost every publication from the interwar period regarding aviation operations in the conditions of an armed conflict expressed a stance on the substantive legitimacy and appropriateness of the draft's provisions over the applicable rules resulting from the Hague Regulations of 1907 on the subject of Articles 22–26 of the 1923 Hague Rules of Air Warfare. The author argued that especially on the subject of Article 22 on the prohibition of terrorist bombing, there was no doubt as to the legitimacy of such a view. For the German author, the prime example of the acceptance by the international community was the confirmation of the supreme and unquestionable principles of the 1923 rules in the form of the League of Nations resolution. Many states confirmed the binding status of the document (Japan, The United Kingdom) at least on the subject of Article 22 and Article 24, para. 1 of the 1923 rules. As a result, the 1923 Hague Rules of Air Warfare, together with the accompanying approval of the legislative nature granted by states, became the *opinio iuris* and *usus* of the international community before the outbreak of World War II – the above-mentioned articles became not only an accepted standard, but also an expression of the clear need to set and uphold such a standard.[385] A similar stance is expressed by representatives of the Polish doctrine, R. Bierzanek and Z. Rotocki.[386] Some authors also argued that the 1923 rules should be treated as a document of special importance due to the fact that it was drawn up by experts authorized by governments and signed by them, which gave the draft a quasi-official character.[387] The stance similar to Hanke's was previously presented by E. Spetzler, who deemed the rules of 1923 a decisive element of the law of air warfare, giving rise to the customary norm that was in force in the interwar period as well as after World War II.[388] Moreover, in his opinion, the practice of states in the period preceding World War II did not lead to a violation of the essential basis of the above norm ("Des Luftkriegspraxis zwischen den beiden Weltkriegen labt gleichfalls eine grundsätzliche Abkehr von dem bisherigen Gewohnheitsrecht nicht erkennen wenn sie auch nicht immer ganz korrekt war"[389]). Agnieszka Jachec-Neale argues that incorporating the wording used in the content may confirm the customary status of norms in the period preceding the outbreak of World War II.[390]

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384 H.M. Hanke, *Luftkrieg*…, pp. 104–105.

385 *Ibidem*, p. 115.

386 "On the whole, one may state that the established rules of air warfare were largely based on the provisions of The Hague Regulations of 1923, which provided, in general opinion, the best attempt at codification of the principles of established rules of air warfare and a basis for a subsequence regulation of this part of operations of war" – Z. Rotocki, *Polish Directives*…, p. 162.

387 H. Meyrowitz, *Le bombardement stratégique d'après le protocole additionnel I aux Conventions de Genève*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht" 1981, vol. 41, p. 6.

388 E. Spetzler, *Luftkrieg*…, p. 156.

389 *Ibidem*, p. 221.

390 A. Jachec-Neale, *The Concept*…, p. 22.

The opposite position was expressed by A.P.V. Rogers, who indicated that no norm was developed on the basis of international customary law until 1977, which would lead to the assumption that during World War II the theory of military objective or the largely unspecified rule of proportionality applied. The British author argued that the speech of Prime Minister Chamberlain from 1938 can hardly be treated as a law, but more as an expression of hope or political game.[391] William H. Boothby emphasized that the British politician's speech was not accompanied by any elucidation of particular concepts used in the document.[392] In turn, before the war, W. Simons and M. Silbert, the authors of the ICRC's 1930 analysis on aerial bombardment, pointed to significant difficulties in assessing whether customary norms had been created under the law of aerial warfare. Silbert argued that the period of World War I in fact led to the possibility of considering the customary validity of two principles: the first, supposedly "Allied" theory of military objective, and the second "German" theory of at least indirect legitimacy of bombings intended to harm civilians. Importantly, according to the author, none of the types of air operations were unequivocally condemned, which is confirmed by M.W. Royse's observation regarding the French manual of 1922 and the American manual of the ACTS of 1926 that affirmed the possibility of specifically targeting the morale of the civilian population in a future air war. What is more, there are a significant number of authors who primarily raise the lack of ratification of the 1923 document as the basic evidence of the invalidity of the Hague Rules of Air Warfare as binding norms of international law.[393] In 1940, W. Friedmann recognized the rules of 1923 as "of course not a law, but a set of useful guidelines".[394] Such an opinion is expressed by, among others, J.M. Spaight, who after World War II expressed the view whereby "the draft remained a draft […] without any binding power".[395] At the same time, these opinions are combined with a comment indicating the reliability of the concept included in the draft, as well as the direct impact of the rules on the further development of international law (e.g., C. Greenwood, A.N. Sack).[396] Jiri Toman and Dieter Schindler argued that the rules "significantly correspond to customary law and general principles resulting from the law of war applicable to naval and land operations".[397] Hersch Lauterpacht in the 7th edition

391 A.P.V. Rogers, *The Principle of Proportionality*, [in:] H. Hensel (ed.), *The Legitimate Use of Military Force*, Aldershot 2008, pp. 195–198.

392 W.H. Boothby, *The Law of Targeting*, pp. 24–25.

393 L.C. Green, *Essays*…, p. 137.

394 W. Friedmann, *International Law*…, p. 222.

395 J.M. Spaight, *Air Power and War Rights*, London 1947, p. 42.

396 G. Greenwood, *Historical Development and Legal Basis*, [in:] D. Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflict*, Oxford 1995, p. 21; A.N. Sack, *ABC – Atomic, Biological, Chemical Warfare in International Law*, "Lawyers Guild Review" 1950, vol. 10, p. 164.

397 D. Schindler, J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, Dordrecht 1988, p. 147.

of *International Law – A Treatise* highlighted that the 1923 rules were not ratified, but "are considered relevant due to the convincing attempt to formulate the principles constituting the law of air war and will be the basic starting point for future discussions on the development of this part of international law".[398] In the case of authors publishing in the post-war period, in particular contemporary ones, opinions referring to the customary nature of the Hague Rules of Air Warfare of 1923 completely omit the aspect of a temporal outlook on the above problem.[399] It is worth noting that in the period preceding World War II, the classical theory of customary law recognized the practice of prevailing and universal repetition as its relevant element.[400]

To summarize, the evidence for the existence of both the elements of *opinio iuris* and *usus* in the context of the 1923 Hague Rules of Air Warfare are:

1) analysis of diplomatic correspondence related to the attempt to ratify the draft by the states concerned (in 1923–1925);
2) the content of declarations made by states at: the Washington Disarmament Conference (1922), the Geneva Disarmament Conference (1932–1934) and the League of Nations (Resolution of the Assembly of the League of Nations of September 30, 1938);
3) the content of guidelines, orders and instructions addressed to one's own air force by the most involved states, in the form of documents adopted by Italy (official legal act), Germany, Poland, The United Kingdom, France;
4) the content of individual declarations and declarations made by states in connection with ongoing armed conflicts (the positions of the Third Reich and the Allies in the period from 1 to 3 September 1939, the Japanese declaration of 1938);
5) raising diplomatic protests regarding violation of the rules (cf. the stance of the US Department of State concerning the operations of the Japanese aviation in China);
6) positive reception by the doctrine of international law, using documents as a base study in the work of research and scientific institutes;

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398 L. Oppenheim, H. Lauterpacht, *International Law: A Treatise*, London 1952, p. 519. In the context of the law of air bombing, Lauterpacht expressed an inconsistent position before and after World War II.

399 M.N. Schmitt, *Air Warfare*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 122.

400 "The classic cases recognizing the existence of a customary rule of international law usually identify the rule only when it is already so overwhelmingly established as to demonstrate little except that such rule does exist. Moreover, the very time that is often required for custom to be established may result in its being archaic by the time it is explicitly and formally recognized" – W.V. O'Brien, *The Law of War, Command Responsibility and Vietnam*, "Georgetown Law Journal" 1971, vol. 60, p. 610.

Evidence to the contrary is provided by:
1) the fact that the 1923 draft was not ratified and no serious attempt at its implementation into the international order[401] at a later date was made;
2) objections raised concerning part of the provisions of the document by the doctrine of international law;
3) the existence of a contrary practice of states, undermining the content of the 1923 rules (conflicts in Ethiopia, Spain and China);
4) indicating in the guidelines and official issuance of orders the relative power of the 1923 rules or considering them not as norms, but only as legal indications.

21. World War II and the state of compliance with the norms of the law of air war

21.1. President Roosevelt's declaration of September 1, 1939

On September 1, 1939, in connection with the beginning of the German invasion of Poland, President Franklin D. Roosevelt appealed to the belligerent states to cease air bombing, as well as bombing civilians and unfortified cities.[402] This appeal was answered by the Polish ambassador in Washington, J. Potocki, who emphasized that the Polish government fully shared the intentions of the President of the United States, stressing the circumstance of issuing appropriate instructions addressed to the Polish air force and the fact of the first violations committed by the German side.[403] The Chancellor of the Third Reich spoke in a similar

401 "It is highly disappointing, therefore, that the nations represented at the Hague failed absolutely to agree on any rule on one of the most important subjects before them, namely, the regulation of the use of aircraft with reference to neutral vessels in time of war" – C. Warren, *Belligerent Aircraft, Neutral Trade and Unpreparedness*, "American Journal of International Law" 1935, vol. 29, p. 202.

402 "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 of their opponents" – *An Appeal to Great Britain, France, Italy, Germany, and Poland to Refrain from Air Bombing of Civilians*, September 1, 1939, https://www.presidency.ucsb.edu/documents/appeal-great-britain-france-italy-germany-and-poland-refrain-from-air-bombing-civilians (accessed: 12.06.2025).

403 "The Polish government acknowledges with gratitude the telegram regarding the air bombing of civilian populations and unfortified population centers during the war. It expresses complete consent to the principles articulated therein and the sentiments that inspire

vein through a note from Minister Joachim von Ribbentrop, pointing out that the Luftwaffe in Poland had received orders to carry out air operations to strike military objectives ("dass Die Deutschen Luftkräfte den Befehl erhalten haben, sich bei ihren Kampfhandlungen auf militärische Objekte zu beschränken").[404] On September 3, 1939, in a joint statement, the French and English governments indicated that, in the interest of saving the civilian population as far as possible, the governments of these states issued instructions to their air forces to limit air bombing "only to military objectives to the narrowest possible extent" – thus repeating the content of the guidelines of August 1939.[405] In the same statement, the Allied side declared, among others, its will to be bound by the provisions of the London Protocol of 1936. In this note, the British and French parties also reserved the right to retaliate in the event of violations by the German side.[406] On the same day, the United States Ambassador to the Republic of Poland, A. Biddle informed about the bombing of the diplomatic mission in Konstancin near Warsaw by the German air force, pointing out that the attack was intentional.[407] On

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them. Remembering these principles, the highest military authorities in Poland issued orders to refrain from bombing open cities and similar actions that would post an immediate danger to the civilian population in the event of war" – *The response of the Polish Government to President Roosevelt's appeal on the bombing of the civilian population*, "Nasz Przegląd", September 2, 1939, p. 4; *The Polish Ambassador (Potocki) to the Secretary of State*, Foreign Relations of the United States Diplomatic Papers, 1939, General, vol. I, p. 545. The content of the Polish note was also confirmed by Ambassador A. Biddle, who was informed by the head of the Ministry of Foreign Affairs, J. Beck, about the content of Polish Air Force guidelines of August 1939: "Minister Beck in behalf of his Government wishes me to assure you that instructions have already been issued to Polish air and military forces to refrain from bombardment of unfortified cities or even military centers where such bombardment might endanger civilian population" – *The Ambassador in Poland (Biddle) to the Secretary of State*, Foreign Relations of the United States Diplomatic Papers, 1939, General, vol. I.

404 "For my own part, I already gave notice in my Reichstag speech of today that the German air force had received the order to restrict its operations to military objectives. It is a self-understood prerequisite for the maintenance of this order that opposing air forces adhere to the same rule. Adolf Hitler" – *The Chargé in Germany (Kirk) to the Secretary of State*, Foreign Relations of the United States Diplomatic Papers, 1939, General, vol. I, p. 544.

405 "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" – „Daily Telegraph", September 4, 1939.

406 S. Garrett, *The Bombing Campaign: the RAF*, [in:] I. Primoratz (ed.), *Terror from the Sky: The Bombing of German Cities in World War II*, Oxford 2010, p. 26.

407 Interestingly, in response to the bombing, the secretary of state asked the ambassador to present a report on existing military objectives, such as military factories, ammunition depots and bridges. In response, the ambassador pointed out that Konstancin is a holiday resort town with no military facilities. *The Ambassador in Poland (Biddle)*…

September 13, 1939, the German side declared that "resistance in all defended areas will be broken by all available means".[408] On October 1, 1939, the German Supreme Command of the Armed Forces (*Oberkommando des Heeres*, OKH) issued a set of international agreements in force in the event of war, placing a fragment of the 1923 Hague Rules of Air Warfare with a comment on the rules: "not formally binding, but constituting an important signpost in the further development of the law of air warfare".[409] On December 2, 1939, as a result of the saturating bombing of Helsinki on November 30, 1939, President Roosevelt declared that the United States was protesting against "deliberate bombing or shelling of the civilian population", recommending that American aircraft manufacturers suspend the supply of equipment to states that are "guilty of these practices".[410] On December 2, 1939, after the air attacks on Helsinki, Soviet Foreign Affairs Commissioner Vyacheslav Molotov responded critically to American accusations about the actions of Soviet aviation against the Finnish civilian population, claiming that they would be "contrary to the interest of the Finnish people".[411]

21.2. The only undefended city? Wieluń, 1 September 1939

The state of compatibility of the "promises" made by the German side should be compared with the realities of actual air operations. Meanwhile, on September 1, 1939, at around 4:40 a.m. – 5:40 a.m., the German attack aircraft carried out a massive airstrike against Wieluń. In the course of his previous research, the author analyzed the factual and legal status of the bombing, without finding clear military grounds justifying the destruction of the city. Wieluń as a border town located

408 "The excessive consideration shown by the German artillery and German aviators for open cities, towns and villages is based upon the prerequisite that these are not declared and made war areas by the adversaries themselves. Since the Poles without consideration of their own population reject this principle, the German armed forces will from now on break the resistance in such localities with all the means at its disposal" – *The Chargé in Germany (Kirk)*…

409 Following R. Bierzanek, *Commentary, 1923 Hague Rules*…, p. 403; see also H.Dv. 231/2 (M.Dv. 435/2, L.Dv. 64/2) Kriegsvölkerrecht-Sammlung zwischenstaatlicher Abkommen von Bedeutung für die höhere Führung.

410 F.D. Roosevelt, *Statement Discouraging the Sale of Airplanes to Belligerents who Bomb Civilians*, December 2, 1939, Foreign Relations of the United States Diplomatic Papers, 1939, p. 799.

411 "The wish of Mr. Roosevelt for the prohibition of the bombardment from airplanes of the population of the cities of Finland insofar as it is addressed to the Soviet Union is based on a misunderstanding. Soviet airplanes have not bombarded cities and do not intend to do so but have bombarded airdromes since our Government prizes the interests of the Finnish people no less than any other Government. Naturally from America, which lies at a distance of over 8000 kilometers from Finland, it is possible that this is not apparent; but none the less, a fact remains a fact" – *The Ambassador in the Soviet Union (Steinhardt) to the Secretary of State*, Foreign Relations of the United States Diplomatic Papers, 1939, General, doc. 993.

near the Polish-German border did not have much strategic or tactical significance for the plans of the German attack, whose so-called *Schwerpunkt* (breaking point) was located to the north (8th Army – moving towards Sieradz) and to the south (10th Army – moving towards Piotrków Trybunalski). As a consequence, this means that even the alleged military advantage of destroying the city's road network in an attempt to hamper the movement of the Polish Army units is extremely difficult to justify, even in the context of a prospective analysis of the events preceding the direct attack on Wieluń, where T. Wesołowski revealed German intelligence reports indicating the established position of the Volhynian Cavalry Brigade (located in fact approx. 50 km south of Wieluń) next to the town, as well as other data proving the awareness of the German side as to the low military value of the town. The failure to conduct reconnaissance immediately before the attack on the town forms aggravating circumstances for the main commander of the air raid, Wolfram von Richthofen, from the perspective of a reasonable commander standard, and a characteristic proof of the deliberate nature of the bombing was its repetition at noon, despite the reports of German airmen about not noticing enemy troops.[412]

From a legal perspective, the attack on the town raised an interesting issue related to being able to decide whether the bombing took place during a state of war or still in peacetime, significantly altering its legal qualification. A similar attempt to charge the Japanese side with the so-called crime of an unannounced attack was the indictment of the Japanese commanders of the invading fleets in Hawaii, British Malaya and Dutch India for the act of killing several thousand Allied soldiers as a result of an unannounced attack (see Chapter IV, point 11.4). Apart from the above considerations, it can be argued that, due to the circumstances – complete surprise and selecting a town, not a military base, as the target of the bombardment – the attack on Wieluń may be the only example of activating the norm of Article 25 of the Hague Regulations of 1907 during World War II.[413] Another example of air attacks of a controversial nature during the Polish campaign was the 80% destruction of the town of Sulejów on September 4–5, 1939. It should be pointed out that the recognition of city centers as a central point of targeting is one of the subjective and objective circumstances that may constitute an element of the intention to deliberately attack the civilian population. An additional element in this respect may also be the lack of any efforts or "active precautions" – as Hanke noted in his analysis of the airstrike by Condor Legion against Guernica on April 27, 1937.[414]

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412 See: M. Piątkowski, *Wieluń – 1 IX 1939 r. Bombardowanie miasta a międzynarodowe prawo konfliktów zbrojnych* [*Wieluń – 1 IX 1939 r. – Bombing of a Town and the International Law of Armed Conflicts*], "Wojskowy Przegląd Prawniczy" 2013, vol. 2.

413 It should be noted that this assessment may be undermined, for example, by the presence of Polish fighter aviation in the area of the Łódź Army operations (III/6 Fighter Squadron of the 6th Air Regiment). The above example reflects the inadequacy of the test set out under Article 25 of the 1907 Hague Regulations in relation to air operations.

414 H.M. Hanke, *Luftkrieg*…, p. 146.

A forgotten, yet special, case of an air attack of a terrorist nature was the one carried out on April 6–8 1941 by the "architects" of the bombing of Wieluń (W. von Richthofen and A. Löhr), as part of Operation "Strafgericht" (*Retaliation*) involving a mass airstrike on Belgrade, as a form of retaliation for the anti-German putsch in Yugoslavia and the withdrawal of this state from its alliance with the Axis. On April 4, 1941, the Yugoslav government issued an appeal, in which it declared the city open (despite the presence of fighter aircraft units around the capital).[415] On April 6, 1941, simultaneously with crossing the state border, approx. 300 German planes attacked the city, causing widespread destruction of government and residential districts and inflicting casualties on the civilian population.

21.3. Erosion of *opinio iuris* and the beginning of total air warfare

On September 15, 1939, the Chief of the Air Staff in the manual *Plans of Attack on the German Defense Industry* indicated that the Hague Rules of Air Warfare had the value of a practical signpost, which would be the basis for assessing the legality of various forms of air attack ("In addition, a considerable measure of practical guidance is afforded by the Draft Hague Rules, which go a considerable way in providing a basis upon which to judge the legality of the various forms of air actions").[416] Article 24 paras. 1–3 was considered to be defective regarding the extent to which they limited the possibility of airstrikes only against known armaments production or specific military supply centers. The fact that the 1923 rules "were drafted 17 years ago, before the implications of modern air warfare had been carefully considered or understood".[417] According to the British institution, this did not include the possibility of attacking fuel production plants and smelters located in the Ruhr area. However, it was argued that, undoubtedly, the destruction of objects in this category was legitimate in the light of the provisions of Article 24, para. 1 of the 1923 rules and conveyed a clear military advantage. Importantly, the rules indicated that HM Government did not intend to withdraw from the statements made in the public forum in the first week of September 1939, but the conduct of the German side during the air campaign

415 The composition of the Yugoslavia's air force was rather exotic, as at the time of the invasion of the Axis states in April 1941 it included fighter aircraft of British production (Hawker Hurricane Mk I in the number of approx. 40), German production (delivery of approx. 70 Messerschmitt Bf 109E-type fighters), as well as successful machines of their own design (Rogožarski IK-3). Interestingly, some types were built under license; due to the changing supply situation, for example, a German airframe equipped with French engines or Hawker Hurricane fighters equipped with German DB 601 engines were built.

416 Chief of Air Staff, *Plans For Attack on German War Industry*, 15.09.1939, PRO AIR 8/283 in: H.M. Hanke, *Luftkrieg*…, pp. 290–296.

417 *Ibidem*, p. 295.

in Poland "exempts His Royal Majesty's Government from further compliance with the provisions indicated therein".

On July 9, 1941, the RAF Bomber Command staff issued a directive, under which it was determined that "the weakest link in the enemy's economic and political system is the morale of the civilian population". Therefore, the new task of the air force should be "the destruction of enemy morale, including the working class".[418]

On February 14, 1942, as a result of the submission of Lindemann's plan and as a result of Arthur Harris taking command of Bomber Command, the Air Staff issued the so-called Area Bombing Directive.[419] Significantly, the main objective of the directive was "the removal of all restrictions related to the use of force" and the concentration of "[…] attacks on the morale of the enemy civilian population, especially workers. In the case of Berlin, harassing attacks to maintain fear of raids […]".[420] The following day, in correspondence addressed to N. Bottomley, the Chief of the Air Staff, C. Portal (one of the coordinators of the combined bombing offensive) indicated that "[…] it is clear that the aiming points will be the built-up areas, and not, for instance, the dockyards or aircraft factories".[421] A distinction was made in the guidelines between priority targets – such as the Ruhr area, and alternative ones, located in the northern and central Germany, directly indicating larger urban centers as targets intended for attack.

On April 14, 1942, impressed by the devastating attack of the RAF Bomber Command on Lübeck, Hitler issued an order to launch retaliatory airstrikes (*Vergeltungsangriffe*) against the British Isles, demanding that the Luftwaffe attacks affect the civilian population to the greatest possible extent, indicating that cultural centers, recreational places and clusters of civilians should also be targetted, thus authorizing the so-called Baedeker airstrikes.[422] On December 30, 1943, Hermann Goering issued guidelines regarding the Operation "Steinbock", indicating the need to carry out "retaliatory attacks against cities with the use of incendiary weapons in response to terrorist enemy airstrikes".[423]

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418 D. Johnson, *Rights*…, pp. 48–49.

419 Area Bombing Directive, February 14, 1942, S.46386/111 in: A. Harris, *Despatch on War Operations, 23rd February, 1942, to 8th May, 1945*, London 1995.

420 *Ibidem*, p. 192.

421 I. Primoratz, *Terror from the Sky*, Oxford 2014, p. 127.

422 The raids took their name from the creator of a popular tourist guide to The United Kingdom and were intended to signify that the Luftwaffe was in fact guided solely by the cultural and social significance of the locality (e.g., Canterbury, Exter, York cathedrals) in its choice of targets, ignoring military considerations. B. Von Benda-Beckman, *A German Catastrophe?: German Historians and the Allied Bombing*, Amsterdam 2010, p. 59. The author rightly notes that the German side justified the airstrikes against the British Isles as acts of retaliation, considering the bombing carried out by the Allies as a mere tool of terror.

423 "Ich habe mich zur Vergeltung gegen die zunehmenden Terrorangriffe des Gegners entschlossen, den Luftkrieg gegen die englische Insel durch zusammengefasste Schläge gegen Städte (besonders Industrieziele und Hafenzentren) zu verstärken" – E. Stilla, *Die Luftwaffe im Kampf um die Luftherrschaft*, Bonn 2005, p. 151.

21.4. Affirmation of unlimited air warfare

On April 29, 1942, the British Air Ministry issued a directive limiting the scope of permissible destruction outlined in the directive of February 14, 1942, concerning areas under German occupation (France, Belgium, and the Netherlands). According to the document, air attacks should be limited to military objectives only, and commanders should be required to take necessary and specific precautionary measures to avoid civilian casualties. In addition, in the event of a risk of losses among non-combatants, there was an obligation to discontinue a given air operation. Above all, intentional attacks against civilians were prohibited.[424] However, this directive did not apply to the territory of the Third Reich and Italy, for which the British leadership deemed it appropriate to continue implementing the guidelines of February 14, 1942, directive in full, due to the unrestricted air warfare conducted by the air forces of these states.[425] The only regulations that could apply in this regard should be those of the 1929 Geneva Convention.[426] On May 7, 1942, the U.S. War Department issued a decision to cease compliance with the provisions of the XIV Hague Declaration of 1907.[427]

On February 4, 1943, the Allied Combined Air Staff issued the so-called Casablanca Directive, outlining the main principles of the so-called Combined Strategic Offensive. The document emphasized that British and American air strikes would primarily focus on U-boat shipyards, aircraft factories, transportation networks, and fuel infrastructure, aiming to cripple Germany's military, industrial, and economic capacity to wage war. It was emphasized that, ultimately, these actions were intended to undermine the morale of the German population and,

424 "Bombardment was to be confined to military objectives. The intentional bombardment of civilian population, as such, was forbidden. It must be possible to identify the objective. The attack must be made with reasonable care to avoid undue loss of civilian life in the vicinity of the target, and if any doubt existed as to the possibility of accurate bombing or if a large error would involve the risk of serious damage to a populated area no attack was to be made. The provisions of Red Cross conventions were, of course, to be observed. Military objectives were defined broadly to include any sort of industrial, power, or transportation facility essential to military activity" – Annex IV, British Directive of October 29, 1942, on the subject of Air Warfare, p. 163.

425 H. Boog, *The Strategic Air War in Europe and Air Defence of the Reich, 1943–1944*, [in:] *idem* (ed.), *Germany and the Second World War: The Strategic Air War in Europe and the War in the West and East Asia 1943–1944/5*, Oxford 2006, p. 31.

426 "In conclusion, the directive stressed that none of the foregoing rules should apply in the conduct of air warfare against German, Italian, or Japanese territory, except that the provisions of Red Cross Conventions were still to be observed, for consequent upon the enemy's adoption of a campaign of unrestricted air warfare, the Cabinet have authorized a bombing policy which includes the attack on enemy morale" – Annex, IRCC, *Draft Rules For the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, Geneva 1956, p. 163.

427 W. Fratcher, *The New Law of Land Warfare*, "Missouri Law Review" 1957, vol. 22, p. 148.

consequently, reduce their capacity to resist Allied actions.[428] The orders set by the directive remained in effect until April 19, 1944, when new orders were implemented, redirecting the objectives of strategic aviation in preparation for the Normandy invasion. As part of these objectives, large-scale bombings of transportation routes across France were initiated, which, in the period leading up to D-Day, resulted in significant civilian casualties.[429]

During the invasion itself, the bombing of the area of Saint-Lô was particularly violent, where during Operation "Cobra" approx. 3,000 medium and heavy bombers of the 8th Army of the USAAF attacked the city and German positions, contributing to the destruction of approx. 3/4 of the urban area. Significantly, the so-called *Panzer Lehr* Division, which was defending the area, largely escaped the effects of the bombing. A similar attack struck the city of Caen, where approx. 10,000 civilians were killed. However, it is important to remember that most of the attacks targeted areas within active combat zones, and some of the losses were caused by the deliberate use of the French civilian population by the German side. This should be taken into account in the legal analysis of the events from June to September 1944.

In February 1944, the British Parliament debated over an inquiry by the Bishop of Chichester, who called on His Majesty's Government to take a position on the bombing of urban areas by the Royal Air Force, with particular emphasis on the situation of the civilian population in those areas. During the discussion, reference was made to the stance of the French and British governments in September 1939, which demonstrated their intent to adhere to the doctrine of military objectives in its narrowest sense, while reserving the right to carry out retaliatory attacks in the event of repeated German violations.[430] It was also noted that this assumption originated from the belief that the instructions were compatible with international law, pointing directly to the content of Articles 22–24 of the 1923

428 "Your Primary object will be the progressive destruction and dislocation of the German military, industrial, and economic system, and the undermining of the morale of the German people to a point where their capacity for armed resistance is fatally weakened" – The Bomber Offensive from the United Kingdom Memorandum C.C.S. 166/1/D by the Combined Chiefs of Staff, January 21, 1943. "Primarily the progressive destruction and dislocation of the German military, industrial and economic systems and the undermining of the morale of the German people to a point where their capacity for armed resistance is fatally weakened. Every opportunity to be taken to attack Germany by day to destroy objectives that are unsuitable for night attack, to sustain continuous pressure on German morale, to impose heavy losses on German day fighter force and to conserve German fighter force away from the Russian and Mediterranean theatres of war" – RAF, Bomber Command, Casablanca Directive, February 4, 1943, C. S 16536.S.46368 A. C. A. S Ops.

429 See more: A. Knapp, C. Baldoli, *Forgotten Blitzes. France and Italy under Allied Air Attack, 1940–1945*, London 2012.

430 "But the point which I wish to establish at this moment is that in entering the war there was no doubt in the Government's mind that the distinction between military and non-military objectives was real" – *Bombing Policy*, HL Deb, February 9, 1944, vol. 130, s. 737–755.

Hague Rules of Air Warfare and recognizing this document as particularly valuable due to the authority of the experts preparing it.[431] Acknowledging that the practice of carpet bombing was initially introduced by the Luftwaffe and recognizing that some civilian casualties are unavoidable, it was pointed out that recent air raids carried out by Bomber Command had resulted in the deaths of a significant number of non-combatants and the destruction of resources of valuable historical and cultural significance, deeming these actions unjustified.[432] In response to these accusations, a representative of His Majesty's Government stated that the British actions were retaliatory, linked to attacks on cities in Poland and the Netherlands, which had occurred before direct strikes on the British Isles.[433] Attacks on German towns were considered a necessary evil; however, they deliberately targeted administrative centers, industry, ports, and transportation lines.[434] It was also pointed out that almost all of the armaments production was dispersed all over the area of a number of localities.[435] The government also referred to the doctrine of reprisals in a *sensu largo*, considering the bombings a justified act of retaliation for the crimes committed by the Third Reich's regime.[436] Significantly, no wording referring to international law was ever included in the statements of the government.

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431 "Further, that this distinction is based on fundamental principles accepted by civilized nations is clear from the authorities in International Law. I give one instance the weight of which will hardly be denied. The Washington Conference on Limitation of Armaments in 1922 appointed a Commission of Jurists to draw up a code of rules about aerial warfare. It did not become an international convention, yet great weight should be attached to that code on account of its authors" – *ibidem*.

432 "It is said that 74,000 persons have been killed and that 3,000,000 are already homeless. The policy is obliteration, openly acknowledged. That is not a justifiable act of war" – *ibidem*.

433 "As your Lordships know, the Royal Air Force has never indulged in pure terror raids, in what used to be known as Baedeker raids of the kind which the Luftwaffe indulged in at one time on this state. Nor, as indeed the right reverend Prelate himself recognized, did we start raids on enemy cities. The city of Rotterdam and the city of Warsaw were destroyed by the Germans before a single British bomb ever fell upon German soil" – *ibidem*.

434 "The targets which have been attacked are the administrative centres, the great industrial towns, the ports and the centres of communication. These targets have been chosen with the definite object of making it more difficult for Germany and her Allies to carry on war" – *ibidem*.

435 "They are all war targets of the very first importance. In addition, there are numbers of smaller enterprises scattered broadcast throughout the city. Every garage is transformed into a factory for the production of war material" – *ibidem*.

436 "Do ask the right reverend Prelate and other noble Lords not only to think of the Germans who are suffering from these raids, but to think also of the Russians and the Poles and the Czechs, the Dutch, the Belgians, the Norwegians, the Yugoslavs, the Greeks, the French and the Danes who are at present enduring intolerable anguish at the hands of the Armies of the Axis. Every day, appalling stories flow in from the occupied states of men, women and children who are being starved, subjected to fiendish tortures, mental and physical, at the hands of the German Secret Police, who are being slaughtered in droves" – *ibidem*.

22. Reprisals in air warfare as a justification for total air war

The doctrine of international law distinguishes between countermeasures that occur in peacetime and so-called belligerent reprisals, which apply during an ongoing armed conflict.[437] Traditionally, in an era without international judiciary mechanisms, reprisals were considered the only means of coercion aimed at compelling the opposing party to comply with international law.[438] Article 27 of the so-called Lieber Code of 1863, which was in force in the United States Army during the Civil War, stated that "in certain circumstances, a belligerent cannot respond to the enemy's violation of the law in any other way than by repeating his barbarous act". Ingrid Detter de Lupis Frankopan argues that within the framework of the doctrine of reprisals, a distinction should be made between reprisals between combatants (such as an act by an occupying power in retaliation for resistance activities) and reprisals between states.[439] However, F. Kalshoven disagrees with this view, arguing that, in essence, there are no significant differences between the two concepts.[440] This allows for a reference to the fundamental framework of reprisals as established in international public law.[441]

The classical concept for assessing the legality of reprisals was expressed in the 1928 *Naulilaa* case (Portugal v. Germany) and was based on the following premises: 1) the need for a prior act violating international law, 2) the issuance of a prior demand that was not satisfied, 3) the requirement that there be proportionality

437 "A reprisal may be defined as a retaliatory measure, normally contrary to international law, taken by one party to a conflict with the specific purpose of making an opponent desist from particular actions violating international law" – A. Roberts, *The Laws of War: Problems of Implementation in Contemporary Armed Conflict*, "Duke Comparative Journal of International Law" 1995, vol. 6, p. 19. "First, reprisals are reactive sanctions. Defined simply, reprisals are violations of international law undertaken in response to unauthorized violations by another subject of international law. Breach of a binding rule is an absolute prerequisite to legitimate reprisal under nearly all conceptions of the practice. Reprisal also requires a degree of privity between parties. Generally, legitimate reprisals must be in response to breaches which have adversely affected the state in question" – S. Watts, *Reciprocity and the Law of War*, "Harvard International Law Journal" 2009, vol. 50, p. 382.

438 G. Simpson, *The Nature of International Law*, Aldershot 2001, p. 20; E. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application*, Dordrecht 1992, p. 130. See more: R. Bierzanek, *Reprisals as a Means of Enforcing the Laws of Warfare: The Old and the New Law*, [in:] A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Naples 1976, pp. 232–278.

439 I. Detter de Lupis Frankopan, *The Law of War*, Cambridge 1987, p. 300.

440 F. Kalshoven, *Reflections*…, p. 787.

441 S. Darcy, *The Evolution of the Law of Belligerent Reprisals*, "Military Law Review" 2003, vol. 175, p. 185.

between the initial violation and the reprisals undertaken.[442] The doctrine of international law has defined the above concept in further detail:

1) the requirement of a prior violation of a given norm of international law, which must be continuous and repeated – however, a single serious violation may be a sufficient reason;[443]
2) the act of reprisals must have a clear coercive motive;[444]
3) the act must be proportionate to the extent of the violation;[445]
4) the act must be a last resort, meaning it should be undertaken only after all non-forceful means of compelling the opposing party to comply with international law have been exhausted, unless such efforts are clearly unnecessary.[446]

The above concept can be referred to as reprisals *sensu stricto*, in which retaliatory measures fall within the limits of the paradigms of proportionality and necessity and therefore possess legitimacy under international law.[447] The use of retaliatory measures in the context of air warfare already took place during World War I, when, among others, on July 22, 1916, in response to German bombing, the French air force attacked targets in Karlsruhe. In the interwar period, the doctrine of international law drew attention to the danger of unlimited air warfare justified by the elaborately developed concept of reprisals.[448] During World War II, the British air strikes against Germany in the summer of 1940 were, *sensu stricto*, reprisals. On August 13, 1940, under the so-called *Adlertag*, the German air force launched a massive, coordinated attack on bases, airfields, and radar stations, followed by strikes on RAF fighter aircraft production sites in southern England. This phase of the campaign is considered critical to the outcome of the battle, since as a result of the adversary's actions, the number of available fighter aircrafts (approx. 400 aircraft downed compared to only 270 produced) and the personnel of British squadrons decreased drastically (from 23 to 16 pilots).[449] It is believed that if the air strikes had continued for another two to three weeks, the RAF would have been deprived of its personnel reserves.[450] However, on the night

442 *Naulilaa Incident (Portugal v. Germany)*, Arbitral Tribunal, 31 July 1928, 2 RIAA 1011.
443 A.D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, "Military Law Review" 2001, vol. 170, p. 159.
444 H.M. Hanke, *Luftkrieg*…, p. 47.
445 H.S. Levie, *Combat Restraints*, "Naval War College Review" 1977, p. 204.
446 Y. Dinstein, *The Conduct of Hostilities*…, p. 221; E. Kwakwa, *Belligerent Reprisals in the Law of Armed Conflict*, "Stanford Journal of International Law" 1990, vol. 27, pp. 51–52.
447 M.C. Bristol, *The Laws of War and Belligerent Reprisals against Enemy Civilian Populations*, "Air Force Law Review" 1979, vol. 21, pp. 412 ff.
448 E. Reisch, *L'Aviation de represailles*, "Revue générale de droit aérien" 1934, p. 765.
449 The high level of losses was a factor that mobilized Fighter Command to allow Polish and Czechoslovak air units to operate.
450 J.F. O'Connell, *The Effectiveness of Airpower in the 20th Century: Part Two (1939–1945)*, Lincoln 2002, p. 26.

of August 24, 1940, as a result of a navigation error, 170 Heinkel He-111 bombers attacked London, confusing it with an aircraft factory in Rochester. The German attack prompted an immediate reaction from the British side. On the night of August 25 to 26, 1940, approx. 80 British bombers appeared over Berlin, attacking it every night thereafter. In response, Hitler ordered an attack on London as a reprisal, aiming to force the city's civilian population to evacuate and to block the roads.[451] On September 7, 1940, approx. 320 bombers escorted by approx. 600 fighters started a campaign called the *Blitz* against the capital of the United Kingdom. At the same time, from that day onward, the intensity of German attacks on airfields in southern England decreased. After September 7, 1940, losses never exceeded the rate of replenishment, allowing the RAF to reorganize and prevent the Luftwaffe from achieving air superiority. The decision of the senior military leadership of the Third Reich to attack London is recognized as a turning point in the battle for Britain.[452]

The concept of reprisals in the *strict sense* can potentially be extended to retaliatory acts related to air attacks not only against the British Isles but also in response to actions carried out in Poland, the Netherlands, Norway, and the former Yugoslavia. Even if this doctrine is considered justified, it should be noted that, in relation to these acts, there are limits beyond which the extension exceeds the limits of proportionality. The aerial bombing carried out by the Allied side in the later period of World War II had little to do with the classic view of reprisals stemming from Naulilla's ruling. The view above can be illustrated with the data on the tonnage of bombs dropped on Great Britain and Germany during various periods of the war. Between 1940 and 1941, approx. 60,000 tons of bombs were dropped (with nearly half targeting urban centers), and between 1942 and 1945, around 15,000 tons of bombs were dropped on the British Isles alone.[453] For comparison, only against the capital of the Third Reich, approx. 70,000 tons of bombs were used, which is almost 80% of the total payloads dropped by the German side during the entire war.[454] In total approx. 533,000 tons of bombs were aimed at urban centers.[455] Only during 1944, RAF bombers dropped approx. 676,000 tons of bombs – 6 times more than the Luftwaffe compared to Britain during the entire war.[456] The overall ratio of Allied and German bomb tonnage was 36:1.[457]

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451 P.M. Regan, *International Law and the Naval Commander*, "US Naval Institute Proceedings" 1981, p. 100.

452 J. Foremann, *Fighter Command Air Combat Claims 1939–1945*, Walton on Thames 2003, p. 207.

453 V. Brittain, *One Voice: Pacifist Writings from the Second World War*, New York 2005, p. 115.

454 J.P. Harrison, *History's Heaviest Bombing*, [in:] J. Werner, L.D. Huynhm (eds.), *The Vietnam War: Vietnamese and American Perspective*, Oxon 2015, p. 133.

455 J. Brauer, H. van Tuyll, *Castles, Battles and Bombs. How Economics Explains Military History*, Chicago 2009, p. 197.

456 J.F. O'Connell, *The Effectiveness*…, p. 76.

457 Not including German tonnage dropped over built-up areas over Poland, Belgium, the Netherlands, France, Norway and the USSR (no data available).

In the context of the concept of reprisals, it is even more difficult to assess proportionality given the scale of U.S. Air Force operations against Japan, even when considering the previous actions of the Japanese Air Force in China during the 1930s.

The Allied leadership quickly crossed the line between reprisals *sensu stricto* and *sensu largo.* This was openly admitted by His Majesty's Prime Minister in a radio address on May 10, 1942, saying: "We are in a position to carry into Germany many times the tonnage of high explosives which he can send here".[458] Thus, he indicated that the Allied war practice would not be in any way related to the activities of the German air force but would pursue its own goal instead.[459] In the area of reprisals *sensu largo*, the bombing of Germany by the Allied air force was an expression of retaliation as a response to the general criminality of the German extermination system. It was also a response not only to war crimes, in the form of indiscriminate air attacks that targeted civilian populations, but also to other crimes committed by the Axis powers in the occupied territories.[460] Searching for traces of legal considerations justifying the concept of reprisals *sensu largo* among the military-political leadership of the Allies, particularly with regard to W. Churchill and A. Harris, does not appear to be necessary. This is in fact confirmed by the application of the double standard of bombing rules to the Third Reich and the occupied territories (see point 21.4).[461] The British leader considered the air strikes as Britain's contribution to the final victory over Hitlerism, as the only possibility of effectively influencing German society.[462] As part of this struggle, grounded in purely axiological considerations, the political and social system of the Third Reich, in the view of the head of the HMG government, was

458 *Prime Minister Winston Churchill's Broadcast Report on the War*, 1942, http://www.ibiblio.org/pha/policy/1942/1942-05-10a.html (accessed: 8.12.2020).

459 "In those days he used to boast that for every ton of bombs we dropped on Germany he would drop ten times, or even a hundred times, as many on Britain. Those were his words and that was his belief. Indeed, for a time we had to suffer very severely from his vastly superior strength and utter ruthlessness. But now it is the other way round. We are in a position to carry into Germany many times the tonnage of high explosives which he can send here. And this proportion will increase all the Summer, all the Autumn, all the Winter, all the Spring, and all the Summer, and so on till the end" – Excerpt from W. Churchill's radio speech of 10 May 1942 on the war situation, see: *Prime Minister Winston Churchill's Broadcast…*

460 See an interesting example of S.E. Nahlik, *From Reprisals to Individual Penal Responsibility*, [in:] A. Delissen, G.J. Tanja (eds.), *Humanitarian Law of Armed Conflict Challenges Ahead. Essays in Honour of Frits Kalshoven*, Leiden 1991, p. 173.

461 R. Wayne Gehring, *Protection of Civilian Infrastructures*, "Law and Contemporary Problems" 1978, vol. 42, p. 103.

462 See more: C. Harmon, *Are We Beasts? Churchill and The Moral Question of World War II "Area Bombing", S. Garrett, Political Leadership and "Dirty Hands": Winston Churchill and the City Bombing of Germany*, [in:] C. Nolan (ed.), *Ethics and Statecraft: The Moral Dimension of International Affairs*, Santa Barbara 2015, p. 32.

likened to a vast criminal organization.[463] This view was emphasized in a radio address on May 10, 1942, in which Churchill stated that "The civil population of Germany have, however, an easy way to escape from these severities. All they have to do is to leave the cites where munition work is being carried on, abandon their work and go out into the fields and watch the home fires burning from a distance".[464] German society participated in the criminal activities of Nazism directly, e.g. through military service, as well as indirectly, by performing work for the purposes of war.[465] Both categories were treated as acceptable air offensive targets. It is difficult to clearly determine whether Churchill ignored the presence of a third group of people (e.g. the elderly, children and adolescents) who could not effectively influence the functioning of the Third Reich in any way, or whether, being aware of its existence, he considered it as collateral damage, which had to be accepted in the name of defeating the criminal system as part of a so-called supreme emergency.[466] James M. Spaight formulates a more decisive conclusion

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463 See more: M. Walzer, *Wojny sprawiedliwe i niesprawiedliwe. Rozważania natury moralnej z uwzględnieniem przykładów historycznych* [*Just and Unjust Wars*], Warszawa 2010. An interesting example of Churchill's attitude towards the bombing of Coventry in 1940: A. D'Amato, *Legal and Moral Dimensions of Churchill's Failure to Warn*, "Cardozo Law Review" 1998, vol. 20, pp. 561 ff.

464 "We have a long list of German cities in which the vital industries of the German war machine are established. All these it will be our stern duty to deal with as we have already dealt with Luebeck, with Rostock and half a dozen important bases. The civil population of Germany have, however, an easy way to escape from these severities. All they have to do is to leave the cites where munition work is being carried on, abandon their work and go out into the fields and watch the home fires burning from a distance. In this way they may find time for meditation and repentance. There they may remember the millions of Russian women and children they have driven out to perish in the snows and the mass executions of peasantry and prisoners of war which in varying scale they are inflicting upon so many of the ancient and famous peoples of Europe" – *Prime Minister Winston Churchill's Broadcast*…; A. D'Amato, *Legal and Moral*…

465 See the content of the letter from Gen. Ira Eaker from 1979, in which he justified American air operations during the Second World War. P. Faber, *The Development of US Strategic Bombing Doctrine in the Interwar Years: Moral and Legal?*, "The United States Air Force Academy Journal of Legal Studies" 1996–1997, vol. 7, p. 123.

466 "In other words, there exists a very strong presumption against the deliberate killing of non-combatants but it is not an irrebuttable one. Situations may be envisaged where one would be justified in breaking this rule. Thus if the Allied's bombing of the cities in World War II had been the only way to win the war and if winning the war was vital to the interests of humanity, then a justification could be found that would be consistent with the principle of discrimination (eg. the defence of freedom, the protection of civilisation)" – R. Mushkat, *Jus in bello Revisited*, "Comparative and International Law Journal Studies Affairs" 1998, vol. 21, p. 31. See more: P. Gray, *The Leadership, Direction and Legitimacy of the RAF Bomber Offensive from Inception to 1945*, Birmingham 2012; G. Best, *Churchill and War*, London 2005, p. 282; R.G. Wright, *Noncombatant Immunity: A Case Study in the Relation Between International Law and Morality*, "Notre Dame Law Review" 1991, vol. 67, pp. 349–350.

in this regard, pointing out that "Targets are no longer identifiable because belligerents have taken good ^re that they should not be identifiable. They have not only adopted the most elaborate schemes of camouflage but, […] have protected all centers of war-production with very powerful defences".[467] A similar opinion in this matter is expressed by R.G. Wright.[468]

On the other hand, it is worth noting that invoking the doctrine of reprisals may, in a sense, implicitly acknowledge the existence of a given norm, with the derogation being treated as a specific justification to that extent. However, this remark can be applied to two areas of the prohibition on bombing civilians. One may be the confirmation that law exists, and the other – the lack of legality of the new practice.[469]

23. Status of the Law of Air Warfare in the Initial Period of World War II

Heinz M. Hanke emphasized that, along with the Japanese declaration of 1938, the above notifications could have had the character of a unilateral declaration of a declaratory nature and constituted binding international law in relations between the participants of the war during its initial months. The opposite position was taken by E. Spetzler, who pointed out that there was a difficulty in unambiguously determining, on the basis of existing data, which of the individual states decided to "secretly" implement the 1923 Hague Rules of Air Warfare due to the fact that strategic air warfare was not considered to be inherently conducted in an indiscriminate manner ("Ob. Einzelne Staaten, die in ihrer Luftkiregskonzeption einen betonten strategischen Flugwaffeneisatz vorgesehen hatten, sich bei ihrem Bekenntnis zu den Haager Luftkiregsregeln schon mit einem geheimen Vorbehalt beschaftigen, ist schwer zu beurteilen").[470]

467 J.M. Spaight, *Bombing Vindicated*, London 1944, pp. 115–116. See also: C.P. Stacey, *Review Article: The Bombing of Germany, 1939–1945*, "International Journal" 1962, vol. 17, p. 307.

468 R.G. Wright, *Noncombatant*…, pp. 352 ff.

469 The above situation can be compared to a group of pedestrians waiting to cross the road at an intersection. One of the pedestrians decides to cross the lanes at a red light. The second person decides to take the same step due to the behavior of the first. Detained by officers, this person cites the action of the first pedestrian. In this way, the implication admits that there is a norm prohibiting crossing the road at a red light. The situation of a detained person's failure to explain (clarify) should be treated differently. However, it cannot be inferred from this fact that by remaining silent, the detainee questions the existence of the principle *per se*.

470 E. Spetzler, *Luftkrieg*…, p. 221.

The Permanent Court of International Justice on the status of East Greenland (*Legal Status of Eastern Greenland*), assessing the statement made by the Norwegian Minister of Foreign Affairs Nils Ihlen to Danish ambassador, stated that "beyond any doubt, the reply of the Minister of Foreign Affairs in response to inquiries from a diplomatic representative of a foreign State, within his competence, is binding on the Minister's state of origin".[471] At this point, however, it is worth emphasizing that in the context of unilateral declarations of states, it is necessary to distinguish between those that are legal acts from those that are political acts.[472] The importance of the above distinction was highlighted by the International Law Commission.[473] This is of inherent importance, especially in the context of the international responsibility regime, which can ultimately be triggered only on the basis of the violation of a legal norm.[474] Hans Kelsen, in his work on the recognition of states, pointed out the fundamental differences between the "political act of state recognition and the legal act of state recognition".[475] The ICJ emphasized the necessity to analyze the circumstances surrounding the making of a declaration in the case concerning nuclear tests in the South Pacific (Australia v. France), where the need for an external manifestation of the intention to be bound by the declaration itself was raised, as well as (which seems to be a constitutive requirement) the conduct of the state in accordance with the submitted declaration, which will have effects on third parties and become a source of international obligations.[476] Applying the above paradigm, the ICJ ruled on the non-binding nature of unilateral declarations of states on the *Frontier Dispute* (Burkina Faso v. Mali), pointing out the lack of a sufficient manifestation of the intention to be bound by the content of a non-binding resolution of an international organization.[477] In another part of the judgment, attention was drawn to the need for careful consideration of the content of declarations addressed to an abstract addressee.[478] In

471 Legal Status of Eastern Greenland (Denmark v. Norway), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

472 E. Csatlós, *The Legal Regime of Unilateral Act of States*, "Miskold Journal of International Law" 2010, vol. 7, p. 36; P. Saganek, *Unilateral Acts of States in Public International Law*, Leiden 2016, pp. 56–57.

473 See more: *Unilateral Acts of States (A/CN/4/383, sect/ F. A/CN.4/486. A/CN.4/L.558), First Report of the Special Rapporteur*, "Yearbook of International Law Commission 1998: Summary Records", vol. 1, pp. 32–35.

474 E. Kassoti, *The Juridical Nature of Unilateral Acts of States in International Law*, Leiden 2015, p. 120; "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form" – *Case Concerning The Factory at Chorzów*, Publication of the Permanent Court of International Justice, Series A-No. 9/1927, p. 21.

475 H. Kelsen, *Recognition in International Law: Theoretical Observations*, "American Journal of International Law" 1941, vol. 35, p. 605.

476 *Nuclear Tests (Australia v. France), Judgment*, I.C.J. Reports 1974, para. 43.

477 *Frontier Dispute (Burkina Faso v. Mali)*, Judgment, I.C.J. Reports 1986, paras. 38–40.

478 "The Chamber considers that it has a duty to show even greater caution when it is a question of a unilateral declaration not directed to any particular recipient" – *Frontier Dispute (Burkina Faso v. Mali)*, Judgment, I.C.J. Reports 1986, para. 39.

the case of *Military and Paramilitary Activities in and Against Nicaragua* the ICJ questioned the binding nature of declarations made by the ruling junta in Nicaragua on the international stage, due to the lack of a "legal obligation to take specific action".[479] Hence, the actual value of declarations made may be problematic due to their nature *per se* (political or legal) and the lack of a genuine intention to be bound by the content of a given declaration.[480]

Considering the circumstance related to the existence of the intertemporal rule, it is important to refer to the case law of criminal tribunals established immediately after World War II, as they appear to be the most relevant from the perspective of the scope of the recognized norms and the period. One of the key legal issues that arose in the case law of the IMTFE was the need to determine whether the Japanese Empire was bound by the provisions of the 1929 Geneva Convention on the Treatment of Prisoners of War. This finding was relevant to the existence of the charges brought against Japanese war criminals, based on the killing or ill-treatment of Allied prisoners of war (including the conviction of American airmen under the so-called Enemy Airmen's Act – see below). Japan signed the convention but did not ratify it. In 1941, the Allies indicated that they would adhere to the provisions of the Convention with respect to Japan and demanded appropriate guarantees from the government in Tokyo, which were granted by Japan's Minister of Foreign Affairs, S. Togo. The statement indicated that the Japanese Empire would comply with the Convention in its relations with the Allied states on a *mutatis mutandis* basis (Latin for "as circumstances permit, taking into account differences"). The IMTFE inferred from the Japanese statement that the state had committed to adhering to the Convention as closely as possible to the literal wording of the Convention.[481] Due to the exchange of similar notes between the Allied states, the judges of the Tokyo Tribunal indicated that an agreement had been concluded between the combatants through the Swiss Embassy.[482]

479 "However, the Court is unable to find anything in these documents, whether the resolution or the communication accompanied by the «Plan to secure peace», from which it can be inferred that any legal undertaking was intended to exist" – *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, para. 261.

480 R. MacDonald, *Nuclear Weapon-Free Zones and Principles of International Law*, [in:] W. Heere (ed.), *International Law and Its Sources: Liber Amicorum Maarten Bos*, The Hague 1989, pp. 73–74; M. Gitzmaurice, O. Elias, *Contemporary Issues in The Law of Treaties*, Utrecht 2005, pp. 39–44.

481 "Under this assurance Japan was bound to comply with the Convention save where its provisions could not be literally complied with owing to special conditions known to the parties to exist at the time the assurance was given, in which case Japan was obliged to apply the nearest possible equivalent to literal compliance. The effect of this assurance will be more fully considered at a later point in this judgment" – J. Pritchard, S.M. Zaide (eds.), *International Military Tribunal for the Far East, judgment of 12 November 1948*, "Tokyo War Crimes Trial" 1981, vol. 22, p. 711.

482 "This exchange of assurances constituted a solemn agreement binding the Government of Japan as well as the Governments of the other combatants to apply the provisions of the Geneva Prisoner of War Convention of 27 July 1929" – *ibidem*, p. 716.

However, it is difficult to establish with certainty that a similar agreement was reached between Poland, the Third Reich, France, and Great Britain. First and foremost, there were different circumstances in this regard: President Roosevelt's appeal was a solemn request to the warring parties to consider the welfare of the civilian population in the course of warfare. The notes submitted by Poland and the Third Reich, while ultimately in accord in the context of adopting the prevailing military objective doctrine, their form did not imply the intention to conclude any agreement between the combatants. The statements of the British and French governments should also be assessed in a similar context. Furthermore, recognizing the necessity for two elements of a binding declaration at the state level, where the effect of verbal communication should lead to specific actions, the declarations of both the Japanese government in 1938 and the Third Reich in 1939 should be considered superficial and legally meaningless.[483] On the other hand, a cumulative view of the content of the Axis states' declarations, along with the adoption of appropriate instructions by the air forces of Japan and the Third Reich in this regard, may strengthen the view of the customary authority of the 1923 document, at least in terms of the military objective doctrine.

24. The collapse of the norms governing air warfare during World War II

24.1. *Desuetude*

Another circumstance of detrimental impact for the recognition of the 1923 Hague Rules of Air Warfare is the observation that, in the perspective of Nuremberg case law, when decoding the meaning of customary law norms, there was a strong emphasis on the actual element of practice in determining the legality of a given means or method of conducting warfare. In other words, in the event of a conflict between *opinio iuris*, in favor of upholding the validity of a norm, and the opposite *usus*, the very definition of custom as a source of international law implies that there can be no customary legal norm based solely on *opinio iuris* without an element of state practice.[484] The above considerations lead to the concept of desuetude – under-

483 G. Swiney, *Saving Lives*..., p. 737.

484 "First, a customary rule arises out of state practice; it is not necessarily to be found in UN resolutions and other majoritarian political documents. Second, opinio juris has nothing to do with «acceptance» of rules in such documents. Rather, opinio juris is a psychological element associated with the formation of a customary rule as a characterization of state practice" – A. D'Amato, *Trashing Customary International Law*, "American Journal International Law" 1987, vol. 101.

stood by H. Kelsen as the negative legal effect of a given custom (G.G. Fitzmaurice referred to it as "tactical withdrawal from the norm").[485] It is sometimes described as a so-called negative custom, meaning a situation in which a treaty-based norm is deemed non-binding due to contrary practice and the adoption of a new legal conviction regarding behavior that opposes the treaty norm.[486] There are certain doubts as to whether desuetude can also apply to the abandonment of a customary norm. To this extent, A. D'Amato recognizes that this is, in fact, the establishment of a new custom.[487] During the Nuremberg trials, the concept of desuetude was applied to the norms of the 1936 London Protocol regulating submarine warfare. It is significant that the binding nature of these norms was recognized in the context of the Allies' declaration on September 3, 1939 – the same declaration in which Great Britain and France committed to observing the concept of military objective. William J. Fenrick points out that during World War II, every U.S. Navy submarine was equipped with a manual on naval and air warfare that replicated the provisions of the 1936 London Protocol. However, on orders from the fleet command, these rules were abandoned in response to retaliatory measures.[488] The concept of desuetude is most frequently invoked in the context of the collapse of the distinction principle during World War II – which is significantly related to the rejection of the "restrictive military objective theory".[489]

24.2. *Non liquet*

A separate issue is the question of the so-called *non liquet* situation, i.e. the determination of the non-existence of a norm.[490] This situation differs from the phenomenon of negative custom though the absence of a legal belief component

485 M. Glennon, *Limits of Law: Prerogatives of Power: Interventionism after Kosovo*, New York 2001, p. 60. "On the other hand, where the parties themselves, without denouncing or purporting actually to terminate the treaty, have, over a long period, conducted themselves in relation to it more or less as though it did not exist, by failing to apply or invoke it or by other conduct evincing lack of interest in or reliance on it, it may be said that there exists what amounts to a tacit agreement of the parties, by conduct, to disregard the treaty and to consider it as being at an end" – *Second Report on the Law of Treaties by Mr. G.G. Fitzmaurice*, "Special Rapporteur, Yearbook of the International Law Commission" 1957, vol. II, p. 48, para. 86.

486 M.E. Villiger, *Customary*…, p. 217.

487 A. D'Amato, *Trashing*…, p. 97.

488 W.J. Fenrick, *Comments on Sally V. and W. Thomas Mallison's Paper: The Naval Practices of Belligerents in World War II: Legal Criteria and Developments*, "International Law Studies" 1993, vol. 65, p. 111.

489 J. Dill, *Legitimate Targets? Social Construction, International Law and US Bombing*, Cambridge 2015, p. 116.

490 D. Bodansky, *Non Liquet and the Incompleteness of International Law*, [in:] L. Boisson De Chazournes, P. Sands (eds.), *International Law: the International Court of Justice and Nuclear Weapons*, Cambridge 1999, p. 154.

regulating a given practice. Hans Kelsen considered the above situation impossible to fulfill due to the logical nature of the completeness of international law.[491] Hersch Lauterpacht believed that due to the lack (until the 1950s) of any *non liquet* situation, the doctrine proving the absence of a norm is a pure theory. Indeed, an international court can always refer at least to the principles of *ex aequo et bono*.[492] However, many years later, it is precisely within the framework of international humanitarian law that many legal scholars trace the existence of a *non liquet* situation to the ICJ Advisory Opinion on *The Legality or Threat of the Use of Nuclear Weapons* and the report of the panel to the ICTY Prosecutor on the legality of the 1999 NATO air operation in Serbia.[493] It is worth pointing out that many years after the end of the war, during the XIX ICRC conference in New Delhi in 1957, the Japanese delegate stressed that "It is widely known that one can hardly find at present any international rule governing aerial warfare and the use of long-distance weapons".[494]

There may be some doubts whether the so-called negative custom is possible in the context of international humanitarian law. In this regard, it is important to emphasize the fact that the basis for its creation cannot be individual violations, but a new practice of a reciprocal nature, resulting from the behavior of each belligerent in an armed conflict.[495] Karol Wolfke pointed out that the stronger the character of the previous norm, the more proportionately it must be com-

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491 H. Kelsen, *Principles of International Law*, New Jersey 2003, p. 438.

492 H. Lauterpacht, *Some Observations on the Prohibition of 'Non Liquet' and the Completeness of the Law*, [in:] *idem* (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht, Vol. 2: The Law of Peace*, Cambridge 1975, p. 215.

493 S.C. Neff, *Non Liquet and International Law*, [in:] K.H. Kaikobad, M. Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick*, Leiden 2009, p. 76; K. Kulovesi, *Legality or Ohterwise? Nuclear Weapons and the Strategy of Non Liquet*, "Finnish Yearbook of International Law" 1999, vol. 10, p. 56.

494 "It is widely known that one can hardly find at present any international rule governing aerial warfare and the use of long-distance weapons" – *Final Record Concerning the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, 19th International Conference of the Red Cross, Geneva 1958, p. 91; "These rules have never been adopted, and the state practice in the last forty years clearly shows that very few customary rules of aerial warfare have emerged" – C.L. Cantrell, *Humanitarian Law in Armed Conflict: The Third Diplomatic Conference*, "Marquette Law Review" 1977, vol. 61, p. 256.

495 "Not all violation results in desuetude, of course; if it did, virtually no rule would be binding. Desuetude occurs only when a sufficient number of states join in breaching a rule, causing a new custom to emerge" – M. Glennon, *How International Law Die*, "Georgetown Law Journal" 2005, vol. 93, p. 942; "But sometimes a violation of a CIL norm is just that – an unlawful act that does not really purport to establish a new rule. Similarly, it surely cannot be enough for States to unilaterally declare that a custom is no longer real or binding" – D.J. Bederman, *Acquiescence, Objection and the Death of Customary International Law*, "Duke Journal of Comparative and International Law" 2010, vol. 21, p. 37.

pensated for with the strength of the new customary norm in order for it to be replaced.[496] On the other hand, it is difficult to consider the practice of carpet air bombing, even if the condition of sufficient *usus* is met, as a custom without the existence of *opinio iuris* (according to the principle of "what only opinio iuris can do, only opinio iuris can undo").[497] This is strongly emphasized by Steven Gibb, who indicates that until the end of the war, each side claimed to attack only military objectives, never raising or usurping in any way the right to attack civilians through air bombing. In his opinion, this sufficiently justifies the inability to create a negative custom.[498]

24.3. A raid of 1000 bombers against Kiel – the applicability of the 1923 Hague Rules of Air Warfare comes to an end?

The analysis of the course of air operations during World War II leads to the following conclusions. In the first phase of the conflict, the party violating the principles resulting from the provisions of Articles 22–24 of the 1923 Rules, i.e. bombings of a terrorist or carpet nature regardless of the presence of civilian targets, were carried out by the German Luftwaffe. At the same time, Allied aviation was carrying out its limited air operations essentially as declared on September 3, 1939. In this context, it is worth emphasizing that unilateral violations of the military objective doctrine by the German Air Force are not sufficient to impair the validity of the customary law norm derived from the content of the Hague Rules of Air War. It is certainly not evidence of a widespread negative practice among states. A change in the pattern of Allied air operations occurred in the second half of 1940, with the invocation of the doctrine of reprisals as a form of retaliation against the German attacks on London and Coventry, as well as the American air strike of April 17, 1942 on Tokyo (directed against military facilities). The exhaustion of the rationale of the doctrine of reprisals *sensu stricto* appears to have occurred with the further expansion of the scope of the air offensive in 1941. A key moment in the destruction of the norms of a convention-based nature (Article 25 of The Hague Regulations of 1907) and rules based on custom, having its foundations in the 1923 rules, was the issuing of the so-called Area Bombing Directive on February 14, 1942, and the first attack associated with its implementation, i.e. Operation "Millennium" undertaken on May 31, 1942.[499] This imparts likelihood to a situation in which:

496 K. Wolfke, *Custom*…, p. 93.

497 G.J.H. van Hoof, *Rethinking the Sources of International Law*, Deventer 1983, p. 101.

498 S. Gibb, *The Applicability of the Laws of Land Warfare to U.S Army Aviation*, "Military Law Review" 1976, vol. 73, pp. 56–57.

499 M.S. McDougal, F.P. Feliciano, *Law and Minimum World Order: The Legal Regulation of International Coercion*, Yale 1961, pp. 640–659.

1) convention-based norms have been destroyed – i.e. The Hague Convention of 1907 in terms of the actual practice of states and *opinio iuris* (E. Spetzler,[500] W.T. Mallison[501]);
2) the final collapse of *opinio iuris* took place on February 14, 1942 with the issuing of the Area Bombing Directive;
3) the collapse of the *usus* occurred on May 31, 1942 with the *Bomber Command* carpet raid on Kiel – Operation "Millennium";[502]
4) since May 31, 1942, the law of air bombardment has been a *non liquet*[503] norm.

The above transformations proving the gradual decline of *opinio iuris* are confirmed by a characteristic statement from J.M. Spaight, who in his 1944 study tried to directly affirm the practice of carpet bombing, indicating that the losses among the civilians as well as private property are "regrettable, but justified in the context of a significant military advantage obtained as a result of air attacks", being the result of damage linked to the location of industrial facilities within the area of urban centers.[504] The dispersal of the armament industry by the competent authorities of the Third Reich and the Japanese Empire was considered an action that directly legitimized the carpet bombing of cities and towns under which elements of armament infrastructure were located.[505] The night raid tactics undertaken by the RAF in 1943 must have led to a decline in the ability to distinguish effectively

500 "In Ergebnis enthält die Haager Landkriegsordnung also keine positive Norm, welche der friedlichen Zivilbevölkerung im selbständigen Luftkrieg einen ausgeprägten Kriegsrecht Schutz gewährt" – E. Spetzler, *Luftkrieg*…, pp. 39–41.

501 W.T. Mallison, *The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars*, "George Washington Law Review" 1967/1968, vol. 36, p. 334; *idem*, *Claims Concerning Lawful Weapon of Belligerent Attack*, "International Law Studies" 1966, vol. 58, p. 176.

502 H. DeSaussure, *The Laws*…, p. 534.

503 A. D'Amato, *Law and War: A Doctrine of Deterrence*, "UN Chronicle" 1998, no. 4, p. 53. "The Chief of the British Air Staff proved to be right that the loose legal controls on aerial bombing would not outlast the war. At best, the pre-war international legal standards for aerial warfare were «murky» and not strong enough to constrain states" – N. Canestaro, *Legal and Policy*…, p. 447. "This leaves without sanction in international law the indiscriminate use of aerial bombardment, either conventional or nuclear, at least in the prosecution of a just-that is, non-aggressive-war, which is, of course, always adjudged by the victors" – S. Littell, *The Fifth Annual Ernst C. Stiefel Symposium: 1945–1995: Critical Perspectives on the Nuremberg Trails and State Accountability*, "New York School Journal of Human Rights" 1995, vol. XII, p. 486. "It is therefore likely that the revised laws of war will be stiffer than the rules of 1907. It will not be possible, for instance, to exclude aerial warfare. The fact that the drafters of the Hague Air Warfare Rules of 1923, which Phillips calls a «juridical fantasy», did not take military necessities sufficiently into account, has prevented their acceptance by states" – J. Kunz, *The Laws of War*, "The American Journal of International Law" 1956, vol. 50, p. 316.

504 J.M. Spaight, *Bombing*…, pp. 90–91.

505 G. Adler, *Targets in War: Legal Considerations*, "Houston Law Review" 1970, vol. 8, p. 38.

between factories and residential areas but may still have been proportional in some context with achieving the goal of victory over the Third Reich, with the indication that civilian casualties may have been "unintended but foreseen".[506]

On the other hand, however, it is worth noting that the air warfare norms, as partly inspired by the 1923 rules, could be assessed in a way that is relevant to the normative value of the London Protocol of 1936 (such a view is indicated by N. Dunbar).[507] The International Military Tribunal, in the trial of Admiral Karl Doenitz, ruled that the above standards were not applicable, pointing to their uneven compliance by all combatants. In the course of the trial, it was noted that both the Third Reich and the Allied States (interestingly, France and the United Kingdom made a statement on compliance with the London Protocol of 1936, in parallel with their position on air warfare) chose to deviate from their pre-war instructions. The Tribunal did not determine the timeline of how the 1936 London Protocol ceased to apply, indicating only that the Third Reich withdrew from its observance in September 1939, and the Allies in 1940 and 1941, respectively. As a result, according to the IMT, the 1936 regulation was treated as a non-binding *ab initio* from 1 September 1939.[508]

It is also worth considering the customary nature of the Hague Rules of Air Warfare in the context of the document itself. It should be noted that the effect of the work of the commission of jurists of 1923 is cited in the context of Article 18 (use of incendiary weapons), Article 19 (prohibition of the use of false markings), Article 20 (parachute evacuee status), Articles 22–24 (bombing rules). David Johnson also divided the 1923 Hague Rules of Air Warfare on the basis of more or less controversial provisions, adding to these less controversial ones the rules on the status of a military aircraft (Articles 1–16), the admissibility of propaganda (Article 21), the obligation to respect neutral airspace (Article 39), the imperative for a neutral state to protect its own airspace (Article 42).[509] Completely overlooked in the doctrine of international law are issues related to other sections of the rules concerning the treatment of neutral aircraft, contraband, and the exercise of the right of visit at sea by a military aircraft. The above remark is significant, particularly in attempts to assess the customary nature of other rules of air warfare. This is extremely difficult due to the lack of practice and the existence of only a few studies by Castrén, Spaight, and Meyer, which are essentially theoretical in nature.

506 R.G. Wright, *Noncombatant*…, pp. 349–350.

507 N. Dunbar, *The Legal Regulation of Modern Warfare*, "Transactions of Grotius Society" 1954, vol. 40, p. 90.

508 Assessments relating to the actual effect of the IMT submarine warfare ruling, however, vary, see H. Robertson, *U.S. Policy on Targeting Enemy Merchant Shipping: Bridging the Gap Between Conventional Law and State Practice*, "International Law Studies" 1993, vol. 65, pp. 338 ff.

509 D. Johnson, *Rights*…, pp. 40–41.

Table 4. The Hague Rules of Air Warfare of 1923 and their customary status in 1945

Articles	Articles 1–16	Articles 18–20	Articles 22–24	Articles 39 and 42	Articles 44–63
Status	Confirmed customary norm[a]	Confirmed customary norm (discussion on the status of Article 20 see chapter VII)[b]	Controversial	Confirmed by the practice of neutral states	No data available or contrary practice

[a] W.G. Downey, *Revision of the Rules of Warfare*, "American Society of International Law Proceedings" 1949, vol. 43, p. 107.
[b] D. Johnson, *Rights*…, p. 40.

Source: the author's own elaboration.

25. ICRC during World War II

On March 12, 1940, the ICRC appealed to the governments of the warring states, requesting the protection of civilians from the effects of aerial bombings, reminding them of the significance held by the provisions of the 1907 Fourth Hague Convention and the 1907 Hague Regulations. The organization proposed concluding multilateral agreements between the warring parties to clarify the concept of military objective.[510] The ICRC's request was answered by, among others, the Third Reich, the United Kingdom, Italy, the United States and Poland. The German dispatch stated that "the restriction of attacks to military objectives may be altered in the event of a different practice by opposing states." Italy directly invoked the 1938 Royal Decree, the United Kingdom stated that the RAF did not attack targets other than military ones (on the condition of reciprocity), and the United States pointed to President Roosevelt's appeal from the first days of September 1939.[511] It is notable that no governments of key states responded to the ICRC's subsequent appeals in July 1943 and January 1944, except for the United States, which issued a very general declaration.[512]

510 *Report of the International Committee of the Red Cross on its activities during the Second World War (September 1, 1939 – June 30, 1947*), vol. I, Geneva 1945, pp. 683–685.
511 *Ibidem*, p. 686.
512 *Ibidem*, p. 688.

26. ICRC New Delhi Draft of 1956

26.1. General remarks

At the 1949 session of the American Society of International Law, W. Downey, head of the international law section in the legal support service of the U.S. armed forces, referred to the law of air warfare as a nonexistent dimension of *ius in bello*, arguing that the provisions of Articles 22–24 of the Hague Rules of Air Warfare had never become law and that the practice of all warring parties during World War II denied them any normative value. The American officer stated that the creation of an acceptable code of air warfare "will be met with the gratitude of all humanity, and its author will be recognized as the Francis Lieber of the 20th century".[513] The second perspective summarizing the state of international law on air warfare was a commentary by L. Nurick (also a representative of the U.S. legal services), who highlighted the collapse of the principle of distinction due to: 1) the lack of a clear definition of a military objective, 2) the absence of criteria regarding so-called quasi-combatants, 3) the lack of consensus between practitioners and theorists of air warfare on so-called terror bombings, 4) the lack of technical capabilities allowing for proper distinction during World War II, 5) the failure to define the limits of permissible incidental destruction, and 6) the general dissonance between the theory and state practice during the conflict.[514] These two perspectives, expressed by legal services officers of the world's most powerful air force, seem to encapsulate the entirety of the international community's need for a clear solution regarding the regulation of air warfare legislation.

26.2. Military objectives in the light of the ICRC draft of 1956

The first attempt to develop a platform for agreement was the initiative undertaken by the ICRC in 1954 in the form of a conference of experts (with the participation of, among others, R. Baxter and E. Castrén), modeled after the 1923 commission, which unambiguously emphasized the need for the immediate adoption of regulations governing air warfare.[515] The actions of the aforementioned group directly triggered two years of preparatory work, culminating in the adoption of the 1956 draft titled *Draft Rules for the Limitation of the Dangers incurred by the Civilian*

513 W.G. Downey, *Revision*…, p. 108.

514 L. Nurick, *The Distinction*…, pp. 691–695.

515 "The Experts considered that aerial warfare was one of the fields of hostilities in which a code of rules, already very useful in the case of «localized» conflicts, was most needed" – ICRC, *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, Geneva 1956, p. 22.

Population in Time of War. Article 1 of the regulation introduced a normative obligation to exclude the civilian population from the scope of military operations, while simultaneously mandating the concentration of war efforts on destroying the enemy's war potential.[516] The direct consequence of this indication was expressed in Article 7 the principle of distinction, i.e. directing attacks only against military objectives. The commentary on the draft explicitly highlights the *ratio* behind this provision, which is fundamentally aimed at preventing aerial operations involving carpet bombing.[517] It was decided to define the concept in a positive manner by providing an enumerative list of military objectives that hold the status of either "specific" or "commonly accepted" as legitimate objectives of military attack.[518] The above definition also had a casuistic rather than an abstract character, unlike the rules from 1923. Due to practical considerations, it was decided to include classified categories of objects as military objectives.[519] Article 7, in its third sentence, stipulated that, from the classification of the aforementioned objects, any targets should be excluded whose destruction or damage does not provide a clear military advantage at the time of the attack. In this way, reference was made to the regulation characteristic of Article 24 of the Hague Rules of Air Warfare, excluding from destruction certain types of objects, installations, or infrastructure whose destruction is unnecessary, thus creating within Article 7 of the 1956 document, a two-part test of a legitimate military target. The first requirement was the presence of a given target in a specially prepared annex. These included:

1) armed forces and persons participating in hostilities;
2) areas occupied by the adversary's armed forces, installations, structures intended for military use (barracks, quarters), military administration buildings, as well as ammunition and fuel depots;
3) airports, shipyards, communication lines and roads provided that they have significant military value;
4) radio emitting and receiving, as well as television installations;
5) armaments industry, technical, supply, engineering, and metallurgical support facilities, power plants producing for the armed forces, laboratories, and technical experiment sites.[520]

According to the annex, the list of the above-mentioned targets was to be updated every 10 years. What is interesting, besides the classic category of facilities

516 *Ibidem*, p. 39.
517 *Ibidem*, p. 65.
518 *Ibidem*, p. 66.
519 "It is not enough, however, to talk of categories of objective. It is also necessary to describe these categories, as in fact the ICRC had already requested in its March 1940 appeal, which was to the effect that the codification should give at least some slight indication of the type of places threatened in the event of a conflict in order to enable suitable steps to be taken for the removal there from of the persons concerned" – *ibidem*, p. 69.
520 *Ibidem*, pp. 72–73.

whose military significance was confirmed by the practice of World War II, the introduction of radio and television transmission installations and relay stations into the above collection was a novelty. The second requirement was that, under specific circumstances, the destruction of the facility would provide a definite military advantage to the combatants. In fact, the 1956 document combined various concepts (Article 2 of the Ninth Hague Convention of 1907 and Article 24 of the Hague Rules of Air Warfare) into one document.[521]

26.3. Definition of the term "attack"

Article 3 of the draft stated that the concept of "attack" applies to all acts of hostility undertaken against an adversary through the use of armed force, both in the context of offense and defense. Interestingly, the commentary highlights that in the context of air warfare, the concept of bombing remains somewhat undefined. It argues that bombing should be interpreted broadly, encompassing not only the act of dropping free-falling bombs but also cases of strafing with onboard small-caliber weapons and the (then) new phenomenon of using rockets, which should also be considered as part of bombing operations. Due to the above, the 1956 rules, unlike the 1923 draft, introduced the term "attack" into the language of international humanitarian law as a broader concept, encompassing the use of armed force in all dimensions, regardless of the means or methods employed. The term "act of violence" refers to any actions that are the result of an impact of kinetic nature, intended to cause specific damage to the adversary.[522] It should be noted that this provision was not limited to the attacking party but encompassed any act of violence committed against the adversary, including those carried out to implement tactics such as scorched earth in occupied territory.[523] The outline of Article 4 matched the doctrinal postulates that called for the formulation of a definition of the civilian population, which, in the 1956 document, was defined in negative terms. These postulates pointed out that members of the armed forces, auxiliary units, and those participating in armed operations were not classified as civilians.[524] In the commentary addressing the status of so-called quasi-combatants, it was noted that they assume the risk of being present within a military target – such as an armament factory. However, the rules did not clarify whether they were considered an integral part of the military target or merely incidental casualties of attacks directed at industrial sites. It was decided that they should not be objects of attack within their households.[525] Article 6

521 A. Jachec-Neale, *The Concept*…, p. 31.
522 ICRC, *Draft Rules for the Limitation of the Dangers*…, p. 44.
523 *Ibidem*, p. 45.
524 *Ibidem*, p. 46.
525 *Ibidem*, p. 48.

prohibited direct and terrorist attacks against civilians and objects exclusively used by them. Article 6 para. 3 maintained that civilians located near military objectives must accept the risk of becoming an object of an armed attack.

The challenge for the authors of the draft was to reconcile the new regulations with the existing provisions of the 1907 Hague Regulations. This applied in particular to Articles 25–27 of the Hague Regulations of 1907 and the emergence of the concept of a military objective based on Article 7 of the 1956 draft. Importantly, the ICRC stated that the changes introduced did not in any way change the already existing law but complement and confirmed the existing solutions. However, in the context of air warfare, it was found that the scope of protection resulting from Article 25 of the 1907 Hague Regulations was insufficient in protecting the civilian population, both for the reasons mentioned above and due to the loss of its protective function. Consequently, more detailed rules were introduced, emphasizing the expansion of the concept of military objectives based on the existing provisions of Article 2 of the Ninth Hague Convention of 1907. The comment on the scope of codifying the law of air warfare was significant, as it indicated that future changes would primarily pertain to norms governing the rules of aerial bombing.[526]

Article 8 of the 1956 rules contained new postulates obliging the person ordering or executing an attack to take certain active precautions. One of these principles was the reiteration of the provisions from the League of Nations resolution of September 30, 1938, including the obligation to identify targets presumed to have a military purpose, provided they were within the zone of direct combat contact.[527] Another requirement – which constituted a complete normative novelty – was the incorporation of the lesser evil principle in target selection, prioritizing the protection of civilians. The commentary on the draft highlighted a practical example of this principle: the treatment of railway stations located in urban centers as military objectives. Achieving a military advantage by disrupting railway traffic can be accomplished by targeting railway lines instead, thereby avoiding operations that pose significant risks to civilians in densely populated areas.[528] Notably, the provision explicitly instructed commanders to refrain from attacks likely to cause excessive destruction or damage in relation to the anticipated military advantage. The commentary further emphasized that the assessment of military advantage should be grounded in experience – acknowledging the potential disparity between anticipated outcomes and actual effects – while adhering to the principle of *in dubio pro humanitate*.[529] Surprisingly, in a sense, Article 9 affirmed the principle established on the basis of Article 24 of the Hague Rules of Air Warfare on the distinction between the legal situation of areas located in close proximity to the front and urban centers locat-

526 *Ibidem*, p. 54.
527 *Ibidem*, p. 78.
528 *Ibidem*, p. 79.
529 *Ibidem*, p. 82.

ed in the hinterland. For this category, an attack should be conducted with utmost precision, targeting only the immediate vicinity of the military target. The consequence of the above distinction was the introduction of Article 10 prohibiting the area bombing understood as a comprehensive attack on "an area where distinctive military objectives are located".[530] Article 16 specified the possibility of announcing a given locality as an open city, in relation to which there was an obligation to notify the other party, which should refrain from attacks, unless military activity is carried out within a given location (e.g. the presence of armed forces, any armament manufacturing activity, as well as the transit of military units).[531]

The 1956 document was the first open proposal for a treaty-based solution prepared by the ICRC, as part of which national Red Cross associations began a broad discussion, appointing their representatives to take part in the XIX ICRC conference in New Delhi in 1957.[532] The draft certainly represented progress compared to the legal vacuum that had previously existed in the context of air warfare law, introducing solutions that would later form the basis for future discussions within AP I. However, the distinction made between the legal status of areas in direct combat zones versus those in the hinterland, particularly regarding the scope of protection (which had been criticized under the 1923 rules), raises doubts. Legislative methods for defining a military objective were also a point of contention. However, the list to be annexed to the future convention at the time of drafting the document contained quite detailed instructions in this regard, adequate to the conditions of the air war in the 1960s and 1970s.

26.4. Development of the American Vision of the Law of Air Warfare in 1956–1976

In accordance with the new manual on land warfare (*The Law of Land Warfare FM27-10*) adopted in 1956, the amended point 39 indicates that bombing is subject to the regime resulting from the provisions of Article 25 of the Hague Regulations of 1907 concerning the laws and customs of land warfare. Interestingly, the undefended location was defined in a manner very similar to Article 16 specified as part of the ICRC 1956 draft, simultaneously emphasizing the prohibition of bombing undefended cities. By contrast, it was pointed out that defended cities (defined in a classic way, characteristic of the work of the Second Peace Conference of 1907) could be subject to the rigors of bombing to the full extent. Importantly, the textbook also used the concept of a military objective, adopting as a definition a concept extremely similar to the final content of Article 52 of the AP I adopted

530 *Ibidem*, p. 92.
531 *Ibidem*, pp. 120–121.
532 *Final Record Concerning the Draft Rules*…

in 1977.[533] Examples of legitimate targets include: the armaments industry, sites where troops are stationed, weapons and fuel depots, ports and communication lines used for military purposes, as well as other places where military operations are supported. At the same time, it was emphasized that, according to Article 25 of the 1907 Hague Regulations, towns, villages, and buildings that constitute military objectives but are not defended cannot be an object of attack. The final part of the interpretation of the concept of a military objective is surprising and appears to be, in fact, a return to the well-known and widely criticized way of interpreting the 1907 regulations. This division was even more unclear due to the broad definition of a defended area. As a result, the American interpretation of the law of air bombing, as presented in the 1956 manual, appears to be an attempt to merge two concepts which are, however, fundamentally contradictory.

The 1955 U.S. Navy manual stated that a military aircraft is an aircraft under the control of the armed forces, bearing military markings, commanded by a member of the armed forces, and operated by a crew subject to military discipline.[534] In this context, direct reference was made to the heritage of the pre-war period, but with the exclusion of the explicit obligation for crew members to wear a uniform.

During the Vietnam War, Senator Edward Kennedy, chairman of the Senate Committee on Refugees, requested the Department of Defense to clarify the legal standard applied by the U.S. Air Force. On September 22, 1972, the U.S. Department of Defense indicated that the leading legal regime governing air operations consisted of the 1907 Fourth Hague Convention, the 1949 Geneva Convention, and the principles of customary law outlined in UNGA Resolution 2444/1969. The government side emphasized that the prohibition of attacks against civilians did not include operations targeting military facilities that may cause incidental civilian casualties. Regarding the very definition of a military objective, the proposals contained in the 1923 and 1956 documents (as well as the provisions of the Institute of International Law from 1969) were deemed unrealistic and "lacking the status of either customary international law or treaty law". However, interestingly, based on an "acceptable analogy", the Department of State emphasized that the source of the military objective doctrine could be found in Articles 1 and 2 of the Ninth Hague Convention of 1907 and Article 8 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, using in this regard the list of designated military objects. It was noted that, in certain situations, the military potential of civilian infrastructure may lead to the classification of specific objects as military objectives based on

533 "Combatants, and those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage" – *The Law of Land Warfare FM 27-10*, Department of the Army Field Manual, 1956, p. 5.

534 *The Law of Naval Warfare NW1P-2*, United States Navy.

customary law.[535] The Department of State document signals yet another interpretation of the concept of military objective, different from the one adopted in 1956.

In 1976, after the end of the Vietnam War, the U.S. Air Force issued its first manual on international law regulating the conduct of aerial operations in armed conflict (*Air Force Pamphlet AFP 110-31*). The document indicated that, as of the day of its drafting, air warfare was not regulated by any international law treaty. Importantly, even regarding the status of a military aircraft, the U.S. Air Force manual did not refer to the 1923 rules (which, elsewhere in the document, were deemed as "have some authority because eminent jurists prepared them, they do not represent existing customary law as a total code").[536] Commenting on the findings regarding legal human targets, it was noted that, despite the disruption of the boundary between non-combatants and combatants (pointing to the example of the working class during World War II), this distinction remains part of the applicable law.[537] The practice of 1939–1945 and the increase in civilian casualties were, in the assessment of the manual, "several trends have tended to blur the distinctions between combatants and noncombatants including civilians, resulting in less effective protection".[538] The document referred to the requirements of Article 25 of the Hague Regulations of 1907, indicating that, in the view of the United States, "it has been recognized by the practice of nations that any place behind enemy lines is a defended place because it is not open to unopposed occupation."[539] The manual established a legal regime based solely on the doctrine of military objectives, aligning with the proposals submitted during the 1974–1977 Diplomatic Conference and ultimately adopting the definition contained in Article 52 of AP I. Similar solutions were adopted regarding the precautions.

27. The Doctrine of International Law in Relation to the Phenomenon of Unlimited Air War

The state of international law in the years 1945–1977 was largely dependent on determining the customary nature of the 1923 Hague Rules of Air Warfare or at least some elements of this document, which had a basis in conventional norms

535 Letter from the U.S. Department of Defense to Senator Edward Kennedy, September 22, 1972, after: A.W. Ronnie, *Contemporary Practice of the United States Relating to International Law*, "The American Journal of International Law" 1973, vol. 67, p. 123.

536 *Air Force Pamphlet AFP 110-31*, pp. 5–3.

537 *Ibidem*, pp. 3–4.

538 *Ibidem*.

539 *Ibidem*, pp. 5–12.

(e.g. Article 2 of the Ninth Hague Convention of 1907), or other principles gradually gaining recognition in the practice of states. Many of them were at least partially articulated in the period directly preceding the work of the 1974–1977 diplomatic conference. Nevertheless, the position of the most well-known international law scholars of that period was highly polarized. The first and most radical viewpoint was that the course of military operations during World War II, and in particular the mass, indiscriminate, carpet bombings, led to the creation of a practice essential for the emergence of a customary international law norm. This viewpoint was expressed, among others, by H. DeSaussure and B. Ferencz (one of the prosecutors at the Nuremberg Trials).[540] This perspective seems too far-reaching, as it is difficult to find any approval for the direct bombing of civilians in official declarations of states. The justification for this conduct was often based on the doctrine of reprisals or a developed doctrine of military objectives. However, it is important to note that at the time, states were not clearly convinced of the illegality of such practices.

Joseph L. Kunz described the period of international humanitarian law following the Nuremberg verdicts as a time of complete chaos. He argued that the transition from mechanized warfare to automated warfare did not lead to any corrections in the normative framework of *ius in bello*, resulting in complete legal relativism due to the doctrine of reprisals and the emergence of new types of weaponry.[541] Philip Jessup pointed out that the practice of World War II led to the abandonment of the old test for defended cities and demonstrated that indiscriminate bombing would become an expected form of pressure on states that use force in violation of international law. The American lawyer argued that the principle of sparing non-combatants was never applicable in the case of sieges and air bombardments.[542] Kunz also noted that Jessup's remark essentially seems to affirm historical events, and in a sense, it can be seen as a law-making statement – evidence of the creation of a new norm following the loss of the binding force possessed by the standards functioning under the 1907 Hague Regulations. The future judge of the ICJ was not entirely isolated in this regard. Hersch Lauterpacht pointed out that, in his view, the course of air bombardments during World War II was not governed by any norm, at least from 1941–1942 on, when bombing civilians became a normal occurrence on the

540 "One of the most widely publicized complaints, for example, has related to the use of napalm bombs by United States forces. The customs of war have been periodically modified to keep pace with the expanding technology of destruction. The bombing of defended cities has, whether it pleases us or not, become a permissible act of warfare" – B. Ferencz, *War Crimes and the Vietnam War*, "American University Law Review" 1968, vol. 17, p. 412; H. DeSaussure, *The Laws*…, p. 545; J. Bond, *The Rules of Riot: Internal Conflict and the Law of War*, Princeton 1974, p. 98.

541 J.L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision*, "American Journal of International Law" 1951, vol. 45, pp. 51 ff.

542 P. Jessup, *A Modern Law of Nations – An Introduction*, New York 1948, p. 215.

battlefield.[543] According to the British author, this was not solely due to the application of the doctrine of reprisals but stemmed from the unrestricted definition of a military objective. As a result, the adoption of the above-mentioned view had legal implications. Lauterpacht, like some lawyers of the pre-war period, argued that in the context of air warfare, there were no areas with non-defended status, with all the consequences of this fact.[544] In the seventh edition of the monumental *Oppenheim's International Law* of 1952, H. Lauterpacht pointed out that the Hague Rules of Air Warfare of 1923 were "importance as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war and they will doubtless prove a convenient starting-point for any future steps in their direction".[545]

More approval should be given to the position represented by H. Blix, who argued that there was an opportunity to "distil" the norms and customs applicable to air warfare during the Second World War, which would have been done by an international tribunal if it had been given a clear task in this regard.[546] The period between 1945–1977 should, in a sense, be referred to as the "time of legal lawlessness". The acceptance of such a conclusion is suggested at least by the position of G. Schwarzenberger, who stated that the jurisprudence of the IMT in no way confirmed or denied the legality of carpet bombings.[547] Illegality is revealed in the constant violation of at least the most unambiguous provisions of the Rules of 1923, and is perpetuated by the mistaken belief that, in fact, the "law of air warfare" is a *non liquet* norm.[548] Jochen von Bernstroff and Enno Mensching go further in their analysis and argue that the abstention of the Nuremberg Tribunals from adjudicating the legality of air strikes during the Second World War had the dimension of judicial *desuetudo* – understood as the abandonment of a norm due to the lack of its enforcement by an international tribunal.[549] Steven

543 Earlier, H. Lauterpacht (in 1936) claimed that there were no norms regulating air warfare, but condemned attacks directed deliberately against civilians. It should be noted that the inaccuracy in Lauterpacht's approach to the issue related to air bombing, expressed before and after the Second World War, was recognized by A.P.V. Rogers, *The Principle*…, p. 198; J.W. Garner, *The Outlook*…, p. 11.

544 H. Lauterpacht, *The Problem of the Revision of The Law of War*, "The British Yearbook of International Law" 1952, vol. 29, pp. 365–368.

545 L. Oppenheim, *International: A Treatise, Vol. 2: War*, London 1952, p. 519.

546 H. Blix, *Area Bombardment: Rules and Reasons*, "The British Yearbook of International Law" 1978, vol. XLIX, p. 37.

547 G. Schwarzenberger, *The Law of Air*…, p. 130.

548 *Ibidem*.

549 "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 desuetude meaning the abrogation of an existing rule through subsequent non-enforcement by an international court. The long-term repercussion of such forms judicial desuetude for international go way beyond classic rule of law-concerns. As we have attempted to plausibilize in this piece, judicial desuetude in war crimes trials can 'create' new legal patterns legitimizing the most excessive forms of military

Gibb stated that the authors of the post-war period focused solely on emphasizing that the Hague Rules of Air Warfare were not binding, without noting that the failure to adopt the Code from 1923 in the form of positive law did not provide a basis for assuming that the practice of uncontrolled air warfare is consistent with other norms of international law.[550] "Legitimate lawlessness" allowed the belligerent states to create multiple counterarguments and subjective interpretations.[551] It must be repeated with R. Baxter that the apathetic state of the doctrine of international law is partly responsible for such a situation.[552] However, this apathy had various causes and was not always due to the bad faith of the researchers of that time, but also to the complicated political and legal reality. Lauterpacht, Parks, Jessup, Ferencz, DeSaussure, Falk are representatives of the Anglo-Saxon doctrine, which treated about the existence of the norms of the law of air warfare during and preceding World War II with the greatest possible reserve. In contrast, experts advocating the opposite view represented the continental law school and came from states that had been defeated in the Second World War, were neutral or had particularly experienced the phenomenon of air bombing (Bierzanek, Rotocki, Spetzler, Hanke, Meyorwitz, Baxter, Rosenblad, Kido). Some of these authors captured the issue of air bombings during Second World War as a certain element of a historical drama, the last act of which was concluded with the atomic attack on Hiroshima and Nagasaki in 1945, without taking into account the fact that the lack of an unambiguous assessment of the events taking place during the last world war brings about significant conclusions of a *pro future* nature, perpetuating the state of uncertainty of international law on this matter. The side effects caused by refraining from taking a position on this issue by the IMT were

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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" – J. von Bernstorff, E. Mensching, *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" 2023, vol. 4, p. 1139.

550 S. Gibb, *The Applicability*…, p. 55.

551 "If anything was cynical, it was the practices adopted by belligerents in both World Wars, and if anything is unprincipled, it is the preparations made for future wars. Yet, a skeptical analysis of cynical practices should not be mistaken for a cynical analysis" – G. Schwarzenberger, *From the Law of War to the Law of Armed Conflict*, "Journal of Public Law Emory Law School" 1968, vol. 17, p. 68.

552 "In recent years, the codified law has been supplemented by a vast body of case law, only a portion of which has been reported. But it is sometimes stated that, notwithstanding this great body of materials which should satisfy even the most ardent positivist, the law of war is urgently in need of widespread revision. I would be the first to affirm that the law of war is uncertain in certain respects, that it needs revision in many areas, and that research in this area has suffered from the apathetic attitude of international lawyers" – R. Baxter, *The Law of War*, "Naval War College Review" 1957, vol. 10, p. 94.

perfectly illustrated by T. Taylor, who indicated that this entails consequences in the context of the air war in Vietnam, taking place nearly 30 years after the end of Second World War.[553]

William H. Parks acknowledges that the lack of any clear legal standards is primarily to blame for the tragedy of the Second World War, while arguing that the practice of states during the conflict created several important interpretive guidelines: 1) civilian casualties accompanying attacks on military objectives were treated as a natural consequence of warfare, 2) the responsibility for protecting civilians from the effects of aerial attacks was proportionately distributed between the attacker and the defender (as well as the civilian population itself), 3) the dispersion of the arms industry affected the extent of destruction among non-combatants.[554]

In the report of the head of the US prosecution team at Nuremberg, T. Taylor, one can find the formulation that "[…] nonetheless the ruins of German and Japanese cities were the results not of reprisal hut of deliberate policy, and bore eloquent witness that aerial bombardment of cities and factories has become a recognized part of modern warfare as carried on by all nation".[555] Taylor later argued that the attempt to hold US commanders responsible in connection with the bombing of North Vietnam was not grounded in the jurisprudence of the Nuremberg Tribunal, pointing out that the postulates in this regard were only *de lege ferenda*.[556] Lastly, C.P. Phillips pointed out that, in his opinion, military aviation entered the post-war era, "[…] air power entered the post-war period free of all limitations have those imposed by its own technology".[557]

553 T. Taylor, *Nuremberg and Vietnam: An American Tragedy*, New York 1971, p. 142.

554 W.H. Parks, *Air War*…, pp. 54–55.

555 T. Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10*, Washington 1949, p. 65.

556 W.A. Solf, *A Response to Telford Taylor's Nuremberg and Vietnam*: *An American Tragedy*, "Akron Law Review" 1972, vol. 5, p. 432.

557 C.P. Phillips, *Air Warfare*…, p. 334.

CHAPTER VI

AIR WARFARE LAW IN LIGHT OF AP I

1. General Remarks

In 1969, at the 21st conference in Istanbul, the ICRC emphasized that the practice of states during World War II, specifically the use of mass carpet aerial bombing, effectively undermined the fundamental principle of international humanitarian law, which was the obligation to continuously distinguish between combatants and non-combatants on the battlefield.[1] Waldemar A. Solf and W.G. Gradison demonstrated that this principle had completely "[…] virtually extinguished".[2] In international law doctrine, there was a widespread belief that the above issue was one of the driving forces behind the initiation of work on the next draft of international humanitarian law concerning the regulation of the use of certain methods and means of warfare.[3]

The preparatory work for the conference consisted of three consecutive stages. The first stage involved actions taken during expert meetings at the 21st International Red Cross Conference in 1969 under the program titled "Reaffirmation

1 "This was the request made by the ICRC to the League of Nations as far back as 1920. In other words, it, has never resigned itself to consider the practice of indiscriminate bombing a valid aspect of international law. And yet this practice, sometimes based on theories considering the civilian population a suitable target, was developed to such a degree, especially during the Second World War, that it has hoped to cast doubts on the fundamental distinction between combatants and non-combatants. During that war, it was a cause of great suffering and loss among the populations concerned, without even producing decisive military advantages. And the trials of war criminals conducted after 1945 failed to remove this doubt" – 21st International Conference of the Red Cross, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict*, Report submitted by the International Committee of the Red Cross, Geneva 1969, p. 65.

2 W.A. Solf, W.G. Grandison, *International Humanitarian Law Applicable in Armed Conflict*, "The Journal of International Law and Economics" 1975, vol. 10, pp. 569–570.

3 F. Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, "Chicago Journal of International Law" 2004, vol. 5, p. 202.

and Development of International Humanitarian Laws and Customs Applicable in Armed Conflicts." The second stage was a round of meetings of government experts from 1971 to 1972, the result of which was the submission of the Additional Protocol I (AP I) along with commentaries. This document was then presented to diplomatic delegations at the so-called formal diplomatic conference held between 1974 and 1977, which ultimately concluded in the adoption of the First Additional Protocol to the Geneva Conventions of 1977 in its present form. During the first stage, in a series of diplomatic meetings held as part of the conference on the confirmation and development of international humanitarian law, which took place in 1971 in Geneva, it was argued that air warfare required special regulation. This regulation should form part of measures aimed at improving the standard of protection for civilians during armed conflicts.[4]

One of the matters discussed by government experts involved issues that had already been partially regulated in 1907, particularly within the framework of the so-called III Document, i.e., a set of principles and rules concerning the conduct of hostilities, with considerations for, among others, the law of air bombing.[5] The International Committee of the Red Cross adopted a position in which it recognized the 1907 regulations as part of customary international law, applicable to all belligerents in the event of an outbreak of an international armed conflict.[6] At the same time, the organization emphasized that it would not undertake actions aimed at revising the existing norms of the Fourth Hague Convention of 1907,

4 "There should be as extensive a defence as possible, and even complete immunity, for the civilian population; the civilian population as a whole should be protected, without special rules and discrimination in favour of women and children which would complicate regulations in which simplicity was of the essence; whatever the nature of a conflict, the civilian population's right to protection should be the same; protection of the civilian population did not mean protection solely of human life but also of the resources necessary for human existence, so that protection of property essential for survival should not be omitted, and starvation as a weapon should be forbidden; in view of the danger of air raids' killing entire populations over wide areas, and considering the inadequacy of relevant rules, air warfare should be subject to regulations" – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May – 12 June 1971), *Report on the Work of the Conference*, Geneva 1971, p. 21.

5 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May – 12 June 1971), *Protection of the Civilian Population against Dangers of Hostilities – Vol. III*, Geneva 1971.

6 "Taking into consideration these stipulations with a view to possible reaffirmation or development, the ICRC does not consider them as conventional provisions tied to an instrument, the application of which depends on very strict, formal conditions (existence of war in the formal sense and clausula si omnes). Rather, as is generally agreed, it considers them as rules of customary law of a definitely humanitarian nature, in that they directly concern protection of the human person and that they are binding" – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May – 12 June 1971), *Introduction – Vol. I*, Geneva 1971, p. 32.

particularly the Hague Regulations concerning the Laws and Customs of War on Land. A contentious issue in this regard was how to determine which convention (the Hague or Geneva) would serve as the principal reference point and foundation for the additional protocols. It was decided that the Additional Protocols would be an extension of Chapter II of the the Fourth Geneva Convention of 1949. This view was justifiably not devoid of controversy, as only some of the solutions adopted under Additional Protocol I were coherently aligned with the spirit of Geneva laws, which essentially did not regulate the use of methods and means in warfare, for instance. On the other hand, it was pointed out that newly formed states (emerging during the post-colonial period) had not invoked the rules established under the Hague Conventions of 1907. Ultimately, it was decided to avoid any unambiguous answer regarding the relationship between Additional Protocol I (AP I) and the 1907 Hague Regulation, acknowledging that in certain situations, customary international legal norms may take on a new form and be written into new regulations, without questioning their nature.[7]

2. Definition of the concept of civilian population The issue of quasi-combatants

The decisive importance for issues inherently related to shaping the principles of air warfare, particularly in the area of bombing, was held by the so-called III Document on the protection of civilians from the dangers arising from armed conflicts, developed by a group of government experts in 1971. A characteristic feature can be seen in the first sentences of the document, mentioning the appeal by the ICRC to the League of Nations in 1920 that called for the restriction of air operations solely to achieving military purposes and for the confinement of unregulated air warfare to protecting undefended cities and towns.[8] In the 1969 report, the ICRC

7 "On the other hand, the ICRC considers it indispensable that these rules, even if some of them are considered to be customary law, should appear in their present form or in a developed form in some new instrument of international law, to which all the new States will be able to adhere expressly. Thus we will dissipate the uncertainty sometimes found as to the existence or non-existence of rules of customary law binding on the international community as a whole" – *ibidem*, p. 34.

8 "The efforts of the International Committee of the Red Cross (ICRC) in the field of the safeguarding of the civilian population go back a long way; in 1920 it proposed to the General Assembly of the League of Nations that it take different measures, such as the limitation of aerial warfare to exclusively military objectives, the absolute prohibition of the use of asphyxiating gases and the prohibition of the bombardment of «open towns», or undefended ones" – *Protection of the Civilian Population*…, p. 1.

experts emphasized that, based on experience gained from air operations since 1939 and legal issues stemming from the need to strengthen international law, the following points needed to be addressed:

1) the rule pertaining to the bombardment of military objectives should be supplemented with a definition of "civilian population"; additionally, the definition of military objectives must be adequately aligned with the proposal made by the Institute of International Law in 1969;
2) the bombardment of military objectives should be preceded by their prior identification;
3) bombing aimed at military objectives should be carried out with utmost care to avoid civilian casualties (it was advocated that the word "limitation" should be discarded in this respect);
4) bombing should not cause damage disproportionate to the military value of the target; the consequence of this rule should be to declare, as a last resort, the obligation to cease air operations;
5) when choosing a military target, it is essential to analyze the outcome of the attack in relation to the civilian population.[9]

When constructing the definition of the concept of "civilian population" (in accordance with the approach outlined in the ICRC 1956 draft), it was decided to use a negative legislative technique, the basis of which was the highlighted principle that all individuals who are not members of the armed forces of a belligerent state should be categorized as "civilian population".[10] The above view simultaneously implied the need for a clear formulation of the concept of "military objective", especially in the personal context. The inadequacy of the requirements of Articles 1 and 2 of the 1907 Hague Regulations, along with the expansion of the concept of combatants, including industrial workers, necessitated the adoption of a new concept regarding persons who, while not directly falling under the category of military personnel (or accompanying formations), were not involved in exclusively peaceful actions. The starting point was an attempt to refer to the term "person directly participating in hostilities", as indicated on the grounds of the

9 Institute of International Law, *The Distinction between Military Objectives and Non-Military Objectives in General and Particularly the Problems Associated with Weapons of Mass Destruction*, Edinburgh, 9 September 1969, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=A56B450838E9715DC12563CD0051D3DF (accessed: 17.12.2020); 21st International Conference of the Red Cross, *Reaffirmation*…, pp. 72–75.

10 "The majority of experts have, therefore, preferred to decline formulating a positive definition, and this for two reasons: it would tend to ignore or neglect important categories of the civilian population and, above all, it would create the grave danger of giving the impression that the categories not mentioned are considered – a contrario – as being licit personal objectives. The general trend consists in starting with the category of persons considered as military objectives in order to admit that all persons who are not members of the armed forces or who do not fill a military role should belong to the civilian population" – *Protection of the Civilian Population*…, p. 19.

common Article 3 of the 1949 Geneva Conventions, and to combine this concept with the traditionally existing dimensions of the function of combatants as individuals who are part of the military personnel and those equated with them based on organizational and functional ties. Subsequently, these individuals, as civilians, were included in the category of civilian population. In light of the assumptions of the third document from the group of governmental experts, a person remained a civilian as long as their actions were not linked to the enemy suffering a military harm.[11]

The weakness of the principle of distinction was reflected in the fact that the specialists writing the draft of Additional Protocol I had significant difficulties in specifying a clear positive legal norm protecting civilians in the course of warfare. They largely referred to the achievements of international humanitarian law in terms of customary rules, which were reaffirmed by UN General Assembly resolutions in the 1960s and 1970s.[12] The recommendations emphasized that civilians should not be used to shield military objectives. At the same time, it was pointed out that civilians whose activities directly contributed to the adversary's war effort, and who were physically within the boundaries of a military target, would bear the consequences of any attack aimed at it.[13] This view demonstrates how strong in this respect were the influences of World War II linked to the collapsing classical approach to the definition of a combatant in the context of total war waged against an industrialized state.[14] In addition, the concept of so-called quasi-combatants included those indirectly involved in the adversary's war effort, as well as those directly participating in hostilities, who would be ultimately deprived of the protection given to combatants.[15] In further work, the decision was also made to adopt the concept of a non-military object, the practical interpretation of which turned out to be even more difficult than

11 "Conversely, a person remains a civilian as long as his act or activity is not responsible for immediate damage suffered by the adversary, on the military level. Thus, a legal solution is found to the problem of civilians linked to the military effort" – *ibidem*, p. 28.

12 "While the next major iteration of the laws of war-this time in binding treaty form as the Hague Regulations 15 did not include explicit reference to the idea of non-combatant immunity, nor to the idea of direct participation in hostilities, the literature of the time continued to affirm the principle" – E. Crawford, *Virtual Battlegrounds: Direct Participation in Cyber Warfare*, "I/S Journal of Law and Policy for the Information Society" 2013, vol. 9, p. 4.

13 "Nevertheless, civilians whose activities directly contribute to the military effort, assume, within the strict limits of these activities and when they are within a military objective, the risks resulting from an attack directed against that objective" – *Protection of the Civilian Population*…, p. 38.

14 D. Schindler and J. Graham argue that the principle of distinction had to "survive" the period of World War II, see: D. Schindler, *International Humanitarian Law: Its Remarkable Development and Its Persistent Violation*, "Journal of the History of International Law" 2003, vol. 5, p. 172.

15 "The rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the law of wars. Fighting is legitimate only for the combatant personnel of a state" – Hostage Trial, *Law Reports of Trials of War Criminals*, United Nations Wartime Commission, vol. XV, London 1947–1949, p. 111.

in the case of the concept of "military objectives".[16] The initial proposal by experts regarding the definitions of "civilians" and "civilian population" was different from the one proposed in the draft of AP I – by introducing the concept of direct participation in hostilities as an element placing a person on an equal footing with military personnel.[17] Ultimately, it was decided that the draft omit the phrase "direct participation in hostilities" and refer to the "classic" category of combatants defined in the 1949 Third Geneva Convention, specifically: 1) members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces (Article 4 para. A(1)), 2) members of other voluntary organizations, including those operating in occupied territories under the conditions of organized command, badge, discipline, and the open carrying of arms (Article 4 para. A(2)), 3) members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power (Article 4 para. A(3)), as well as the so-called *levee en masse* (Article 4 para. A(4)).[18] Individuals accompanying armed forces who were not their members, as well as crew members, including those of civilian aircraft were excluded from the application of this provision. An important element of the definition of civilians and the civilian population was supplied by the provisions of Article 45 paras. 3 and 4 of the AP I. First of all, it was emphasized that the presence of individual persons who could be classified as combatants does not change or deprive a given group of civilians of their status as a civilian population, allowing implicitly that a group ceasing to predominantly consist of civilians would lose this status. The above-mentioned provision did not specify clear boundaries between these circumstances, but the use of the term "individual" indicates that only individual persons, rather than whole groups, would affect the change in status for a group classified as civilian population. As indicated by the representative of the ICRC during the preparatory phase, should individual engage in acts of armed conflict, they would become a legitimate military target.[19] The second element was the introduction of a presumption that in cases of doubt, a person would be considered a civilian. This presumption is rebuttable.[20] At the plenary session of the diplomatic conference, the article only underwent minor technical revision (merging point 4 with point 1) and as Article 50 AP I, it was adopted by consensus.

16 *Protection of the Civilian Population*…, p. 132.

17 ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, Geneva 1973, pp. 56–57.

18 *Ibidem*, p. 55. *Levee en masse* – a spontaneous organization of the population in an area directly threatened by the enemy, which did not have time to organize into regular armed units. In the event of falling into the hands of the enemy, members of *levee en masse* are entitled to prisoner of war status.

19 CDDH/III/SR.5, para. 5, p. 36.

20 "This presumption is not incontrovertible, but as long as it exists, it involves specific obligations: the person or persons in respect of whom there is a doubt must be treated as civilians, that is to say, they must not be considered as a target for attacks. The presumption is however valid only in so far as the appearance and behavior" – ICRC, *Draft Additional Protocols*…, p. 56.

The status of the direct participation in hostilities was regulated under Article 51 para. 3 of AP I. As noted earlier, it was initially considered that the requirement for recognizing a person as a civilian is their abstention from actions that would harm the enemy. However, it should be noted that the actions of quasi-combatants of an indirect nature, such as workers in armaments factories, were not considered to be acts of hostility of direct significance.[21] In other words, professional employment was not considered to be sufficiently related to participation in hostilities, indicating the need to distinguish the above circumstance from participation in the general war effort.[22] The controversy arises from the fact that the protection characteristic of civilians is once again granted to individuals who cease involvement in combat (loss of protection only for the duration of such participation). Due to the use of the above phrase, Article 51 para. 3 of AP I is considered by W.H. Parks as the most serious flaw in the entire 1977 regulation. It allows civilians under the so-called revolving door mechanism (alternating between combat and civilian roles), to "maneuver" between the statuses of combatants and non-combatant civilians, who, by definition, are not supposed to participate in hostilities.[23] The American doctrine raised the problematic nature of this mechanism, referring to aerial operations.[24] However, according to W.H. Boothby, there are no major doubts regarding the qualification of personnel involved in aircraft production or the administrative operation of airbases, as their actions are not directly related to active combat operations.[25] The contribution of an individual to the war effort does not affect their civilian status either (I. Henderson recalls a case from World War II, where a British civilian specialist developed a groundbreaking radar for night fighters).[26] Historically, acts such as gathering intelligence

21 M. Guillory, *Civilizing the Force: Is the United States Crossing the Rubicon?*, "The Air Force Law Review" 2001, vol. 51, p. 117.

22 "There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva 1997, para. 1945, p. 619. "Clearly, civilian employees carry out activities without which advanced combat operations could not be mounted" – M.N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, [in:] F. Horst (ed.), *Festschrift für Dieter Fleck, Crisis Management and Humanitarian Protection*, Berlin 2004, p. 515; L. Cameron, *New Standards for Private Military Companies?*, [in:] A. Peters, L. Koechlin, T. Forster, G. Zinkernagel (eds.), *Non-State Actors as Standard Setters*, Cambridge 2009, p. 130.

23 W.H. Parks, *Air War and the Law of War*, "Air Force Law Review" 1990, vol. 32, p. 118.

24 A.L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview,* "The Air Force Law Review" 1991, vol. 37, p. 49.

25 W.H. Boothby, *The Law of Targeting*, Oxford 2012, p. 346.

26 I. Henderson, *The Contemporary Law of Targeting*, Leiden 2009, p. 108.

by the crew of a civilian aircraft and transmitting radio communications were considered direct participation in hostilities (see the Hague Rules on Air Warfare). In the context of unmanned vehicle operations, attention was drawn to the status of operators of these vehicles under Article 51 para. 3 of AP I if they are not members of the armed forces of the user's state.[27] A similar status applies not only to the activities of operators *per se* but also to controllers, persons managing armament, and those responsible for communication systems.[28] Their status is not altered by the fact that the aircraft in question bears markings indicating its affiliation with the air forces of a given state. Another example is a civilian who equips an aircraft with military weaponry or refuels a military aircraft.[29]

The discussion on the concept of direct participation in hostilities cannot be complete without referring to the effort undertaken by the International Committee of the Red Cross (ICRC) in 2009 to develop interpretative guidelines on this matter. The document emphasized that direct participation in hostilities requires the simultaneous fulfillment of three criteria: 1) harmfulness of the act, through actions aimed at causing harm to the enemy; 2) causal link between the action and the damage; 3) direct connection of the act to actions undertaken for the benefit of, or against, a party to the conflict.[30] The ICRC's proposal also addresses the limitation of the use of force with respect to legitimate military objectives. It is groundbreaking because the rule of proportionality (unlike the principle of proportionality applied under human rights protection standards) in international humanitarian law does not impose any restrictions on the scope of the use of force (for example, deploying an airstrike against a single combatant is considered legitimate).[31] The ICRC document did not receive full approval from the international law doctrine.[32]

The final element of the considerations regarding the status of the so-called quasi-combatants of an indirect nature (e.g., workers in armament-manufacturing factories) is the assessment of their situation in relation to a planned attack on the armaments industry. It is important to note the existence of two opposing

27 E. Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict*, Oxford 2015, p. 134; I. Henderson, *Civilian Intelligence Agencies and the Use of Armed Drones*, "Yearbook of International Humanitarian Law" 2010, vol. 13, p. 155.

28 M.N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities*, "Harvard National Security Journal" 2010, vol. 1, p. 31; I. Henderson, *The Contemporary*…, p. 104.

29 R. Kolb, *Advanced Introduction to International Humanitarian Law*, Cheltenham 2014, p. 146.

30 ICRC, *Interpretive Guidance on the Notion on Direct Participation in Hostilities Under International Humanitarian Law*, Geneva 2009, pp. 47–60.

31 I. Henderson, B. Cavanagh, *Military Members Claiming Self-Defence During Armed Conflict: Often Misguided and Unhelpful*, [in:] J. Petrovic (ed.), *Accountability for Violations of International Humanitarian Law: Essays in Honour of Tim McCormack*, Oxon 2016, p. 89.

32 See: W.H. Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, "New York University Journal of International Law and Policy" 2009, vol. 42; A.P.V. Rogers, *Direct Participation in Hostilities: Some Personal Reflections*, "Military Law and the Law of War Review" 2009, vol. 48.

views on this matter. The first view suggested that workers, for the duration of their work in the factory, are to some extent "affiliated" with the military target, and thus the destruction of a specific facility results in the workers effectively being treated as a single target. Consequently, the presence of workers did not trigger issues related to the possible estimation of civilian casualties under the rule proportionality.[33] The second view assumed that, as individuals merely contributing to the enemy's war effort under Article 51 para. 3 of AP I, they could not, under any circumstances, be treated as military objectives. Consequently, in the event of an attack on their workplace, they must be included in the assessments required by Articles 51 and 57 of AP I.[34] More credence should be given to the latter view; however, a possible modification of the scope of the proportionality rule (by accepting a higher level of losses) must be considered justified.[35] In this context, it is worth quoting a full passage from the 1971 ICRC expert report:

> In practice, all civilians bear the risk associated with the indirect consequences of attacks directed against military objectives. What is fundamental, however, is the difference between a civilian who bears indirect risk by being in the vicinity of a military target, and a person acting for the benefit of a given state's war effort who is within a military target, performing specific tasks. The difference in this respect concerns the level of protection – precautionary measures applied to civilians in the vicinity of military facilities must be of a higher level than those applied to civilians associated with a state's war effort; the danger of indirect consequences is therefore higher.[36]

3. Area bombing in AP I

In the context of detailed provisions on the protection of civilians, the need to regulate the phenomenon of area bombardment, which became part of air warfare practice during World War II, was recognized.[37] In 1971, ICRC specialists emphasized the need to strengthen the role of international law in limiting the scope of

33 W.H. Parks, *Air War*…, p. 4.

34 I. Henderson, *The Firebombing of Tokyo and Other Japanese Cities*, [in:] Y. Tanaka, T. McCormack, G. Simpson (eds.), *Beyond Victor's Justice: The Tokyo War Crimes Trial Revisited*, Leiden 2011, p. 318.

35 J. Summers, *Introduction*, [in:] C. Harvey, J. Summers, N.D. White (eds.), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe*, Cambridge 2014, pp. 17–18.

36 R.W. Gehring, *Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I*, "Military Law and Law Review" 1980, vol. 19, p. 15; *Protection of the Civilian Population*…, p. 39.

37 *Protection of the Civilian Population*…, p. 35.

permissible warfare in airspace.[38] It was recognized that restrictions in this respect were possible for both humanitarian and military reasons, given the inefficiency of carpet bombing raids. The prevailing view was that this method of conducting military operations should be explicitly prohibited in AP I. The final version presented by the ICRC to the Conference of Governmental Experts highlighted the need for: 1) a clear prohibition on targeting civilians, 2) a clear prohibition of terrorist activities, 3) a prohibition of indiscriminate bombing, 4) a prohibition of reprisals, and 5) the so-called risk clause for civilians located within a military target.

The work of the Conference of Governmental Experts significantly modified the content of Article 46 of the draft AP I by combining provisions from several earlier versions.[39] In para. 1, the necessity of abstaining from making civilians the object of attack was reaffirmed, while also including provisions prohibiting employment of methods of a terrorist nature. In the comments to the provision, it was argued state that this premise does not cover dangers extending to civilians in close proximity to a military target, who bear the risk of incidental effects of the attack.[40] A valuable point in the context of terrorist activities is the conviction of government experts that the absence of a provision signaling an intent of a directional nature may consequently lead to the recognition that, *post factum*, any attack, even a legal one, but causing a specific psychological effect, could be considered terrorist in nature.[41] Paragraph 2 defined the scope of the provision, indicating that the protection resulting from the article does not extend to persons directly participating in hostilities, recognizing that such a person with civilian status is a legitimate military target throughout the entire period of their involvement.[42] Paragraph 3 prohibited the deployment of such means (implicitly

38 "These weaknesses become especially apparent in the regulation of aerial warfare which could include in provisions contained in the protocol relating to the protection of the civilian population in armed conflicts or in its regulations qf execution, on a complementary basis" – *ibidem*, p. 102.

39 "The suggestions made in relation to Article 45 might be grouped into three categories: the first concerned the actual concept of the article; the second contained two sets of proposals with regard to paragraphs 2, 3 and 4, to widen their scope, or, on the contrary, to narrow it or delete the paragraphs; the third category referred to paragraph 5, proposing its deletion (this seemed to be the dominant view), its insertion elsewhere, or its retention" – ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Report of the Work of the Conference, Volume I*, Geneva 1972, para. 3.154, p. 148.

40 "None the less, civilians who are within or in the immediate vicinity of military objectives 13 run the risk of «incidental» effects as a result of attacks launched against those objective" – ICRC, *Draft Additional Protocols*…, p. 57.

41 "The omission of any mention regarding intention in this case would have meant that any attack which only had a psychological effect on the civilian population would be a posteriori unlawful" – *ibidem*, p. 158.

42 "Thus, a civilian taking part in fighting, whether singly or in a group, becomes ipso facto a lawful target for such time when he takes a direct part in hostilities" – *ibidem*, p. 58.

referring to weapons) and methods of warfare[43] that could indiscriminately harm both civilians and combatants, or military objectives and civilian facilities, pointing out, for example, attacks that treat a zone containing several military facilities in proximity to each other and within a residential area as a single target. This was, in the opinion of government experts, a direct reference to the practice of area bombing.[44] Another example of indiscriminate operations was the execution of attacks that may be expected to entail incidental civilian casualties and the destruction of civilian facilities clearly disproportionate to the anticipated, direct and substantial military advantage. The rule of proportionality in this respect was at the same time intended to ensure the protection of the civilians from attacks on military objectives. As a result, attacks could lead to incidental losses, while considering that civilians in the vicinity of military facilities must bear the risk associated with the possibility of a military attack.[45] Paragraph 4 introduced the prohibition of reprisals against the civilian population – a groundbreaking solution that was not present *per se* in previous documents of positive law, especially in the context of the principles governing the conduct of hostilities.[46] Paragraph 5 indicated that the presence or movement of civilians or individual civilians may not be used for military purposes, in particular civilians may not shield military facilities with their presence or hinder conducting military operations. It was further argued that in the event of a violation of the rule by one of the combatants, the other would still be obliged to apply the precautionary rules listed in other articles. Experts in this matter drew on the provision from Article 28 of the Fourth Geneva Convention of 1949, whose stipulations contained similar content, although it specifically concerned protected persons. It was further argued that, if engaged in illegal activity, the civilian population could not count on full protection, but the combatant is still not exempt from the obligation to comply with precautions.[47]

43 "This provision flows directly from the Basic rule (Article 43). The expression «means of combat» covers mainly weapons, while the word «methods» covers the use that is made of those weapons" – *ibidem*.

44 "The intention of this provision is to prohibit target area bombing, also called «carpet bombing». This method of waging total warfare, whether it is carried out from land, sea or air (as indicated by the words «by bombardment or any other method»), causes very heavy losses among the population and rouses civilians to take counteraction by taking a direct part in the hostilities" – *ibidem*.

45 *Ibidem*, p. 59.

46 "Nevertheless, as the essential purpose of Article 33 is to protect civilians from belligerents in whose power they might be, it was necessary, on the one hand, to extend this rule to the field of hostilities and, on the other hand, to specify that it would apply to the civilian population as a whole" – *ibidem*, p. 59.

47 "There are two consequences of the violation mentioned in the final sentence: first, the civilians in question will not in fact enjoy real immunity, and secondly, the precautionary measures specified in Article 50 must be taken" – *ibidem*.

Diplomatic conference held between 1974 and 1977, the ICRC representative emphasized that the first document which made an attempt to determine the extent of civilian population protection was the ruling of the Commission of Jurists of 1922/1923.[48] He emphasized that it was necessary to accept the subjective nature of the rule of proportionality. However, the introduction of the above concept raised substantive concerns during the work of the so-called Third Committee, involving the delegations of Hungary, the GDR, Poland, Czechoslovakia, and the representative of the North Vietnam, who denied the proportionality rule status as a part "existing international law".[49] Some representatives completely rejected the possibility of implementing any concept based on the rule of proportionality within AP I and, considering it an element that could lead to abuse by the attacker.[50] Dieter Fleck, Erik Castrén, as well as Hans Blix indicated that the deletion of para. 3(b) (in the final version of Article 51 para. 5(b)) might lead to a collapse of the effectiveness of the ban on indiscriminate bombing.[51] It was further argued that the absence of the proportionality criterion in the final text would lead to absurd circumstances on the battlefield and, in itself, would constitute a degradation of the already existing norm of customary character (United Kingdom's delegate).[52] Similar doubts existed regarding the classification of a terrorist attack expressed in para. 1 ("intended to spread terror and which spread terror").[53] In the context of the adopted prohibition of reprisals, there was a consensus among the conference participants (some delegations pointed out that, from the historical conduct of hostilities, in the absence of a system of international justice, reprisals were the only means of forcing the state – the violator – to comply with humanitarian law, postulating the possibility

48 "Since the First World War there had been many vain attempts at codifying the immunity of the civilian population. The 1922/23 project would have required combatants to abstain from bombing when it might affect the civilian population, but a good text was useless if it went unsigned, unratified and unimplemented. The Red Cross was conscious of the fact that the rule of proportionality contained a subjective element, and was thus liable to abuse. The aim was, however, to avoid or in any case restrict the incidental effects of attacks directed against military objectives" – CDDH/III.SR.5, para. 12, p. 37.

49 CDDH/III/SR.8, para. 13, p. 61. M. Piątkowski, *The Case of M/S Józef Conrad and Law of Air Warfare During the Vietnam War*, "Journal of International Humanitarian Legal Studies" 2022, vol. 13(1), p. 144.

50 Leading the way in this regard were Arab states, whose amendments aimed to eliminate the possibility of any harm to civilians, consequently adopting the view of zero tolerance for collateral damage. See: J. Rabkin, *Proportionality in Perspective: Historical Light on the Law of Armed Conflict*, "San Diego Journal of International Law" 2015, vol. 16, p. 313.

51 CDDH/III/SR.7, para. 28, p. 54; CDDH/III/SR.8, para. 9, p. 60.

52 CDDH/II I/SR.8, para. 48, p. 64. "An absolute prohibition would result in a very difficult situation, for instance when there was a single civilian near a major military objective whose presence might deter an attack" – CDDH/ I/SR.7, para. 37, p. 55.

53 CDDH/I II/SR.7, para. 23, p. 54.

of permitting reprisals against civilian objects).[54] The Australian delegate pointed to the issue of the commander's good faith and the need to take into account subjective circumstances that could be based on correct and reasonable grounds when deciding to launch an attack.[55] George Aldrich (the representative of the United States) emphasized that the rule of proportionality, based on the existing international law of a customary nature (this position is worth emphasizing in the context of air operations in Vietnam), is the only reasonable legal solution that may limit the effects of an armed conflict, enabling combatants to implement specific military measures.[56] Ultimately, the draft version of Article 46 (which was to become the later Article 51 AP I) was extended. As part of para. 3 (later to become para. 4) it was determined what types of attacks are of an indiscriminate nature: 1) which cannot be directed against a specific military target, 2) which use means or methods that cannot be directed against a specific military target, 3) which use means or methods the effects of which cannot be limited in accordance with the requirements of AP I. Consequently, indiscriminate attacks included all attacks aiming at military target and civilian objects indiscriminately.[57] In para. 4(a) (later to become para. 5(a)) an attack treating a group of clearly distinguishable and distant military objectives, generally located in built-up areas as a single military target was given as an example.

At the plenary conference, the French side objected to the amendment, arguing that a detailed distinction of what types of attacks were considered prohibited carried many contradictions and ambiguities that would hinder their direct practical application.[58] The first controversy was how to establish a definition of a specific military target, which could be difficult to define in the case of industrial districts or forested areas serving as a cover for the civilian population and camouflage for military operations. The second area of contention was the issue of determining what clearly distinctive and distant military objectives are. The value of para. 7 was also questioned as preventing the armed forces from taking meaningful actions in defense of a locality, as it will always clash with the prohibition of deploying

54 "His delegation could accept a prohibition on reprisals against civilians or the civilian population, but not on reprisals against civilian objects" – CDDH/I/SR.7, para. 37, p. 55.

55 "With regard to the view of some delegations that paragraph 3 was too subjective and provided too little protection, he said that military commanders, acting on the best information they could obtain, would attack targets which they regarded as warranting attack" – CDDH/III/SR.8, para. 33, p. 63.

56 CDDH/III/SR.8, para. 69, p. 67.

57 CDDH/215/Rev.l, p. 204.

58 "As an example he said that it would be very difficult in many cases to estimate the limits of a «specific military objective» which was mentioned but not defined in paragraph 4(b) especially in industrialized zones of large cities and in forestry zones which could serve as a cover to the stationing and movement of enemy force while being used as a shelter by the civilian population" – CDDH/SR.41, para. 111.

military objectives within built-up areas.[59] The last form of blocking the adoption of the provision was a proposal from Turkey to vote on each paragraph separately. Consequently, however, Article 51 AP I was adopted by an overwhelming majority, with only France voting against it.

4. Prohibition of indiscriminate attacks in AP I

4.1. Means of attack

As already mentioned earlier, the principle of distinction in the context of the provisions of Article 51 paras. 4 and 5 of the AP I was directly linked to an attempt by the international community to find a remedy to prevent carpet bombing from recurring.[60] Article 51 para. 5(b) of AP I directly referred to this particular practice.[61] Article 51 para. 5(a) of AP I, on the other hand, provided a definition of attacks without distinction – the natural interpretation of the phrase is contained in the content of point (a) of the provision ("attacks that are not directed against a specific military objective").[62] A more complex instruction is provided in the content of point (b). It should be pointed out that the provision makes a division according to the means and methods that may be used to strike specific targets without distinction.

Referring first to the means, it should be noted that relatively few weapons are discriminatory *per se*.[63] This circumstance is primarily related to the ability of a given weapon to be directed at a given military target.[64] What is important in

59 "The French delegation considered that Article 46 went beyond the scope of its humanitarian aim and that it was likely seriously to impair the inherent right of legitimate defence" – CDDH/SR.41, para. 114.

60 "Thus, actions such as the bombing of London by the Luftwaffe in 1940, or attacks such as that on Dresden by the Allies in 1944, are now proscribed. This Article will not prevent all civilian casualties in areas containing legitimate military objectives, but it attempts to prevent indiscriminate attacks on populated areas launched solely for the purpose of destroying the will of the civilian population in general to wage war" – W.H. Buckley, *New Protocols Broaden Definition of "Armed Conflict"*, "Mercer Law Review" 1977–1978, vol. 29, p. 1166; M. Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, "California Wester International Law Journal" 2002, vol. 33, p. 34 ff.

61 I. Detter de Lupis Frankopan, *The Law of War*, Cambridge 1987, p. 231.

62 J. Crowe, K. Weston-Scheuber, *Principles of International Humanitarian Law*, Northampton 2013, pp. 59–60.

63 W.H. Boothby, *The Law of Targeting*, p. 92.

64 T.M. McDonnel, *Cluster Bombs over Kosovo: A Violation of International Law?*, "Arizona Law Review" 2002, vol. 44, p. 79.

this regard is the effectiveness of the weapon in the context in which it is capable of being predictable and controllable.[65] Such a type of armament is colloquially referred to as "blind".[66] One of the common examples indicated in the doctrine of international law is the deployment of two weapons –so-called Fat Berta, used by the Germans to shell Paris during World War I, as well as V-1 and V-2 rocket missiles during World War II. In the first case, for example, J.M. Spaight deemed that at the time of its deployment, there was no norm – either positive or even customary law – explicitly prohibiting the use of long-range artillery, and that the result of its deployment was also a consent to the possible inaccuracy of the attack.[67] In the context of attacks with V-1 and V-2 missiles, the primitiveness of target homing systems was so low that achieving effectiveness depended on selecting a sufficiently wide area, which was most often at least a medium-sized city. Similar considerations apply to rudimentary rockets and missiles (handmade), which, by their very nature, cannot be directed against a specific military target – e.g., those used by Hamas during the shelling of Israel in 2023 and in the years preceding it.[68] For this reason, Article 51 para. 4(b) of AP I may be an independent basis for the prohibition of armament, which is inherently incapable of complying with the principle of distinction.[69]

Another sphere regulated by the content of the provision is, in turn, the difference between a method and means. Legal weaponry can be used in illegal ways.

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65 "With the changing nature of war, where the industrial capacity and civilian morale of a nation are so important to its ability to wage war, it is becoming more difficult to define a military target. A weapon so inaccurate that it was as likely to hit non-combatants as combatants would clearly be illegal" – H. Harris, *Modern Weapons and the Law of Land Warfare*, "Military Law and Law Review" 1973, vol. 12, p. 20.

66 S. Wei, *The Application of Rules Protecting Combatants and Civilians Against the Effects of the Employment of Certain Means and Methods of Warfare*, [in:] F. Kalshoven, Y. Sandoz (eds.), *Implementation of International Humanitarian Law: Research papers by Participants in the 1986 Session of the Center for Studies and Research in International Law and International Relations of the Hague Academy of International Law*, London 1989, p. 382.

67 J.M. Spaight, *Air Power*…, p. 230 ff.

68 "Hamas forces have fired thousands of indiscriminate rockets towards Israeli population centres" – Diakonia International Humanitarian Law Center, *Legal Brief: 2023 Hostilities in Israel and Gaza: December 2023*, 2023, p. 5, https://apidiakoniase.cdn.triggerfish.cloud/uploads/sites/2/2023/12/Legal-Brief-2023-Hostilities-in-Israel-and-Gaza.pdf (accessed: 5.06.2025).

69 E. Crawford, A Pert, *International Humanitarian Law*, Cambridge 2015, p. 198. "If a weapon is incapable of being used in a way which permits discrimination between military objectives and civilians or civilian objects, then it is inherently indiscriminate and these principles render it unlawful. In practice, very few weapons are so inaccurate that they cannot be used in a way which complies with the principles set out in the preceding paragraph, although the V1 and V2 missiles used by Germany in the Second World War probably fell into that category" – C. Greenwood, *The Law of Weaponry at the Start of the New Millennium*, "International Law Studies" 1998, vol. 71, p. 200.

Steven Haines understands the above to be a distinction between the designed characteristics of weaponry and the misuse of a particular type of armament.[70] Michael N. Schmitt points out that the second dimension of the provision is a question of method application, which may refer to almost any type of means, giving as an example in this regard actions of the Iraqi armed forces during the First Gulf War, where the launching of SCUD rockets against Israeli cities was disproportionately dangerous for the civilian population in relation to the actual ability to destroy military objectives.[71] William H. Boothby argues that another example in this regard is furnished by the effects of using biological or chemical weapons – their use is prohibited *per se* not only by a special, dedicated treaty norm, but also by the fact that their use cannot be in any way controlled and limited solely to the destruction of military objectives.[72] The British author also refers in this context to an issue implicitly arising from the stipulation of Article 51 para. 5(a) of AP I, namely the need to select a set of means that may, to some extent, determine the assessment of whether a given attack displays the characteristics of an indiscriminate strike – provided that such means are found in a given state's arsenal and their use is justified in the light of the quantity of precision munitions available, the general tactical, strategic and partially economic situation.[73] It is therefore far more likely that it is the question of the use of a particular means or method that will be assessed from the perspective of the norm contained in Article 51 para. 4 AP I.[74] For example, in this vein, the United Kingdom submitted an interpretative declaration to the content of Protocol III to the CCW Convention, whereby it indicated that air bombardment "do not imply that the air-delivery of incendiary weapons, or of any other weapons, projectiles or munitions, is less accurate or less capable of being carried out discriminately than all or any other means of delivery".[75]

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70 S. Haines, *The Developing Law of Weapons: Humanity, Distinction, and Precautions in Attack*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 283; see also H. Blix, *Means and Methods of Combat*, [in:] United Nations Educational, Scientific and Cultural Organization, *International Dimensions of Humanitarian Law*, Dordrecht 1998, p. 145.

71 M.N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, "Yale Human Rights and Development Journal" 1999, vol. 2, p. 148.

72 W.H. Boothby, *The Law of Targeting*, p. 92.

73 *Ibidem*, p. 93.

74 S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford 2012, p. 347.

75 "The United Kingdom accepts the provisions of article 2(2) and (3) on the understanding that the terms of those paragraphs of that article do not imply that the air-delivery of incendiary weapons, or of any other weapons, projectiles or munitions, is less accurate or less capable of being carried out discriminately than all or any other means of delivery" – Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Geneva, 10 October 1980. United Kingdom of Great Britain and Northern Ireland, 1995, https://ihl-databases.icrc.org/en/ihl-treaties/ccw-protocol-iii-1980/state-parties/gb (accessed: 13.07.2025).

Given the above, the premise of the prohibition of indiscriminate attacks is contextual: it is the circumstances that will determine the legality of the means (rarely) and method (more often).[76] As the British specialist in the assessment of the legality of weapons points out, undoubtedly Article 51 para. 4 AP I of the provision will also apply during the legal review process mentioned on the basis of Article 36 AP I of 1977.[77] Article 51 para. 4(c), in turn, referred to weapons, the effects of which cannot at all be limited solely to military objectives – such as bacteriological weapons.[78] As J. Conde Jimianian pointed out, weapons of this type are "incapable of discrimination, their effects are difficult to control, they are unpredictable in scale and duration, and they may prove impossible to defend against".[79] Interestingly, as K. Egeland points out, no weapon or method has in turn been banned "on the grounds of being inherently disproportionate".[80]

4.2. Methods of attack

As mentioned previously, Article 51 para. 5(a) of AP I referred directly and unambiguously to World War II and the practice of air operations, taking place in particular between 1942 and 1945.[81] Thus, the practice of area attacks was banned *pro futuro*.[82] According to F. Bouginion, Article 51 para. 5(a) of AP I was one of the most important achievements of the diplomatic conference between 1974 and 1977.[83] During the preparatory work, four interesting

76 W.H. Boothby, *Weapons and the Law of Armed Conflict*, Oxford 2009, p. 79.

77 *Idem*, *The Law of Weaponry: Is it Adequate?*, [in:] M.N. Schmitt, J. Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultiness, Essays in Honour of Yoram Dinstein*, Leiden 2007, p. 306.

78 Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 1965, p. 623.

79 J.M. Conde Jimianian, *The Principle of Distinction in Virtual War: Restraints and Precautionary Measures under International Humanitarian Law*, "Tilburg Law Review" 2010–2011, vol. 15, p. 76.

80 K. Egeland, *Lethal Autonomous Weapon Systems under International Humanitarian Law*, "Nordic Journal of International Law" 2016, vol. 85, p. 105.

81 M. Veuthey, *Histoire du droit international humanitaire dans la guerre aérienne*, [in:] A.-S. Millet-Devalle (ed.), *Guerre* aérienne et droit international humanitaire, Paris 2015, pp. 51–52; W.J. Fenrick, *The Prosecution of War Criminals in Canada*, "Dalhousie Law Journal" 1989–1990, vol. 12, p. 262.

82 "Thus, actions such as the bombing of London by the Luftwaffe in 1940, or attacks such as that on Dresden by the Allies in 1944, are now proscribed. This Article will not prevent all civilian casualties in areas containing legitimate military objectives, but it attempts to prevent indiscriminate attacks on populated areas launched solely for the purpose of destroying the will of the civilian population in general to wage war" – W.H. Buckley, *New Protocols*…, p. 1166.

83 A lecture given at the *International Humanitarian Law Conference: 40th Anniversary of 1977 Additional Protocols to the Geneva Conventions: Confirmed Relevance to the Contemporary Armed Conflicts*, Yerevan, October 26, 2017.

papers were written on the issue of so-called area bombing. Hans Blix pointed out that indiscriminate bombing, which is carried out in a careless manner, is not only illegal but also devoid of any military significance, considering it a waste of ammunition. A similar position was expressed by B. Carnaham, who indicated that the practice of World War II proved that where was no link between bombing the civilian population and impact on the morale of the German civilian population, justifying, however, possible violations by actions based on the principle of reprisals, and significant civilian losses through technical inaccuracy.[84] James M. Spaight argued that in many cases the combatants intended to destroy purely military objectives, but the effects of such attacks turned out to be excessive due to the proximity of civilian population concentrations and technical inadequacies.[85] In this regard, he considered the accurate identification of targets and appropriate selection of attack methods to be essential elements of the planning process.[86] Esbjörn Rosenblad made a distinction between carpet bombing (or area bombing) and so-called target area bombing, considering the latter method to be indirectly aimed at causing effects characteristic of carpet-bombing raids or even a terrorist attack.[87] As H. Meyrowitz rightly emphasized, the differences between individual types of bombing during World War II were in no way based on legal regulations, but on purely technical ones.[88] An attempt to build a legal justification for area bombing was indicated by the US military instruction AFP 110-31, issued just before the adoption of AP I, which emphasized that "the dispersion of industry made it necessary to treat the entire zone as a target, and a strong anti-aircraft defense prevented the proper target selection".[89] George Adler held that attacks of a zonal nature (target area bombing) which have military facilities dispersed over a given area as their primary target cannot be regarded as having been carried out in violation of the principle of distinction, since the resulting civilian population losses are incidental and can only be assessed in the light of the rule of proportionality.[90]

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84 "Most of the violations of the laws of air warfare in World War I and World War II resulted from two factors: the inaccuracy of bombing and the law of belligerent reprisal and reciprocity" – B. Carnaham, *The Law of Air Bombardment in Its Historical Context*, "The Air Force Law Review" 1975, vol. 17, p. 51.

85 J.M. Spaight, *Air Power in the Next War*, London 1939, p. 130.

86 H. Blix, *Area Bombardment: Rules and Reasons*, "The British Yearbook of International Law" 1978, vol. XLIX, p. 58.

87 E. Rosenblad, *Area Bombing and International Law*, "Military Law and Law of War Review" 1976, vol. 15, pp. 62–65.

88 H. Meyrowitz, *Le bombardement stratégique d'après le protocole additionnel I aux Conventions de Genève*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht" 1981, vol. 41, p. 15 ff.

89 *Air Force Pamphlet AFP 110-31*, pp. 5–5.

90 G. Adler, *Targets in War: Legal Considerations*, "Houston Law Review" 1970, vol. 8, p. 28.

4.3. Types of air bombing

First and foremost, the terms used in the literature should be defined. It is possible to distinguish five main types of bombing which took place during Second World War:

1. Terror bombing – bombing raids executed to intimidate the civilian population.
2. Civilian population bombing – distinguished from terror bombing by the lack of an element of intention in the form of *dolus directus coloratus*.
3. Carpet bombing (or its synonyms – area) – the most classic example of indiscriminate bombing, which treated the distinction between military and civilian targets with the utmost arbitrary discretion, usually treating the center of a built-up area as the central geographical targeting point.[91]
4. Target area bombing[92] – this type of attack was directed against a given area featuring legitimate military objectives as well as civilian facilities, e.g. industrial districts, within which factories and production plants catering to the needs of armed forces were located, but also non-military facilities such as accommodation for those employed in armament factories.[93] An example is furnished by the attack against the Ruhr during World War II, where a significant density of industrial facilities from the point of view of the war economy of the Third Reich made it impossible to separate these targets from others.[94] George H. Aldrich believed that rare cases exist where bombardment of this type will not result in a simultaneous violation of the rule of proportionality.[95] A certain contemporary subtype of target area bombing

91 "As carpet bombing by its nature does not adhere to the principle of distinction, but rather strikes indiscriminately at an entire area, it cannot, by definition, differentiate between combatants and noncombatants, and thus violates customary international law in the frequent case when civilians and civilian objects fall victim to such attacks" – N. Barrett, *Holding Individual Leaders Responsible for Violation of Customary International Law: The U.S Bombardment of Cambodia and Laos*, "Columbia Human Rights Law Review" 2000–2001, vol. 32, p. 455.

92 "Area bombing, and now «target bombing» refer to attacks on cities or congested populace areas in which the indirect damage to the civilians will be large. But strategic economic warfare, ultimately, was to include the civilians themselves as targets provided they were working in the military effort. In major wars, this would mean the entire community" – H. Almond, *Comments on Hugh Lynch's Paper: Strategic Imperatives: Economic Warfare at Sea*, "International Law Studies" 1993, vol. 65, p. 303.

93 S. Oeter, *Methods and Means of Combat*, [in:] D. Fleck (ed.), *The Handbook of the International Law of Military Operations*, Oxford 2013, p. 119.

94 W.H. Parks, *The Protection of Civilians from Air Warfare*, "Israel Yearbook of Human Rights" 1997, vol. 65, p. 75. The American author (p. 94) points out that a subtype of area bombing is the targeting of military objectives, but with a high collateral damage ratio, citing the example of Warsaw in September 1939 (with the caveat that the information in this regard is disputed).

95 G.H. Aldrich, *New Life For the Laws of War*, "American Journal of International Law" 1981, vol. 75, p. 780.

may be the tactics of so-called sky artillery observed during Russia's aggression against Ukraine employed both by helicopters and fixed planes. This is an action forced by the accumulation of anti-aircraft weaponry, which forces air crews to launch attacks using unguided missiles fired towards enemy lines. This tactic allows the crew to stay as short as possible in the danger zone, but at the expense of accuracy. The use of such tactics in an urban area, for instance, is likely to lead to a violation of the ban on indiscriminate attacks, because the time over the target is limited to a minimum, which prevents the correct identification and distinction of targets.[96]

5. Precision bombing – in which an attack is directed only and exclusively against military objectives. Significantly, as part of this attack, it is still permissible that accidental and unintentional losses might occur among the civilian population, proportional to the military advantage obtained.

As a side note to the classification given, it is worth pointing out that it only holds any value in a situation in which there is a real chance of exposing the civilian population to danger as a result of bombing. Therefore, it does not apply to situations where the target of the attack is, for example, a concentration of strictly military objectives over a large area with no civilian population. A point of reference in this regard can be found explicitly in Article 51 para. 5(a) of AP I, where a "concentration of civilians or civilian objects" was indicated as a negative premise for the attack. In such a situation, the choice of bombing method (carpet or precision) may be essentially arbitrary and depends solely on the intent of the attacker (while maintaining other restrictions pursuant to other norms of international humanitarian law).[97]

In the context of the preparatory work, attention should be turned to the controversial interpretation of the phrase "clearly separated and distinct military objectives" occurring in Article 51 para. 5 AP I – it should be pointed out, however, that the *ratio* of the provision concerned the prohibition of target area bombing, carried out despite the possibility of separating individual military objectives (located at a certain distance from each other).[98] In such situations, the attacker should launch two separate attacks, instead of a single area strike, especially if they possess new precise means of combat.[99]

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96 M. Piątkowski, O. Sotula, *Air Warfare over Ukraine and International Humanitarian Law*, "Acta Universitatis Lodziensis. Folia Iuridica", vol. 106, pp. 13–33.

97 T. Marauhn, S. Kirchner, *Target Area Bombing*, [in:] N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare*: *Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006, p. 95.

98 "It will be noted that the Conference adopted a wording very similar to that which the ICRC had proposed, namely, «at some distance from each other». It was decided not to add the phrase cited above, no doubt through fear of encouraging area bombardment, for in such a case the attacking forces could use their own judgment, taking into account the weapons available and the circumstances, as to whether the individual objectives were too close together to be attacked separately" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 1971.

99 T. Marauhn, S. Kirchner, *Target Area*…, p. 96.

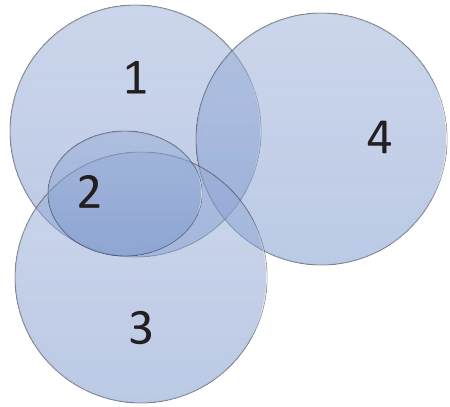

Figure 1. Types of air bombardment and IHL

Legend: 1 – bombing of the civilian population, 2 – terror bombing, 3 – carpet bombing, 4 – target area bombing.

Source: author's own contribution.

William H. Parks was a critic of the solutions adopted under Article 51 para. 5(a) of AP I, who considered that, in the first place, the provision should consider whether within its framework, there is a technical possibility to carry out an air attack on certain military objectives in a separable manner.[100] While, in the context of the author's comment, one may consider whether, in fact, the content of AP I raises such doubts, the reservation regarding the responsibility of the defending party for the use of "passive" precautions seems much more justified. The consequence of omissions should, in the author's opinion, be "responsibility for death or injury resulting from the illegal action of the defender lies with the defender, however."[101] The American expert recognized the final content of Article 51 para. 5 AP I as inherently contradictory to the above logic, considering it, moreover, as one drawing a wrong conclusion from the practice of states during World War II.[102] In this regard, it appears that the decisive factor influencing the author's acceptance of a given application was the dispersion of the armaments industry by the governments of the Third Reich and Japan within urban areas. A similar view was expressed by G. Adler, who stated that if the enemy is not obliged to indicate the location of military objectives, and camouflages, hides or deploys them in the vicinity of civilian population centers, all the more so the

100 W.H. Parks, *Air War*…, p. 161.
101 *Ibidem*, p. 168.
102 *Ibidem*, p. 165 ff.

attacker in this situation is not obliged to refrain from carrying out the attack.[103] However, this is not a unified view.[104] As C. Greenwood pointed out, the preamble of AP I unambiguously emphasizes the fact of compliance with the provisions of the Protocol "regardless of the circumstances", "reasons" or "motives".[105] This does not mean, however, that certain behaviors of the adversary may affect the *per casu* assessment of individual incidents, especially in the context of the proportionality rule.

4.4. Critical point of the law of air bombing

It should be emphasized that the boundaries between the above types of bombings are not clear-cut. In the case of points a, b, c, the possibility of distinguishing an attack on account of its execution in a terror-inducing or area mode is basically obliterated.[106] This is clearly due to the difficulty of classifying a particular bombing as terror without simultaneously assigning a specific intent. Hersch Lauterpacht believed that it was possible to put an equality sign between terror attacks and bombing aimed directly at the civilian population without any military considerations.[107] From a practical point of view, the difference is indeed difficult to grasp in this respect, but the theoretical lack of fulfilment of the additional premise of a terror-inducing action in fact makes it difficult to make a correct distinction between the two types of attacks.[108] A much more significant difference was the line drawn between so-called target area bombing and precision bombing – perfectly illustrated by the example of the ICTY ruling in the *Gotovina* case, in-

103 "If the approximate location is known and the best hardware is used, it is not an illegal indiscriminate attack when some nonmilitary objectives are also struck. When factories are concealed in jungles, oil and gasolines dumps are hidden, and supplies are placed in populated areas, the fault lies with the side which so located the military target. There is no duty for one side to notify the enemy of the precise geographic coordinates of military resources; on the other hand, there is no duty for the opposing forces to withhold attack. The question at all times is one of balancing military advantage with incidental damage. If the military target is important enough, attack is legal" – G. Adler, *Targets in War*…, p. 29.

104 See: R.G. Wright, *Noncombatant Immunity: A Case Study in the Relation Between International Law and Morality*, "Notre Dam Law Review" 1991, vol. 67.

105 C. Greenwood, *International Humanitarian Law in Context: A New International Legal Order*, "Collected Courses of the Xiamen Academy of International Law" 2016, vol. 8, p. 321.

106 "Under such circumstances, the distinction between the combatant and noncombatant could be readily observed. However, with long range artillery, high altitude bombing, guided missiles, nuclear bombs, and poison gases, a certain control is lost over the direction of the weapon. Add to this the fact that the noncombatant lives near and works in legitimate military objectives where little protection can be offered him" – J. Kelly, *A Legal Analysis of the Changes in War*, "Military Law Review" 1961, vol. 13, pp. 104–105.

107 H. Lauterpacht, *The Problem of the Revision of The Law of War*, "The British Yearbook of International Law" 1952, vol. 29, p. 368.

108 H. Blix, *Area Bombardment*…, p. 195.

dicating serious difficulties in the correct assessment of the type of bombing underlying the findings necessary for appropriate subsumption. This interdependence was discerned by K. Raby, who argued that there is "a fine line between bombing of an incidental nature and bombing without distinction".[109] These difficulties result from the inability to clearly grasp whether the attacker is attacking legitimate military objectives, in the course of which they make justified errors (resulting from technical faults, for example), or through carelessness or apparent negligence, simultaneously attacking military and civilian targets without distinction.[110] As J.D. Ohlin pointed out, this circumstance becomes more difficult, as ICTY jurisprudence indicates the need to separate criminalized recklessness from ordinary negligence.[111]

5. Rule of proportionality in AP I[112]

5.1. General remarks

The USAF AFP 110-31 instruction, issued just before the completion of the work on AP I, identified the reasons for accidental civilian casualties, recognizing them to be mainly a consequence of the inability to separate military objectives from

109 K. Raby, *Bombardment of Land Targets Military Necessity and Proportionality Interpellated*, Thesis, Charlottesville 1964, p. 64 ff.

110 A. Breitegger, *Cluster Munitions and International Law: Disarmament with a Human Face?*, Oxon 2012, p. 42.

111 J.D. Ohlin, *Targeting and the Concept of Intent*, "Michigan Journal of International Law" 2013, vol. 35, p. 99.

112 At this point, one can refer to R. Dworkin's division into principles (specific patterns and interpretative signposts) and rules (all-or-nothing fashion) (M. Zirk-Sadowski, *Wprowadzenie do filozofii prawa* [*Introduction to Philosophy of Law*], Warszawa 2021, pp. 197–198). At this point, it should be noted that two references are found in the literature: the principle of proportionality (much more frequently) and the rule of proportionality. M.N. Schmitt, for example, believes that in international humanitarian law, there are foundational principles (such as humanitarianism and military necessity), general principles (such as distinction, prohibition of causing excessive injury and unnecessary suffering, and chivalry), and rules (e.g., proportionality rule and use of precautions). M.N. Schmitt, *International Humanitarian Law*, [in:] B. Saul, D. Akande (eds.), *The Oxford Guide to International Humanitarian Law*, Oxford 2020, pp. 148–151. The discussion regarding the role of principles within international law ("general principles of law formed within the international legal system") is a subject of debate in the International Law Commission (*General principles of law: Text of the draft conclusions provisionally adopted by the Drafting Committee on first reading*, A/CN.4/L.982. ("my conclusion is that this norm is a rule, not a principle, because it is very specific and lacks breadth in its application" – J. van den Boogaard, *Principles of*

civilian facilities, the deliberate placement of military assets around goods and civilians, a change in the purpose of a given category of facility, as well as a lack of due diligence of the attacking party during the execution of an air strike.[113] The commentary clearly stated that attacks against military objectives could result in losses among non-combatants, but their limit is the excess of casualties and damage to civilian property in relation to the "expected, direct and unequivocal military benefit".[114]

It should be mentioned at the outset that, while the concept of proportionality itself was more or less formulated, its concretization into an acceptable and relatively clear form had been the subject of much controversy, starting with the Hague Rules of Air War of 1923. The multitude of proposed legislative solutions, on the one hand, indicated the desired direction of regulation, but on the other hand introduced contentious elements. The draft of AP I stipulated that the recognition of an operation as legitimate in the context of possible civilian casualties was conditional on the assumption that casualties or destruction were incidental and proportional to the direct and significant military benefit.[115] Yet another concept was applied by government experts who argued for definitions of clear military advantage.[116] Antonio Cassese stated that the customary status of the rule of proportionality as of the 1977 diplomatic conference was too "vague to become a reflection of the existing legal situation".[117] The statement highlights the significant challenge faced by the delegates in selecting and refining the formulations of this paradigm. At the same time, as M.N. Schmitt rightly pointed out, the rule

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International Humanitarian Law: A New Framework, [in:] S. Sivakumaran, C.R. Burne (eds.), *Making and Shaping the Law of Armed Conflict*, Oxford 2024, p. 67. The author emphasizes that proportionality in international humanitarian law is a specific rule that applies in strictly defined circumstances related to the conduct of attacks. Therefore, it is unnecessary for explaining the principles and foundations of international humanitarian law (since if a planned attack does not result in civilian casualties, proportionality will not apply). The author further argues that the widespread use of the term "principle of proportionality" is tied to its practical significance or the granting of discretion to the commander. J. van den Boogaard, *Proportionality in International Humanitarian Law*, Cambridge 2023, p. 25.

113 *Air Force Pamphlet AFP 110-30*, pp. 5–10.

114 *Ibidem*.

115 *Draft to the Additional Protocols*…, p. 64.

116 "Those who order or launch an attack, shall refrain from doing so when the probable losses and destruction are disproportionate to the concrete military advantage sought by them" – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, *Report on the Work of the Conference, Vol. I*…, p. 153.

117 "Current formulations, however, can be regarded as too broad and not reflecting the existing legal situation" – A. Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, "Pacific Basin Law Journal" 1984, vol. 55, p. 85. See also J. Kilcup, *Proportionality in Customary International Law: An Argument against Aspirational Laws of War*, "Chicago Journal of International Law" 2016, vol. 17, p. 250.

of proportionality is of particular importance in the framework of air operations, since aerial means of warfare may be fired or dropped with less precision than standard munitions, and the characteristics of air operations also mean that an attack is often carried out without a full picture of the situation on the ground.[118]

It should therefore not be surprising that the final content of the rule of proportionality differed significantly from what was adopted in draft Protocol I, despite the widespread understanding of its essence.[119] As mentioned earlier, during the Diplomatic Conference, Arab and African states considered any concept of justifying losses among non-combatants to be a kind of oxymoron, contrary to the general character of AP I.[120] The United States, on the other hand, insisted that the rule of proportionality was an already recognized component of customary international law.[121] It was argued that the scope of the provision should be limited by introducing a geographical criterion in relation to the closest location of the military target.[122] In the content of Article 51 para. 5(b) of AP I, it was decided to replace the word "disproportionate" with "excessive" in relation to the expected, direct and specific military benefit.[123] The solution applied, however, is only a semantic formula intended as a compromise in response to the objection voiced by certain states to the use of the word "disproportionate".[124] It should be noted that this change was considered an advance on the original version, which allowed the content of the norm to be reflected in the provision.[125]

The conference itself pointed out that, while the premises themselves were legitimate, their actual application would be susceptible to subjective interpretation from the perspective of the belligerents.[126] Enzo Cannizzaro argues that proportionality

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118 M.N. Schmitt, *Air Warfare*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, pp. 138–139.

119 "It was only practical to recognize that when legitimate military objectives were attacked a certain amount of incidental damage to civilian objects was inevitable, although such damage must not be disproportionate to the military advantage sought" – CDDH/III/SR.16, para. 53, p. 138.

120 CDDH/III/SR.7, para. 43, p. 56.

121 W. O'Brien, *Some Problem of the Law of War in Limited Nuclear Warfare*, "Military Law Review" 1961, vol. 14, pp. 12–13.

122 CDDH/III/SR.8, para. 9, p. 60.

123 CDDH/III/SR.31, para. 42, p. 305.

124 G.S. and G.P. Corn point out that in the doctrine of international humanitarian law, the terms "rule of proportionality" and "principle of proportionality" are used interchangeably – G.S. Corn, G.P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, "Texas International Law Journal" 2012, vol. 47, p. 365.

125 E. Jaworski, *"Military Necessity" and "Civilian Immunity": Where is the Balance?*, "Chinese Journal of International Law" 2003, vol. 175, p. 186.

126 CDDH/III/SR.19, para. 20, p. 167. "Admittedly the idea of proportionality called for the exercise of judgement on the part of combatants. It might be open to criticism since the combatants would have to strike a balance between civilian losses and military advantage; but the two values were not commensurate" – CDDH/III/SR.21, para. 4, p. 182.

limits the rights of combatants related to the unlimited scope of the use of force to achieve legitimate objectives of warfare.[127] In addition to the rule of proportionality itself, reference is also made to the so-called proportionality equation, related to the compromise between anticipated military advantage and anticipated civilian losses.[128] The equation should strike balance between a specific and clear objective of a military nature and incidental civilian losses.[129] William J. Fenrick further points out that this equation may result in an increase in acceptable civilian losses if the military advantage achieved is substantial.[130] Robert Kolb is of a similar opinion.[131] A different view was presented by J. Dill, pointing out that the emphasis on the immediacy of the military benefit means that its value must be sufficiently high.[132] These views are partly consistent with those expressed in the 1987 ICRC Commentary to AP I, which states that "the incidental civilian losses and damages must not be excessive".[133] The comment found in the ICRC commentary is criticized as having no basis in the content of the treaty.[134] William J. Fenrick argues that the word "excessive" designates a level equal to serious or higher losses.[135] Yoram Dinstein, in turn, draws attention to the need for precision in the use of vocabulary on the basis of Article 51 para. 5(b) of the AP I, referring to the need to distinguish between "excessive" and "extensive" descriptors. In his opinion, civilian losses may be extensive, yet not excessive in relation to the expected, direct and specific military advantage. The Israeli professor also believed that Article 51 para. 5(b) of AP I is not to be understood based on a deduction resulting from the consequences of the attack, but

127 E. Cannizzaro, *Proportionality in the Law of Armed Conflict*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 336.

128 "The proportionality equation compares anticipated military advantages with anticipated civilian losses, not end result advantages with actual civilian losses" – W.J. Fenrick, *Applying IHL Targeting Rules to Practical Solutions: Proportionality and Military Objectives*, "Windsor Yearbook of Access to Justice" 2009, vol. 27, p. 277.

129 H. Reinhold, *Target Lists: A 1923 Idea With Application for the Future*, "Tulsa Journal Comparative and International Law" 2002, vol. 10, pp. 9–10.

130 "For example, if it is essential to block military traffic across a river and the enemy forces may use one of three bridges to cross the river, it may well be permissible to inflict greater collateral losses for destroying the last bridge because of the resultant greater military advantage" – W.J. Fenrick, *Applying IHL Targeting Rules*…, p. 281.

131 R. Kolb, *Advanced Introduction*…, pp. 172–173. "The greater the advantage expected to result from a given action, the more collateral damage IHL will tolerate" – D. Hammond, *Autonomous Weapons and the Problem of State Accountability*, "Chicago Journal of International Law" 2015, vol. 15, p. 674.

132 J. Dill, *Legitimate Targets? Social Construction, International Law and US Bombing*, Cambridge 2015, pp. 95–96.

133 Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 1979, p. 626.

134 C. Greenwood, *The Law of Weaponry*…, p. 201.

135 "«Excessive» is a subjective term which, at a minimum, means as much or more than severe" – W.J. Fenrick, *The Rule of Proportionality and Protocol in Conventional Warfare*, "Military Law Review" 1982, vol. 91, p. 111.

on predicting the value of the military advantage and the level of expected losses among the civilian population.[136] This in fact confirms that, in this respect, it was completely wrong of the interwar period authors to assess air bombings solely from the perspective of the outcomes achieved, as it led to a complete distortion of the wording of the provision, omitting the element of good faith and common sense (such a view was presented by e.g. J.M. Spaight).[137]

5.2. Subjectivism of the rule of proportionality in AP I

The subjectivity of the rule of proportionality is inscribed in the nature of this rule, which, however, must not completely relativize its value.[138] Consequently, the main perspective for the assessment of a given act is at the *ante factum* level, which was confirmed by the achievements of the Nuremberg trials under the so-called Rendulic Rule.[139] Hamutal Shamash points out that taking into account only the proportionality test of Article 51 para. 5(b) of AP I cannot in any way question the legitimacy of

136 Y. Dinstein, *The Principle of Proportionality*, [in:] K. Larsen, G. Cooper, G. Nystuen (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law*, Cambridge 2013, p. 76.

137 "Put differently, assessing proportionality is a forward-looking exercise, which incorporates a margin of appreciation in favour of military commanders. However, decisions must be based on the good faith belief (in the circumstances known to the military commander at the time after taking all feasible measures to ascertain those circumstances) that civilian harm expected from the attack is not excessive to the concrete and direct military advantage anticipated" – B. Clarke, *Proportionality in Armed Conflict: A Principle in Need of Clarification*, "International Humanitarian Legal Studies" 2012, vol. 3, p. 78. "In other words, the provision makes the legitimacy of a bombardment dependent upon its results. It is by those results that the question will be judged, and, indeed, necessarily judged, whether the bombing force has, in fact, complied with the requirements of the rule or not. The intention will be less important than the effect. It is the bombed, not the bombers, who will be the judges. It is they who will decide, first, whether, if one of the bombing airmen is captured, he is to be arraigned as a war criminal, secondly, whether the enemy's action is such as to justify the nation attacked in resorting to reciprocal action and, indeed, in setting aside, in reprisal, all the restrictive rules of bombardment" – J.M. Spaight, *Air Power and War Rights*, London 1924, p. 217.

138 A.P.V. Rogers, *The Principle of Proportionality*, [in:] H. Hensel (ed.), *The Legitimate Use of Military Force*, Aldershot 2008, p. 206. "Given these variables, comparing military advantage against civilian losses or damages is somewhat dependent on the subjective value judgments of military commanders and political decision makers, who must evaluate reasonableness within specific scenarios" – C.P. Toscano, *"Friend of Humans": An Argument for Developing Autonomous Weapons Systems*, "National Security Law and Policy Journal" 2015, vol. 8, p. 211.

139 "The criteria for comparing military advantages and incidental effects upon civilians in the proportionality evaluation are unclear and depend upon subjective *ex ante* perceptions, as stemming from the terms 'anticipated' and 'expected'. Assessment of the elements may lead to opposite conclusions, depending on the background of the fact-finder" – T. Boutruche, *Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice*, "Journal of Conflict and Security Law" 2011, vol. 16, p. 131.

conducting a separate test resulting in turn from adopting the precautions stemming from Article 57 of AP I.[140] This remark was made against the background of a situation in which the belligerent would each time attack a legitimate military target using a method or means that caused justified but unnecessary civilian losses that could have been avoided if a different (possible and reasonable) concept of carrying out a military operation had been adopted.[141] On the other hand, evidentially, the analysis of the above behavior is firstly, impossible, and secondly, since the provisions of AP I by and large allow for collateral losses among the civilian population, then there is no possibility to consider the achievement of an objective indirectly related to hostilities as illegal, while complying with all the obligations during the execution of an air operation. In this case, it should also be noted that the wording of the provision refers to accidental, purely incidental losses, which are the result of ultimately legitimate action.[142] Jonathan Crowe and Kylie Weston-Scheuber point out that in this specific situation, the law justifies the occurrence of foreseen but unintentional losses among the civilian population, referring to the philosophical principle of double effect.[143] According to R. Kolb, the rule specified under Article 51 para. 5(b) of AP I is first and foremost an expression of the prohibition of disproportionality. In the event of an attack on a military target, which will always be the right of belligerents, only the possibility of excessive losses can prevent a military operation.[144] This coincides with the opinion of F. Kalshoven that Article 51 para. 5(b) of AP I clearly establishes a distinction between all attacks, whether proportional or not. The systemic interpretation of the provision cannot be a basis for assuming that only the attacks listed under Article 51 para. 4 of AP I may meet the provisions of Article 51 para. 5 of AP I – any attack, also one directed against a clear military target, may lead to a violation of the above provision.[145] Within the limits of assessing whether a given attack may lead to exceeding the excessive level of losses, there is an objective external factor, based on the normative model of a reasonable military commander.[146]

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140 H. Shamash, *How Much is Too Much? An Examination of the Principle of Jus in Bello Proportionality*, "IDF Law Review" 2005, vol. 2, p. 112.

141 I. Henderson, *The Contemporary*…, p. 198.

142 R. Baxter, *The Duties of Combatants and the Conduct of Hostilites (Law of The Hague)*, [in:] United Nations Educational, Scientific and Cultural Organization, *International Dimensions of Humanitarian Law*, Dordrecht 1998, p. 118.

143 J. Crowe, K. Weston-Scheuber, *Principles of International*…, pp. 56–58. "An action that has both a good and a bad effect may be morally permissible or impermissible, depending on whether its bad effect is merely foreseen by the acting subject or intended as a means or as an objective" – W. Janikowski, *Zasada podwójnego skutku, zasada moralnej symetrii i kwestia legalizacji eutanazji* [*The principle of double effect, the principle of moral symmetry and legalization of euthanasia*], "Analiza i Egzystencja" 2013, vol. 22, p. 127.

144 R. Kolb, *Advanced Introduction*…, pp. 152–153.

145 F. Kalshoven, L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Cambridge 2011, p. 108.

146 A. Breitegger, *Cluster*…, p. 48.

In this regard, the general *ratio legis* of the rule of proportionality focused to a greater extent on taking into account the perspective of belligerents in the context of making subjective estimation comes to the fore.[147] According to L.C. Green, the result of the equation stemming from the application of the rule of proportionality must be of acceptable nature between the military advantage achieved and unintended side effects.[148] It is worth pointing out that the premise of proportionality does not affect military objectives *per se* – in the event of their destruction, the attacker is not obliged to follow the constraints imposed by Article 51 para. 5(b) of AP I.[149] It should be noted, however, that this refers only to the inability to apply proportionality – there are no considerations for civilian populations in a given operational environment (e.g., in the desert), and the scope of the use of force against combatants is limited by other provisions of international humanitarian law.

The adopted rule is not free from criticism of the doctrine of international humanitarian law. In the first place, specific systemic errors were pointed out, expressed by placing two concepts, which are not closely related, within one article – the rules of distinction and proportionality, as well as the correlation between values and numerical indications.[150] Judith Gardam believes that the lack of clarity in the treaty language was the reason for submitting interpretative declarations, which influenced a significant change in the interpretation of the provision.[151] Another element is the criticism of the attempt at extreme subjectification of the proportionality premise as containing ambiguities *per se* that will be resolved in favor of the attacking side rather than essentially contributing to the protection of civilians.[152] Enzo Cannizzaro agrees with the above view, arguing that the assessment of the premises – military and humanitarian ones – cannot be solely limited to the subjective vision of the decision made – this applies in particular to objectively available information allowing one to verify the correctness of the decision at the time of its formulation. In this situation, the lack of such data should,

147 A. Cassese, *Means of Warfare: The Traditional and the New Law*, [in:] *idem* (ed.), *The New Humanitarian Law of Armed Conflict*, Napoli 1979, p. 175.

148 L.C. Green, *Essays on the Modern Law of War*, New York 1985, p. 143.

149 L. Whittemore, *Proportionality Decision Making in Targeting: Heuristics, Cognitive Biases and the Law*, "Harvard National Security Journal" 2016, vol. 577, p. 600.

150 M. Wagner, *Autonomy in the Battlespace: Independently Operating Weapon Systems an the Law of Armed Conflict*, [in:] D. Saxon (ed.), *International Humanitarian Law and the Changing Technology of War*, Leiden 2013, p. 220.

151 "The major objection was the ambiguity of the language, leaving doubts about the legal obligations imposed on state" – J. Gardam, *Non-Combatant Immunity and the Gulf Conflict*, "Virgina Journal of International Law" 1991, vol. 31, p. 830.

152 M. Lesh, *Accountability for Targeted Killing Operations: International Humanitarian Law, International Human Rights Law and the Relevance of the Principle of Proportionality*, [in:] J. Petrovic (ed.), *Accountability for Violations of International Humanitarian Law: Essays in Honour of Tim McCormack*, Oxon 2016, p. 106.

in the author's opinion, lead to withdrawal from action.[153] An action of a different type may be qualified as a kind of willful blindness or – to use a more criminal law wording – recklessness, if it means disregard of the existing set of data and information about the existing objective.[154] The willful blindness theory, however, seems to be extremely difficult to grasp in the context of demonstrating the deliberate or accidental behavior of the perpetrator of the attack, which has been made clear by the jurisprudence of the ICTY to date (see below). A serious objection raised by the authors (A.P.V. Rogers, W.H. Parks) points to the failure of the rule of proportionality to take into account in the possible consequences associated with the existence of specific obligations of the defending side in the form of taking, for example, so-called passive precautions.[155] This remark is consequently unfavorable for the attacking side, in that the adversary's behavior cannot, in the light of Article 51 paras. 6 and 8 of AP I, be the basis for derogation from any standards protecting the civilian population.[156] According to the quoted W.H. Parks, this is a departure from the customary principle of the distribution of the obligations of each party on the battlefield in terms of protecting civilians. It is worth noting that this is not an isolated view, and it is not completely devoid of historical foundations, although it is more characteristic of the assessment of the area bombing technique.[157]

5.3. Application of the rule of proportionality in practice

There is no doubt that the rule of proportionality is, and will continue to be, the subject of numerous doctrinal and jurisprudential disputes.[158] This is partly due to the relative exclusion of historical interpretation, for various reasons, including extra-legal ones, also due to the circumstances accompanying the work of the

153 E. Cannizzaro, *Proportionality in the Law*…, p. 340.

154 R.D. Sloane, *Puzzles of Proportion and the "Reasonable Military Commander": Reflection on the Law, Ethics, and Geopolitcs of Proportionality*, "Harvard National Security Journal" 2015, vol. 6, p. 313.

155 A.P.V. Rogers, *Law on the Battlefield*, Manchester 1965, p. 21.

156 "The effectiveness of such a duty, including the ability of military commanders to implement it in the air and on the ground, may well depend on serious consideration, elaboration, and implementation of defender duties, for defenders are often in the superior position to minimize civilian exposure to the dangers of military operations" – S. Estreicher, *Privileging Asymmetric Warfare?: Defender Duties Under International Humanitarian Law*, "Chicago Journal of International Law" 2010, vol. 11, p. 436; A.A. Haque, *Off Target: Selection, Precaution, and Proportionality in the DoD Manual*, "International Law Studies" 2016, vol. 92, p. 59. See also: W.H. Parks, *Air War*…, p. 174.

157 L.C. Green, *The New Law of Armed Conflict*, "The Canadian Yearbook of International Law" 1977, vol. 15, pp. 29–30.

158 "It follows that the principle of proportionality is easily subject to abuse. However, it can also – if restrictively defined – serve as a useful limitation on aerial bombardment" – E. Rosenblad, *Area Bombing*…, p. 94.

Diplomatic Conference during the years 1974–1977.[159] The very introduction of the rule into positive international humanitarian law was a success, also taking into account the course of the discussion on the legitimacy of the provision, the introduction of which was *per se* also partially questioned in principle. It is difficult to formulate unambiguous, abstract conclusions based only on the use of linguistic tools. In this matter, extreme examples indicated by doctrine or quasi-judicial bodies, such as the destruction of an entire village to avenge the death of one soldier (as indicated by the UN Commission of Inquiry in Darfur), opening fire on soldiers in a crowd of civilians, "or other obvious situations for military commanders" (ICTY commission on NATO bombing in Serbia), are not helpful.[160] For example, during the Second Gulf War, any air strikes that were expected to injure or kill 30 civilians required personal approval by the US Secretary of Defense.[161] It is much more difficult to assess events that involve an almost equal proportion of casualties, such as the attack of June 23, 2009, when an American drone engaged a Taliban field commander, killing 45 militants and 41 civilians.[162] Using only algorithmic quantifiers, taking into account that civilian losses cannot be excessive, the premise of proportionality was maintained. On the other hand, however, the provision helps devise specific guides for its practical application. Assuming that its very essence was to impose restrictions on belligerents and to force the abandonment of the practice of negligent or apparent bombing (understood as a seemingly legal action, because they are directed against a military

159 "It is simply to suggest that, in this regard, the API formulation must be informed by norms and judgments that the text, travaux préparatoires, and API official commentary do not, and likely could not, supply" – R.D. Sloane, *Puzzles of Proportion*…, p. 314.

160 Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge 2016, p. 123; J. Hood, *The Equilibrium of Violence: Accountability in the Age of Autonomous Weapons Systems*, "International Law and Management Review" 2015, vol. 11, pp. 31–32. "However, whenever there might have been any armed elements present, the attack on a village would not be proportionate, as in most cases the whole village was destroyed or burned down and civilians, if not killed or wounded, would all be compelled to flee the village to avoid further harm. The civilian losses resulting from the military action would therefore be patently excessive in relation to the expected military advantage of killing rebels or putting them hors de combat" – Report of the International Commission of Inquiry on Darfur, Pursuant to Security Council Resolution 1564 of 18 September 2004 (n 14) para 266. "Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained" – Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para. 50. Y. Dinstein, *The Principle of Proportionality*…, p. 75.

161 R. Bejesky, *Deterring Ius in Bello Violations of Superiors as a Foundation For Military Justice Reform*, "Wayne Law Review" 2014, vol. 60, p. 429.

162 D. Akerson, *Applying Ius in Bello Proportionality in Drone Warfare*, "Oregon Review of International Law" 2014, vol. 16, p. 195.

target, while completely discrediting the danger that may arise against the civilian population), then in this respect the regulation has achieved substantial progress in the development of international law.[163] Another element is the clarification of the phrase "the concrete, direct military advantage anticipated", which thus eliminated the possibility of recognizing, for example, some activities of a purely terrorist nature as an element of legal impact on the civilian population.[164] The understanding of the extent of military necessity in strategic or tactical terms is controversial.[165] It should be noted that, indirectly, the historical analysis of the reasons that led to the adoption of the above-mentioned solutions seems to question the existence of a cumulative military advantage.[166] There is also a second possibility of understanding the directness of the military advantage, expressed, among others, in the ICTY report on the conduct of the NATO air offensive over Serbia in 1999, as well as in the interpretative declarations of states submitted to AP I (see chapter below).[167]

At the end of this section, it is worth referring to the observation made by M. Schmitt, who in the context of flight crews points out that a pilot performing a combat mission should, regardless of what was established in the mission briefing, pay attention to any circumstances that may change the data needed to assess the proportionality of the attack. At the same time, however, flight crews may also assume that the mission was planned on the basis of data not available to the attackers (e.g., intelligence).[168] As a side note, it should be pointed out that if a crew member notices an unexpected cluster of civilians or civilian goods near military facilities, he or she should examine in detail whether there are grounds for cancelling the attack due to the possibility of violating the rule of proportionality.

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163 V. Epps, *Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rules*, "Georgia Journal of International and Comparative Law" 2012–2013, vol. 41, p. 337.

164 A. Cassese, *The Geneva Protocols*…, p. 86.

165 See: J.D. Wright, *'Excessive' ambiguity: analysing and refining the proportionality standard*, "International Review of the Red Cross" 2012, vol. 94.

166 "The «cumulative» approach has been defended on the basis that taking civilian lives now will save more lives later. Yet this approach would greatly weaken the specific protections accorded civilians under the laws of warfare. Also, the standard for measuring the legality of an act would become vague and elusive, due to the difficulty of assessing how, if at all, an act prevented undesirable future events and of determining how serious the adverse consequences would have been. Therefore, both policy factors and the language of the Conference's articles support a «case-by-case» interpretation of «military advantage»" – B. Brown, *The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification*, "Cornell International Law Journal" 1976, vol. 10, p. 142.

167 P.B. Postma, *Regulating Lethal Autonomous Robots in Unconventional Warfare*, "University of St. Thomas Law Journal" 2014, vol. 11, pp. 304–305.

168 M.N. Schmitt, *International Humanitarian Law*, p. 155.

5.4. The rule of proportionality – interpretative guidelines

The existing stipulation of Article 51 para. 5(b) of AP I is an imperfect solution which contains many abstract considerations.[169] Amichai Cohen argues that the construction of the provision is a manifestation of AP I provisions being intentionally ambiguous.[170] The practical application of the above premise will always be problematic in modern air warfare, with a dynamic battlefield, a large number of variables to be taken into account and the asymmetric nature of modern armed conflicts.[171] It should be noted, however, that from the perspective of the development of air warfare law, this was a common feature of almost every attempt to specify the regulation of all aspects related to air bombing – starting from the first regulations by Paul Fauchille, through the Hague Rules of Air Warfare and the ICRC Rules of 1956. What fundamentally distinguishes these standards from previous attempts at regulation/codification is the fact that they have almost universally been approved by the international community – either in the form of customary law or positive law. The author of this study has little doubt that the application of this premise is based primarily on the paradigm of good faith and common sense – both when assessing the standard of a reasonable military commander and when assessing the equality of two factors, which stems from the rule of proportionality. According to Y. Dinstein, this is the only model of interpretation that allows one to endow the premise of proportionality with acceptable content.[172] The level of complexity of the equation does not mean that the commander of an air operation should withdraw from it, especially if *prima facie* it is possible to assess the proportionality of a given attack.[173] In addition, the foundation of international humanitarian law is a compromise between the interests of the belligerents and humanitarian concerns.[174]

An important addition to the essence of the rule of proportionality is the provision of Article 8 para. 2(b)(iv) of the ICC Rome Statute, which only penalizes war crimes committed in the form of an intentional attack:

169 "The imprecise wording of the prohibition to cause incidental damage that would be «excessive in relation to the concrete and direct military advantage anticipated» is a result of the compromise needed for the delegates negotiating the Additional Protocols to reach a consensus" – R. Bartels, *Dealing with the Principle of Proportionality in Armed Conflict in Retrospect: The Application of the Principle in International Criminal Trials*, "Israel Law Review" 2013, vol. 46(2), p. 275.

170 A. Cohen, *Rules and Standards in the Application of International Humanitarian Law*, "Israel Law Review" 2008, vol. 41, p. 52.

171 L. Doswald-Beck, *Implementation of International Humanitarian Law in Future Wars*, "International Law Studies" 1998, vol. 71, p. 49.

172 L.C. Green, *Essays*…, p. 145.

173 Y. Sandoz, *Land Warfare*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, pp. 108–109.

174 N. Lamp, *Conceptions of War and Paradigms of Compliance: The 'New War' Challenge to International Humanitarian Law*, "Journal of Conflict and Security Law" 2011, vol. 16, p. 243.

1) with awareness (subjective element) that this attack will cause accidental loss of life or injury to persons or damage to civilian facilities;
2) which would be clearly excessive;
3) in relation to the specific, direct and total military advantage anticipated.

It is worth noting that, in fact, the requirements set out in the ICC Rome Statute significantly "relax" the requirements set out in AP I, emphasizing the element of subjectivity, which must be the subject of inquiry regarding the deliberate or accidental nature of the prohibited act.[175] An even further change in the content of the provision is the introduction of the phrase "clearly excessive", a term unknown in AP I, which *per se* does not rule out the possibility that the phenomenon of collateral damage might arise but does not penalize a situation in which losses might be excessive, either.[176] The third important change in relation to the provisions of the 1977 regulation is the indication that the military advantage anticipated, in addition to its specific and direct nature, covers the entirety of military advantages – which is a clear borrowing from the content of the interpretative declarations submitted by some states parties to AP I of 1977, which may suggest adopting a cumulative assessment of whether the premise of military advantage occurs.[177]

At this point, it is worth pointing out that on March 5 and June 24, 2024, respectively, the ICC issued arrest warrants against Russian commanders involved in the missile and air attacks against the Ukrainian energy sector in the autumn and winter of 2022–2023. The allegations relate to committing a war crime typified under Article 8 para. 2(b)(iv) of the ICC Rome Statute, recognizing that there is sufficient evidence to assume that attacks on energy installations constituting military objectives in a manner clearly excessive in relation to the military advantage anticipated caused accidental damage to the civilian population.[178]

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175 "But while the offense of deliberate targeting of civilians is relatively straightforward from a criminal law standpoint, the crime of inflicting «excessive damage» requires both a determination of intent (to cause the damage) and some objective assessment (of the damage as «excessive»). As it is likely that attackers would commonly believe that the damage they are about to inflict is justified by the necessities of the military operation, the crime becomes one of a mixed mens rea requirement of intent and negligence" – G. Blum, *On a Differential Law of War*, "Harvard International Law Journal" 2011, vol. 52, p. 190; W.A.D.J. Sumansadasa, *Principle of Proportionality: The Criticized Compromising Formula of International Humanitarian Law*, "Israel Yearbook of International Humanitarian and Refugee Law" 2010, vol. 10, p. 27.

176 More about differences between the proportionality in AP I and the ICC Rome Statute see: J. Kilcup, *Proportionality in Customary*…, p. 254 ff.

177 J. Rabkin, *Proportionality*…, p. 334; V. Epps, *Civilian Casualties*…, p. 338.

178 "[…] and for those installations that may have qualified as military objectives at the relevant time, the expected incidental civilian harm and damage would have been clearly excessive to the anticipated military advantage" – *Situation in Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov*, 2024, https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and (accessed: 13.06.2025).

5.5. Protection of a military aircraft crew as an element of the rule of proportionality

Another issue, which also raised some doubts during the preparatory work of the AP I of 1977, was the need to take into account the danger to one's own armed forces as part of the rule of proportionality. This element appeared in the interpretative declarations submitted by states to the AP I of 1977 (France, Great Britain and Australia). Later, the phrase "force protection", understood as the protection of one's own military personnel, gained popularity in the doctrine of international law, as one of the factors influencing establishment of facts under the premise of proportionality. In the context of air warfare, it is worth noting the special circumstance related to the ban on flights below 15,000 feet, indicated by the special NATO directive during the bombing campaign against Serbia in 1999 – dictated by the need to protect their own crews against the reaction of the Serbian anti-aircraft defense. As pointed out by W.J. Fenrick, the estimation of the losses of the attacking side is not explicitly provided for in the proportionality equation, indicating that a military commander is, however, obliged to limit his or her own losses.[179] In turn, A.P.V. Rogers argued that in the context of the "15,000 feet" rule, there are no cases of conflicts that do not pose a risk related to the danger to the armed forces personnel.[180] In conclusion, it should be noted that if the proper verification of the goal includes the possibility an increased risk, this element should be accepted, and in the event of negative premises, the combat mission should be abandoned.[181] It seems that the need to protect one's own armed units is still an active element of the rule of proportionality in the light of the provisions of 1995 and 2007 *The Commander's Handbook on the Law of Naval Operations*, which jointly state that the safety of one's own military units is also a military advantage.[182] However, some authors, who argue that the issue of force protection is not part of the proportionality equation, do not endorse this view.[183]

179 W.J. Fenrick, *Regulating Lethal Autonomous Robots in Unconventional Warfare*, "European Journal of International Law" 2001, vol. 12, p. 501.

180 A diverging opinion is held by F.L. Borch, *Targeting After Kosovo. Has the Law Changed for Strike Planners?*, "Naval War College Review" 2003, vol. 56, no. 2, p. 68.

181 A.P.V. Rogers, *Zero-casualty Warfare*, "International Review of the Red Cross" 2000, vol. 837.

182 "Military advantage may involve a variety of considerations, including security of the attacking force" – NWP 1-14M, *The Commander's Handbook on the Law of Naval Operations 2007*.

183 "Military casualties incurred by the attacking side are not a part of the equation. A willingness to accept some own-side casualties in order to limit civilian casualties may indicate a greater desire to ensure compliance with the principle of proportionality. Military commanders do, however, also have a duty to limit casualties to their own forces" – W.J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, "Duke Journal of International and Comparative Law" 1997, vol. 7, p. 549.

5.6. Illegal methods of conducting warfare as part of the proportionality equation

The second dimension of modern armed conflicts is the widespread use (usually by non-state actors) of so-called human shields, i.e., civilians who protect military objectives from a possible attack with their presence. Intentional relocation of prisoners of war near anti-aircraft artillery units in order to protect this position against aerial bombing was already considered contrary to Article 9 of the 1929 Geneva Convention on the Treatment of Prisoners of War under the Nuremberg trials (similar provisions were repeated under Article 23 of the Third Geneva Convention of 1949 and Article 28 of the Fourth Geneva Convention of 1949). In turn, the provisions of AP I prohibit (as an element of so-called passive precautions) the intentional relocation of the civilian population to protect military facilities (Article 51 para. 7 of AP I and Article 58 of AP I). On the other hand, in the same articles, AP I explicitly prohibits the use of reprisals against the civilian population, although the customary nature of these provisions is contested in the light of the ICTY jurisprudence.[184] This consequently implies the inability of the attacking side to claim that the opposing side has neglected its obligations. In this respect, all obligations related to the correct identification of the objective and taking precautions remain valid. In addition, casualties among "human shields" are part of the proportionality equation.[185] Nevertheless, many authors suggest that in such circumstances, some revaluation of the elements of the rule of proportionality should be made, which seems justified by the paradigm of common sense, and the above rule should be adjusted for the fact that the opposing side violates the prohibition of the intentional use of civilian persons and goods to protect military objectives. In this matter, the case of so-called voluntary human shields, whose actions may, in fact, be qualified as direct participation in hostilities should be distinguished.[186] However, this action may be more difficult to identify in a situation in which "human shields" may take a decision while being forced to do so by other factors, like those of their economic

184 In 2000, the Trial Chamber of the ICTY, in the *Kupreškić* case, referred to the impact of the so-called Martens Clause on the development of customary international law concerning the prohibition of reprisals (paras. 527–528). However, on the basis of the *Martić* case, the Trial Chamber expressed a differing assessment regarding the admissibility of reprisals (paras. 16–17) and the Appeals Chamber (paras. 464–467).

185 "Mere presence of human shields does not prevent an attack (as a matter of law) unless it would otherwise violate the proportionality principle by causing incidental injury or collateral damage excessive in relation to the concrete and direct military advantage accruing to the attacker" – M.N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, "Air Force Law Review" 2008, vol. 62, p. 18.

186 M.N Schmitt compare the status of the "voluntary human shields" to stationary anti-aircraft defense – M.N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractor or Civilian Employees*, "Chicago Journal of International Law" 2005, vol. 5, p. 541.

situation. An example of this is the presence of workers from the "Zastava" plant near their workplace (producing partly for the needs of the army) in order to protect it from a NATO air strike in 1999, for fear of destruction of infrastructure and loss of earning opportunities.[187]

Commentary made by the ICRC in 1987 to AP I of 1977 in the context of Article 51 para. 4 and 5 of the AP I, drafted from the perspective of not only the text of the international agreement itself, but also of the views of various delegations revealed during preparatory work and plenary deliberations, provides answers to some bothering questions. One example is the previously stated position of the French and other delegates, calling into question the provision related to the need to limit attacks only to specific military facilities – pointing to the need to reinterpret the provision when conducting defensive actions, e.g., in a built-up area. Surprisingly, and to some extent not arising directly from the stipulation of Article 51 paras. 4 and 5 of AP I, the authors of the commentary made a distinction between military operations taking place in the rear of the front and in combat areas.[188] According to the commentary, in the case of fighting conducted in built-up areas, the use of a civilian installation/civilian building by the adversary's armed forces changes its status and simultaneously opens the possibility of it being attacked legally (Article 52 para. 2 of AP I). The commentary indicates that in the case of military facilities located outside the zone of direct warfare, their military nature must be strictly defined.[189] From the perspective of the earlier arguments contained in the study, it can then be assumed that its authors have not abandoned the distinction between zones located in and outside a combat zone as a legal concept. This is familiar from the 1923 Hague Rules of Air Warfare that introduced stricter criteria of caution and determination of the nature of facility located outside the area of military operations. The adopted view encourages reflection. There is no denying that the authors of the commentary took into account the realities of conducting military operations in a urban area, which was a common feature of all attempts to create a code defining the air bombing regime. As H. McCoubrey pointed out, the 1977 AP I regulations cannot serve as

187 See: A. Głogowska-Balcerzak, M. Piątkowski, *Problematyka żywych tarcz w kontekście asymetrycznych konfliktów zbrojnych* [*The issue of human shields in asymmetric armed conflicts*], "Wojskowy Przegląd Prawniczy" 2015, vol. 3.

188 "For example, it is clear that if fighting between armed forces takes place in a town which is defended house by house, these buildings – for which Article 52 (General protection of civilian objects), paragraph 3, lays down a presumption regarding their civilian use – will inevitably become military objectives because they offer a definite contribution to the military action. However this is still subject to the prohibition of an attack causing excessive civilian losses" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 1953.

189 "Outside the combat area the military character of objectives that are to be attacked must be clearly established and verified. Similarly the limits of such objectives must be precisely determined" – *ibidem*, para. 1954.

a "magic wand" excluding all outcomes arising from the mere fact of conducting warfare.[190] However, the comment made is not reflected in the provision of Article 51 paras. 4 and 5, and in particular Article 51 para. 4(a) of AP I and Article 51 para. 5(a) of AP I. *Ratio legis* of AP I, as well as its literal interpretation, in no way formulate a basis for assuming that the legal situation of facilities on the front line of combat is different from the situation of those located in another theatre of war. In addition, one should agree with M. Waxman's opinion that the provisions of the Protocol clearly deviate from the historical principle of treating a defended city as a single target, but taking into account the progress in legal awareness, as well as reflecting the principle of concentration of military effort, they stipulate that hostilities be limited to strictly indicated objectives, regardless of the location of the target.[191]

6. Definition of attack

As already indicated, in 1956 the ICRC argued that the term "bombing" – used as an example of a specific kinetic action – needs to be replaced by a phrase with a more universal meaning. In addition, the idea of AP I was to create an acceptable code regulating the conduct of warfare in all its dimensions: land, sea and air. Moreover, determination of when the standards governing the process of selecting the method and means of a military operation, the identification of objectives, the application of the rule of proportionality and taking precautions are ultimately activated is the central point of applying Section IV of the ICRC.[192] In document No. III addressed to a group of government experts during work undertaken between 1971–1972, the concept of "attack" was understood as a purely technical and military campaign involving acts of violence against the enemy, regardless of

190 H. McCoubrey, *International Humanitarian Law. The Regulation of Armed Conflict*, Aldershot 1990, p. 115.

191 "The conduct of Allied Coalition forces during the 1991 Persian Gulf War, in which Allied aircraft utilized precision-guided munitions when attacking urban targets, might seem to vindicate the claims of those who argue that Protocol I reflects not only emerging legal custom but also notions of military effectiveness. It may even further be read to reflect an apparent rejection of morale bombing-the use of bombardment to erode civilian will to resist-as an effective military tool" – M. Waxman, *Siegecraft and Surrender*: *The Law and Strategy of Cities as Targets*, "Virginia Journal of International Law" 1999, vol. 39, p. 411.

192 D. Turns, *Cyber War and the Concept of 'Attack' in International Humanitarian Law*, [in:] D. Saxon, *International Humanitarian Law and the Changing Technology of War*, Leiden 2013, p. 217.

the offensive or defensive nature of such steps and the means of combat used.[193] In this regard, reference was made to one specific military operation, limited in time and space.[194] The concept was not given a broader legal and political context, referring essentially to its customary wording.[195] This provision was discussed during the preparatory work at the third committee of the so-called diplomatic conference proper of 1974–1977. The differences between the phrase "attack" and the concept of "military operation", by which the movement or maneuvering of troops for defensive or offensive purposes was understood, was raised.[196] The final selection of the term "attack" signals a reference to a particular element of an operation. Adoption of the version indicated under Article 49 of AP I results in the fact that all actions, not only those naturally relating to offensive, but also to defense, are understood as attack.[197] In fact, the same principles will apply not only from the perspective of an attack, but also in the context of defensive actions, e.g., those understood as the scorched earth tactic.[198]

William H. Parks criticizes the definition of an attack insofar as it contradicts the traditional and literal interpretation of the wording (especially by considering defensive steps as an example of an attack), claiming that it limits the possibilities to conduct offensive air operations.[199] However, it is difficult to recognize the legitimacy of the above view – all the more that, in the light of the ICRC's commentary on Article 49 of AP I, the practical value of adopting a broad definition was emphasized.[200] This also seems to echo remarks made in the interwar period

193 "This word «attack» is used here in its purely military and technical sense; it means acts of violence perpetrated against the adversary, either defensively or offensively, whatever may be the means or arms employed" – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May – 12 June 1971), *Protection of the Civilian Population against Dangers of Hostilities – Vol. III*, Geneva 1971, p. 21.

194 "Every time the term «attack» is employed, it is related to only one specific military operation, limited in space and time" – ICRC, *Draft Additional Protocols*…, p. 54.

195 "In presenting the subject, the ICRC expert specified that the concept of attack should be understood here in a military and technical sense and not in a politico-legal sense; he referred to the ICRC commentary on this article" – ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session 3 May – 3 June 1972, Report on the Work of the Conference*, *Vol. I*, Geneva 1972, 3.147, p. 148.

196 CDDH/III/SR.6, para. 4.

197 P. Grzebyk, *Cele osobowe i rzeczowe w konfliktach zbrojnych w świetle prawa międzynarodowego* [*Personal and material targets in armed conflict from the perspective of international law*], Warszawa 2018, p. 62.

198 L.C. Green, *Essays*…, p. 144.

199 W.H. Parks, *Air War*…, pp. 114–115.

200 "The definition given by the Protocol has a wider scope since it justifiably covers defensive acts (particularly «counter-attacks») as well as offensive acts, as both can affect the civilian population. It is for this reason that the final choice was a broad definition. In other words,

– not to identify the term "bombing" solely with the act of dropping munitions, but to include all actions that consequently have a physical dimension in the form of strafing or launching rocket missiles. In fact, the definition constructed in this way excludes from the wording of Article 49 para. 1 of the AP I any actions without a destructive effect, such as propaganda campaigns.[201] On the other hand, it should be pointed out that an attack does not have to be inherently kinetic and directly destructive – the final result is important in this respect. In this sense, actions such as, for example, using biological or chemical weapons that do not physically affect a given person or object, but have similar effects to conventional weapons, are considered attacks.[202] Therefore, actions that are not kinetic *per se*, but whose out are similar, may be considered an attack – for instance, actions taken as part of radio-technical combat or radar jamming.[203] Here, the most relevant point of reference is the so-called *Tallinn Manual* that discusses how to define an attack in cyberspace, where the result of certain military operations does not inherently involve the destruction or damage of a given target.[204] In this regard, it was decided to adopt a view according to which the effects of a given cyber attack were to be ultimately compared (the so-called effect-based approach) with the example of a conventional strike, the effect of which may be, for example, electricity outage caused by an air bombing sortie or a malware attack.[205]

It is worth noting that in the interpretative declarations of states and the doctrine of international law, doubts were raised regarding the recognition of the term "attack" as an action performed by a single soldier or a single aircraft crew. They resulted from the analysis of some interpretative declarations, which argued that the obligations under Articles 51 and 57 of AP I are addressed only to senior commanders or persons "who have the factual ability to influence the course of a combat operation and its cancellation".[206] Ian Henderson believes that there are no doubts arising from the literal content of Article 49 para. 1 of AP I to consider the action of a single military aircraft as an attack within the meaning of the above provision, although a bombing raid of a team of several combat machines will be recognized as a whole attack within the meaning of Article 57 of AP I, and not an isolated mission involving a single aircraft.[207]

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the term «attack» means «combat action»" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 1880, p. 603.

201 H.H. Dinniss, *Cyber Warfare and the Laws of War*, Cambridge 2012, p. 197.

202 M. Piątkowski, *The Definition of the Armed Conflict in the Conditions of Cyber Warfare*, "Polish Political Science Yearbook" 2017, vol. 46, pp. 274–275.

203 Y. Dinstein, *The Conduct of Hostilities*…, p. 84.

204 R. Liivoja, T. McCormack, *Law in the Virtual Battlespace: The Tallinn Manual and the Ius in Bello*, "Yearbook of International Humanitarian Law" 2012, vol. 15, pp. 52–53.

205 M.N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge 2013, pp. 91–92; E. Kodar, *Applying the Law of Armed Conflict to Cyber Attacks: From the Martens Clause to Additional Protocol I*, "ENDC Proceedings" 2012, vol. 15, p. 112.

206 See the Interpretative Declaration of the United Kingdom.

207 I. Henderson, *The Contemporary*…, p. 161.

7. Interpretative declarations to the content of AP I

The explanations of votes on individual articles also contain interesting views related to the interpretation of some adopted articles. Disputes were provoked, among others, by the prohibition of reprisals, which were treated as the only instrument effectively forcing the other party to act in accordance with the law. In the context of all the provisions related to Section IV, it was stated that when deciding on an attack, the commander should make a decision on the basis of all the information available at the time of the decision.[208] Another drew attention to the fact that when assessing the anticipated military benefit resulting from the circumstances of the attack, the benefit of the entire military attack, and not only its isolated fragments (Canada, West Germany, the Netherlands), should be taken into account.[209] According to R. Else, this is the evidence of a significant interpretative difference between the literal wording of Article 49 para. 2 of AP I and the actual perception of the meaning of this provision by the parties to the treaty.[210] In terms of indiscriminate attacks, it was pointed out that the definition of these attacks does not determine in any way that there are certain types of weapons that can be used to attack indiscriminately in any circumstances (this remark was of paramount importance in the context of being able to use so-called tactical nuclear weapons).[211] Antonio Cassese argues that by adopting the above comments to the content of AP I, Article 51 paras. 4 and 5 was significantly disempowered.[212] The Swedish delegation emphasized that Article 51 para. 4 of AP I defined attacks that are indiscriminate in nature, and Article 51 para. 5 of AP I is the definition of

208 "It is the view of the Canadian delegation that commanders and others responsible for planning, deciding upon or executing necessary attacks, have to reach decisions on the basis of their assessment of whatever information from all sources may be available to them at the relevant time. This interpretation applies to the whole of this section of the draft Protocol including Articles 45 and 47" – CDDH/SR.41, p. 178.

209 "Military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole, and not only from isolated or particular parts of that attack" – CDDH/SR.41, p. 195.

210 R. Else, *Proportionality in the Law of Armed Conflict: The Proper Unit of Analysis for Military Operations*, "University of St. Thomas Journal of Law and Public Policy" 2010, vol. 5, p. 200.

211 "The definition of indiscriminate attack contained in paragraph 4 of Article 46, is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. It is our view that this definition takes account of the circumstances, as evidenced by the examples listed in paragraph 5 to determine the legitimacy of the use of means of combat" – CDDH/SR.41, p. 179. "Our understanding that the definition of indiscriminate attacks contained in paragraph 4 of Article 46 is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances" – CDDH/SR.41, p. 187.

212 A. Cassese, *The Prohibition of Indiscriminate Means of Warfare*, [in:] *idem*, *The Human Dimension of International Law: Selected Papers*, Oxford 2008, p. 175.

indiscriminate bombing.[213] Many of the explanations submitted by the delegates during the vote later became the basis for interpretative declarations submitted by states in the 1980s and 1990s. In this respect, it is worth using the United Kingdom's interpretative declaration as an example, the content of which in relation to Section IV of AP I (Article 51) was duplicated by many states (Germany, Italy, France, New Zealand, Australia, Belgium, Canada, Spain, the Netherlands). In relation to Article 51 of AP I, the view of the delegations of Canada and Australia regarding the overall model of interpretation of the military advantage anticipated was reiterated.[214] In addition, the entire Section IV of AP I is to be interpreted only and exclusively from an *ex-ante* perspective in the light of the available information that exists at the time of making a decision to attack.[215] In the opinion of many states, this emphasizes the need to detach all *post facto* considerations regarding decisions made as part of the targeting.

8. Definition of military objectives in AP I

8.1. General remarks. "Military target" or "military object"?

Any analysis of air and missile warfare must include discussion regarding defining a legitimate target and then, subsequently, determining when the individual defined as a legitimate target is, indeed, a legitimate.[216]

As indicated in the previous chapter, the definition of a military target has evolved since the first attempt at a solution through a treaty, introduced by the content of Article 2 of the Ninth Hague Convention of 1907, through the practice of the

213 "Paragraph 4 contains a definition of indiscriminate attacks and paragraph 5 contains a definition of indiscriminate area bombardment. This paragraph also contains provisions concerning incidental losses when point targets are being attacked" – CDDH/SR.41, p. 199.

214 "In the view of the United Kingdom, the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack" – United Kingdom of Great Britain and Northern Ireland, Reservation, Corrected Letter of January 28, 1998 sent to the Swiss Government by Christopher Hulse, HM Ambassador of the United Kingdom.

215 "Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time" – *ibidem.*

216 A. Guiora, *Determining a Legitimate Target: The Dilemma of the Decision-Makers*, "Texas Journal of International Law" 2011–2012, vol. 47, p. 316.

Allied states taking place during World War I, attempts to create a code of air warfare in 1923 and the ICRC project of 1956, up to the solutions introduced by the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954.[217] The proposals presented had some significant legislative flaws in the form of: 1) attempts to create a closed list of military objectives, 2) failure to determine the necessary scaling of the value of a given object as a military one, 3) a clear lack of reference to the prohibition of attacking non-military objectives, 4) not having the status of a binding law as a norm of customary law (such as the rules of 1923). As pointed out by A. Cassese, customary international law also included the doctrine of a military objective. It was, however, understood very broadly, also in connection with the attempt to include in the above category objectives that were also indirectly related to the issue of the so-called economic war, conducted in order to weaken the capabilities of the military adversary.[218] This resulted in the need for the international community to make a final decision on the adoption of an acceptable definition of a military objective and to define it in an abstract or casuistic manner.

In the course of the work of the group of government experts, the report submitted by the ICRC pointed out that there is no norm in the treaty law regarding a so-called non-military objective, mentioning the usual rules that residential buildings should not be classified as military objectives.[219] Only Article 23(g) of the Hague Regulations of 1907 stipulated the need to respect private property. From the legislative technique point of view, the ICRC report indicated the need to define the objects that should be protected and spared in all circumstances – this would help narrow down the definition of military objectives and exclude those that might raise certain doubts when attacked.[220] The central axis of the definition revolved around the need to supply it with an objective criterion, such as the determination of the effective impact of a given facility in the context of military advantage.[221] In this regard, the need to adopt an adequate causal link as part of a two-part test was advocated: 1) determining whether a given facility

217 21st International Conference of the Red Cross, *Reaffirmation and Development of The Laws and Customs Applicable in Armed Conflict, Part I*…, p. 56.

218 A. Cassese, *The Geneva Protocols*…, p. 83.

219 "The rule for distinguishing between non-military objects and military objectives has not been expressly affirmed by written law, but according to customary law, housing and constructions may not be considered as military objectives" – *Protection of the Civilian Population*…, p. 51.

220 *Ibidem*, p. 55.

221 "To juxtapose, with the natural criterion, a criterion of function which relates to an objective factual state; that is, to the effective use of the objective concerned, for the party which suffers or is going to suffer an attack. Carrying on this idea, it would no longer be a question of military interest or the military advantage of the author of the attack which would decide the intrinsic military character of the objective, but rather the purpose or use of this objective for the party concerned" – *ibidem*, p. 58.

is a military objective by its nature, purpose or use, and 2) the need to demonstrate that this object positively affects the ability to conduct warfare by the party against whom a given attack is to be carried out.[222] In the document, the issue of a specific category of facility understood by experts as mixed objectives was also raised. They are marked as objects used for both military and civilian purposes, as well as essentially civilian objects that can be easily converted for the use of the armed forces.[223]

It should be noted that in the translations of international agreements concluded in international humanitarian law, the Polish legislator uses phrases *obiekt wojskowy* ("military object/facility") and *cel wojskowy* ("military objective") interchangeably to define goods of a military nature. In the guidelines on air bombing, issued by the General Inspector of the Armed Forces in August 1939, the phrase "military objects" was used. In Article 52 para. 2 of AP I, the translation "military target" appears. In a later document – i.e., III Protocol on Prohibitions or Restrictions on the Use of Incendiary CCW Convention – the legislator again uses Article 1, para. 3 with the phrase "military object" (also in Article 8 para. 2 of the Hague Convention For the Protection of Cultural Property Event of Armed Conflict of 1954). In Article 8 para. 2(b)(v) of the ICC Rome Statute, the legislator in translation again uses the phrase "military objective". This formulation is also used in most studies of the Polish doctrine.[224] Patrycja

222 "Firstly, this objective must be of a military character, either in consideration of its very nature or of function at the moment of attack, and secondly, this objective must reinforce in adequate manner, the military effort or operations of the party who is to suffer the attack" – *ibidem*.

223 "«Mixed objectives in the strict sense», that is, objects which can be used for both military and civilian requirements at the same time; secondly, for the category of object which will be called «mixed objects» that is, objects which, according to their usual purpose, are non-military objects but which, by means of a simple transformation, may easily be used directly in the military effort or operations; these latter are, so to speak, «potential military objectives». A mixed objective would be, for example, a factory producing both civilian and military equipment and a mixed object would be a school turned into a barracks" – *ibidem*, p. 59.

224 A. Szpak, *Międzynarodowe prawo humanitarne* [*International humanitarian law*], Toruń 2014, p. 273; R. Bierzanek, *Wojna a prawo międzynarodowe* [*War and international law*], Warszawa 1982, p. 209; M. Marcinko, *Cele wojskowe a obiekty cywilne oraz dobra i obiekty poddane szczególnej ochronie* [*Military objectives and civil objects and objects under special protection*], [in:] Z. Falkowski, M. Marcinko (eds.), *Międzynarodowe prawo humanitarne konfliktów zbrojnych* [*International humanitarian law of armed conflicts*], Warszawa 2014, pp. 131–132. However, the phrase *military facilities* appears, for example, in the content of the *Third Report on the Implementation and Dissemination of International Humanitarian Law in the Republic of Poland of 2014*, 2014, p. 25, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiEx7DBnu6NAxUyIhAIHTtmKGYQFnoECBUQAQ&url=https%3A%2F%2Fwww.gov.pl%2Fattachment%2Fc1e7b8e8-d15d-4d4c-85c3-10f5d879cb78&usg=AOvVaw1tMXPoRYOr_P3a33WMq2G8&opi=89978449 (accessed: 13.06.2025).

Grzebyk is correct in stating that it is consistent with the French and English versions of AP I.[225] In turn, in the Russian version, the phrase "military object" (*объекты*) appears.[226] One could wonder whether there are any significant far-reaching differences in meaning between the above formulations, since they are all used generally in relation to facilities of military importance that serve as objects to be neutralized during an armed conflict, which therefore makes the interchangeable use of the indicated concepts permissible.[227] However, the course of AP I preparatory works indicates the problem of including human targets in the concept of a military object (more on this below).

8.2. The course of preparatory works

A group of government experts developed the adopted draft Article 47 of AP I (later Article 52) on the basis of a combination of the previous provisions occurring on the basis of Article 7 of the ICRC Draft of 1956 and Article 2 of the Resolution of the Institute of International Law in Edinburgh of 1969, which argued that the destruction of a target must bring the attacking party "a clear, definite and immediate military advantage".[228] It was decided to adopt a hybrid approach to the definition of a military objective in a positive manner (determining when given objects may become military objectives), which *per se* extends the category of civilian objects to all objects not classified as military.[229] In the first instance, a decision to reject the model of listing legitimate objectives in the form of a closed or open catalogue was made. This model functioned on the basis of previous attempts to define the notion, advocating the need to formulate an open definition of an abstract nature.[230] The very definition of a objective target had several elements. One aspect was, in accordance with Article 52 para. 2 of AP I, to characterize the target according to its "nature, purpose or use". "Nature" included facilities traditionally considered targets in an armed conflict. The use of the phrase "use" was supposed to be a remedy for objects whose intended use is not military in

225 P. Grzebyk, *Cele osobowe*…, p. 137, footnote 2; J. Linde-Usiekniewicz (ed.), *Wielki słownik angielsko-polski* [*Polish-English Dictionary*], Warszawa 2004, p. 809.

226 Poland acceded to the CCW Convention in 1984 and to Additional Protocol I in 1992: therefore, the basis for translation into Polish until 1989 was the Russian text.

227 From the perspective of the English-language translation of Article 52 para. 2 I of AP: "military objectives are […] objects".

228 ICRC, *Draft Additional Protocols*…, p. 60.

229 "The solution selected here consists in a somewhat strict definition of military objectives (par. 1) and in a more flexible definition of civilian objects (par. 2), while linking the two concepts. By means of an a contrario interpretation and with the aid of a list of civilian objects given purely as an example, the solution proposed makes it possible to avoid the disadvantages of separate general definitions" – *ibidem*, p. 60.

230 "Most experts, however, preferred an abstract definition" – *ibidem*, p. 61.

nature but is transformed for the needs of the war effort of an armed adversary. To a similar extent, the function of the objective understood as its "intended purpose" could also justify its destruction.[231] These facilities had to contribute to the enemy's military aims. The military advantage obtained in such way should be, firstly, direct – there should be a clear link between the elimination of a given target and its impact on the conduct of military operations. Secondly, it should be significant – the attack should have an impact on the conduct of military operations.[232] The lack of these two elements was the basis for questioning the possibility of launching an attack. Article 47 para. 2 of draft AP I stipulated that facilities intended for civilian use, such as residential buildings, means of transport and everything not connected with the military, should not be targeted, except when they are put into military use.

The 1974–1977 conference revealed significant doubts about the definition proposed by the group of government experts. The accuracy of the inventory of civilian objects, given that the means of transport were also included in this category, was questioned – the delegations of the Netherlands, Great Britain, Spain and the United States argued that this was an example of dual-use infrastructure that could be the target of attack at any time, provided that military application could be proven.[233] Hans Blix (joined by E. Castrén) argued that it was necessary to introduce a presumption that should, in principle, resolve the doubts arising from the distinction between civilian targets in favor of protecting civilians.[234] The Swedish expert referred here to the legacy of the 1923 commission of jurists, arguing that the adoption of an abstract definition of a military objective is the only solution guaranteeing the limitation of the target of warfare to facilities that are actually relevant to a given state's war effort.[235] The use of the phrase "military

231 "An alternative criterion should therefore be adopted: that of the function of the objects, whether it be the future function («purpose») or the present function («use»)" – *ibidem*, p. 61.

232 "«Direct» refers to the link which, on the one hand, should exist between the destruction of, or damage to, a military objective and on the other current military operations, depending on whether those operations mayor may not be affected by such destruction or damage. Should such a relationship be non-existent, the attack should not take place. «Substantial» refers to the degree to which the destruction of, or damage to, a military objective may affect current military operations. Should the effect not be significant, the attack should not take place" – *ibidem*, p. 61.

233 CDDH/III/SR.14, para. 17, p. 112; CDDH/III/SR.14, para. 27, p. 114. "From particular examples, such as railway or telephone systems serving both civilian and military purposes, he concluded that the objects in question were very likely to be military objectives, which could be attacked, subject to the proportionality rule" – CDDH/III/SR.15, para. 9, p. 119; CDDH/III/SR.15, para. 24, p. 122.

234 CDDH/III/SR.14, para. 25, p. 113.

235 "The ICRC wording, which provided an abstract definition of military objectives and stated that whatever did not fall within the context of that definition should be considered a civilian object and should, accordingly, be protected, was satisfactory if not perfect" – CDDH/III/SR.15, para 33–34, pp. 123–124.

interest" was also incorrect – vague and without clear justification (such comments were mainly raised by Prof. Bierzanek).[236] The delegation from Czechoslovakia noted that the phrasing of the provision should strongly emphasize that it is forbidden to make civilian facilities the target of attacks and reprisals.[237] Fritz Kalshoven, representing the Dutch side, argued that the introduction of a total ban on reprisals should therefore be an impulse to start work on the system of international justice.[238] There were also doubts regarding the detailed description of the catalogue featuring examples of civilian objects that should be covered by the presumption (most delegations argued that there was agreement to include places of worship and schools).[239]

At the third committee working group forum, a broad consensus regarding the content of the proposed provision was reached.[240] In para. 1, doubts were raised by the addition of a provision prohibiting reprisals against civilian objects. Many delegations were of the opinion that, whilst the prohibition of reprisals against persons is justified, the exclusion of this right in relation to dehumanized objects is too far-reaching. It was emphasized that the concept of military objectives is semantically wider than the term "military objects", i.e., it also covers targets other than military objects.[241] It was decided to duplicate the hybrid definition, in accordance with which targets not classified pursuant to para. 2 are all considered civilian objects, and which defines the very concept of military objectives. Article 47 para. 2 of AP I project was the subject of the most far-reaching modification in relation to the original version of the project – the wording "distribution" in the geographical sense was added, and it was also assumed that the objectives should "make a significant contribution to military activities and their total or partial destruction" would bring a specific military advantage at a given time.[242] In the context of Article 47 para. 3 of AP I draft, doubts regarding the adoption of the assumption of the civilian intended purpose of a certain category of facilities arose. As part of the preparatory work of the third committee, Article 47 of AP I draft was supplemented with a provision whereby the above presumption does not apply if it was to compromise the security of one's own armed forces in zones of active military

236 "Mr. BIERZANEK (Poland) supported the ICRC draft of article 47 but considered that the phrase «of military interest» was too vague. He proposed that it should be replaced by «of military character or nature»" – CDDH/III/SR.16, para. 15, p. 130.

237 CDDH/III/SR.14, para. 22, p. 113.

238 CDDH/III/SR.14, para. 26, p. 114.

239 CDDH/III/SR.15.

240 CDDH/III/SR.224, p. 331.

241 "Account is taken of the fact that military objectives include objectives other than military objects – such as troops, their equipment, and ground – and of the fact that objects may be neutralized or captured as well as destroyed" – CDDH/2l5/Rev. l, para. 64, p. 277.

242 "Extensive discussion took place before agreement. was reached on the word «definite» in the phrase «definite military advantage». Among the words considered and rejected were «distinct», «direct», «clear», «immediate», «obvious», «specific», and «substantial»" – *ibidem*.

operations ("except in contact zones where the security of the armed forces requires a derogation from this presumption"). This provision was dictated by the conclusions of certain delegations that recognized that the lives of infantrymen must not be put at risk during fighting in the city, during which facilities essentially used for civilian purposes are transformed for the aims of conducting military operations.[243] Ultimately, however, humanitarian considerations prevailed and this provision was not included in the final text submitted for consideration to delegates at the plenary session.[244] The United Kingdom and France emphasized that the presumption of the civilian status of objects and persons does not weaken the duties of the commander resulting from the need to protect their troops, in line with the instructions contained in other provisions of Protocol I. According to R. Geiss, the provisions of AP I cannot lead to the view that soldiers, by virtue of their role, must accept the risk of losses among the personnel of the armed forces in order to protect the civilian population.[245] George H. Aldrich pointed out that the instruction of Article 52 para. 3 of AP I would in fact authorize combatants to carry out an attack against facilities disqualified as civilian.[246]

Article 52 of AP I was finally voted in by all but seven abstaining states.[247] In the explanations submitted by the states after the vote, many objections were raised to the text that had been subject to voting. The French delegation considered that this provision (similarly to Article 51 of AP I) raised doubts as to the term "strictly limited to military purposes", pointing out that the reality of the battlefield in certain circumstances makes it impossible to determine the area occupied by military facilities located in a forest or a densely populated area.[248] The representative of the United Kingdom indicated that a military facility can also include a specific area of land due to its location, whose destruction, occupation or neutralization

243 "In paragraph 3 the bracketed phrase which would provide an exception to the normal presumption of civilian use for objects in contact zones, was defended on the grounds that infantry soldiers could not be expected to place their lives in great risk because of such a presumption and that, in fact, civilian buildings which happen to be in the front lines usually are used as part of the defensive works. The phrase was criticized by other delegates on the ground that it would. unduly endanger civilian objects to permit any exceptions to the presumption" – CDDH/III/24, p. 332.

244 CDDH/III/SR.24, para. 22, p. 220.

245 R. Geiss, *The Principle of Proportionality: 'Force Protection' As A Military Advantage*, "Israel Law Review" 2012, vol. 45, p. 76.

246 "That provision appears to promise more than I suspect it can deliver, as combatants who believe there is a significant risk that a house or a church, for example, is being used by their enemy are not likely to presume the contrary at their peril" – G.H. Aldrich, *The Laws of War on Land*, "American Journal of International Law" 2000, vol. 94, p. 52.

247 CDDH/SR.41, pp. 168, 186.

248 "There were many situations in armed conflicts in which it was difficult or even impossible to determine precisely the limits of a military objective particularly in large towns and in forest areas, in either of which enemy armed forces and groups of civilians might be intermingled" – CDDH/SR.41, para. 150, p. 169.

offers a clear military advantage in a given situation (this remark was made in relation to, for example, bridgeheads or forest areas, which can be used to mask the enemy's movements).[249] Moreover, Article 51 para. 2 of AP I prohibits only a direct attack against non-military objects and does not regulate in any way attacks on military objectives and the accidental losses that may ensue (Canada, Germany, the Netherlands, the United States).[250]

8.3. Article 52 of AP I as the focal point of the principle of distinction

Military necessity permits a belligerent, subject to the Laws of War, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money.[251]

The definition of military objectives adopted under Article 52 of AP I, along with highlighting the necessity to exclude civilian objects from the scope of military operations, is undoubtedly included in Article 50 of AP I in the central point of international humanitarian law and the principles governing modern air bombardment law. The doctrine of international humanitarian law has little doubt about the direct genesis of the provision, which stemmed from the consequences of unrestricted air war during World War II.[252] However, the regulations do not constitute any higher standard for air operations, indicating uniform criteria governing all "attacks against objectives on land".[253] The premise of a military target requires meeting a two-stage test, which will first determine whether it, due to its "nature, location, use and purpose, makes a significant contribution to military activity, and then whether its destruction, occupation, neutralization brings a specific military advantage".[254] There is no doubt that the final form of the provision of Article 52 para. 2 of AP I largely refers to the concept of an abstract

249 CDDH/SR.41, para. 153, p. 169.

250 "It is also our understanding that the first sentence of paragraph 2 prohibits only attacks that could be directed against non-military objectives. It does not deal with the result of a legitimate attack on military objectives and incidental damage that such attack may cause" – CDDH/SR.41, p. 179; CDDH/SR.41, pp. 188, 195, 204.

251 Case No. 47, *The Hostage Trial. Trial of Wilhelm List and Others*, United States Military Tribunal, Nuremberg July 8, 1947 to February 19, 1948, p. 66.

252 M. Veuthey, *Histoire*…, p. 52.

253 J. DeSon, *Automating the Right Stuff? The Hidden Ramifications of Ensuring Autonomous Aerial Weapon Systems Comply with International Humanitarian Law*, "Air Force Law Review" 2015, vol. 72, p. 101.

254 M. Roscini, *Targeting and Contemporary Aerial Bombardment*, "International and Comparative Law Quarterly" 2005, vol. 54, pp. 422–423.

definition proposed under Article 24 of the 1923 Hague Rules of Air Warfare. As indicated by M. Sassòli and L. Cameron, Article 52 para. 2 of AP I requires cumulative fulfillment of both elements of the two-part test.[255] This is due to the conjunction in the content of the provision, which requires that goods (and thus specific, physical objects) by nature, deployment, purpose or use make a significant contribution to military operations and their elimination produces a specific military advantage in a given situation. Its specificity is illustrated by R. Kolb in the form of the equation:

$$MO = SCMO + SPM,$$[256]

where:
MO – military objective,
SCMO – a significant contribution to military operations due to purpose, use, deployment or nature,
SPM – specific military advantage.

8.4. Classification of military objectives in the light of AP I

The AP I of 1977 distinguishes military objectives according to:

1. Nature – that is, facilities most clearly classifiable as military: armed forces, barracks, military installations.[257] According to another classification, these include military personnel, warships, military aircraft, armed forces vehicles, armed forces equipment, communications and ammunition depots.[258] The HPCR Manual of 2009 includes all military aircraft (including unmanned aerial vehicles), ground vehicles (excluding sanitary transport), missile installations, military equipment, fortifications, depots, warships, factories and organizational structures of national defense ministries.[259] The document argues that military aircraft will always make a "significant contribution to military operations" *per se*.[260] This was met with legitimate

255 M. Sassòli, L. Cameron, *The Protection of Civilian Objects*, [in:] N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006, p. 48.
256 R. Kolb, *Advanced Introduction*…, p. 159.
257 Y. Sandoz, C. Swiniarski, B. Zimmermann: *Commentary*…, para. 2020, p. 636.
258 T. McCormack, H. Durham, *Aerial Bombardment of Civilians: The Current International Legal Framework*, [in:] Y. Tanaka, M.B. Young (eds.), *Bombing Civilians: A Twentieth-Century History*, London 2009, p. 222.
259 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge 2013, pp. 115–117.
260 *Ibidem*, p. 38.

criticism from I. Henderson, who indicated that the definition of a military objective omits the requirement of a two-part test resulting from the content of Article 52 para. 2 of AP I.[261]

2. Its location – facilities that are not necessarily military in nature, but are legal military objectives, due to their location and their importance for the adversary's war operations. The commentary to AP I cites a bridge under construction as an example, since it is a facility which might constitute a crossing point for military units due to its location.[262] Yoram Dinstein argues that this is a logical consequence of adopting the principle of permissible damage to military objectives, considering that the area occupied by the target itself, as well as all its components, may be the subject of attack in the light of the *ius in bello*[263] norms. Patrycja Grzebyk recognizes that, due to the deployment, combatants may destroy movable or stationary objects that obscure a military target, preventing it from being attacked.[264]
3. Intended purpose or use – the ICRC's commentary on AP I indicates that the phrase "intended purpose" refers to the anticipated method of using a particular facility in the future.[265] Anthony P.V. Rogers notes that in practice it is difficult to imagine when the purpose of a given military objective (i.e., its anticipated function) may be decisive in terms of assuming that a given target will certainly, at the time of attack, have a military purpose.[266] It is worth referring to the above remark on a historical example. During the war between Ethiopia and Eritrea on July 5, 1998, the Eritrean air force bombed the Aksum airport, which was not being used by the Ethiopian air force at the time of the attack. The joint claims committee established after the war at the Permanent Court of Arbitration in The Hague ruled that the bombing of a civilian airport is in accordance with the provisions of the law of armed conflicts, due to the widespread recognition in practice and the theory of *ius in bello* norms that an airport (including a civilian one) may be considered a military target, emphasizing that runways may be intended for use by combat aviation (see Chapter IX). Against the background of the above facts, there were some doubts in terms of recognizing that the purpose of the airport met the second point of the test specified in Article 52 para. 2 of

261 I. Henderson, *Manual of International Law Applicable to Air and Missile Warfare: A Review*, "Military Law and the Law of War Review" 2010, vol. 49, p. 177.

262 Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 2021, p. 636.

263 Y. Dinstein, *Legitimate Military Objectives under the Current Jus In Bello*, "International Law Studies" 2002, vol. 78, p. 150; Rule 22 of the HPCR Project, among the objectives distinguished under the location criterion, identifies a bridgehead or a mountain pass.

264 P. Grzebyk, *Cele osobowe*…, p. 147.

265 G.D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge 2010, p. 525.

266 A.P.V. Rogers, *Law*…, p. 67.

AP I – i.e., obtaining a specific military advantage in a situation where it was not used militarily.[267] From the point of view of dual-use objects, overlapping roles is particularly apparent in this case: airports handling passenger traffic on a daily basis may become a military airbase during a conflict. It should be noted, however, that voices opining that even a civil airport, and in particular its infrastructure (taxiways, runways, as well as fuel and repair installations) may potentially be intended for servicing military aviation and thus may be treated as a military objective within the meaning of the *ius in bello*[268] norms prevailed. Andreas Zimmermann argues that a change of intended purpose cannot be determined by a one-off case and it is necessary to demonstrate in this regard a permanent "intention to change the intended purpose of the target".[269] However, it should be strongly emphasized that airport building or passenger planes themselves should be placed outside the scope of military operations (unless they are used for military operations).[270] Against the background of the above example, one might wonder whether the destruction of a civilian airport may result in a humanitarian threat (e.g., hindering the delivery of external assistance or medical operations) – such a case cannot be ruled out when, for example, the only airport in a given area is destroyed.

Airports are treated as legitimate military objectives, but it is emphasized in the doctrine that only military airports constitute natural targets. Civilian airports may be a target if they are used or are intended for military use, which depends on

267 S.D. Murphy, W. Kidane, T.R. Snider, *Litigating War: Mass Civil Injury and The Eritrea-Ethiopia Claims Commission*, Oxford 2013, pp. 249–250.

268 "Nevertheless, during the 2003 air campaign, some air attacks were carried out on Baghdad international airport, with the specific aim of preventing the Iraqi leadership from escaping. If one does not accept that such structures are military objectives per se, the damage to Baghdad's civilian airport by aerial bombing raises some doubts. First of all, attacks against this installation can hardly be justified on the assumption of its potential value for Iraqi military aviation: as it was impossible for this force to use military airfields, it was quite unrealistic to assume that it would use Baghdad's international airport. Secondly, an attack against civilian airports to prevent the escape of the enemy leadership does not appear, at first sight, to be justifiable by the acquisition of a particular «military advantage». The leadership's departure would, on the contrary, probably have favoured the Allied aim of weakening the enemy's command and control of government and therefore some doubts regarding these actions may be expressed" – G. Bartolini, *Air Operations Against Iraq (1991 and 2003)*, [in:] N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006, p. 239. In 2003, during the Second Gulf War, the U.S. Air Force bombed the international airport in Baghdad, which, according to G. Bartolini, was an extremely controversial action due to the lack of any Iraqi military aviation activity during the armed conflict (the failure to achieve an element of actual military advantage).

269 A. Zimmermann, *Abiding by and Enforcing International Humanitarian Law in Asymmetric Warfare: The Case of "Operation Cast Lead"*, "Polish Yearbook of International Law" 2011, vol. 31, p. 61.

270 M.N. Schmitt, *Air Warfare*, p. 133.

the circumstances (e.g., as indicated by J. van den Boogaard when there is damage to military aviation bases, which forces military aircraft to land and be serviced at civilian airports). Another problem is the widespread coexistence of military and civil aviation within one airport. Then, airport infrastructure, especially taxiways and runways, become a military target by virtue of their use. Gary D. Solis points out that when an airport is shared by civil and military aviation, civilian passenger aircraft may be classified as a military target and thus be subject to attack because of their location. As previously indicated, while runways and taxiways may be subject to destruction, in the event of a clear separation of military and civilian segments, there are no grounds for treating the entire airport area as a military objective in its entirety, especially the passenger terminal and remotely located civilian aircraft.[271]

8.5. Dual-use objects in the light of Article 52 of AP I

Definition under Article 52 of AP I clearly sets aside the issue of the possible overlap of the two concepts of military objective and civilian facility. First of all, attention is drawn to carrying out analysis at the time of making an appropriate decision to conduct a combat operation, reducing it to a two-tier test, but it does not determine the assessment of the possible consequences of an attack against a given object. The problem may seem quite artificial at first glance – why is any analysis of the effects of a military operation needed, if a given object has been classified as a military objective? Doubts should not exist when the attacked target is by nature a military facility. It is more difficult to give a clear answer to the issue described when the subject of the military operation is a dual-use installation. In practice, this issue first appeared in Iraq in 1991, when the Allied states taking part in Operation "Desert Storm" performed approx. 46,000 sorties, executing a strike against the entire national infrastructure. One of the attacked targets was this state's energy network. In this case, it was intended to achieve a specific military advantage in the form cutting off electricity supply to command units, radars, anti-aircraft artillery, as well as systems supplying the production sites of weapons of mass destruction.[272] The anticipated military outcomes were achieved, but the long-term effects of the strike caused a serious humanitarian crisis, severing the energy supply to hospitals, water treatment and purification units, irrigation networks and food warehouses.[273]

271 "If the civilian aircraft were strafed and destroyed by an attacking enemy as collateral damage to a lawful attack on the military portion of the airfield, the civilian passengers would perish with the satisfaction of knowing that they had not been unlawfully targeted" – G.D Solis, *The Law of Armed Conflict*…, p. 402.

272 Final Report to Congress, Conduct of the Persian Gulf War, April 1992, pp. 148–149.

273 Report to the Secretary-General on Humanitarian Needs in Kuwait and Iraq in the Immediate Post-crisis Environment, Dated March 20, 1991, pp. 5–7. It should be noted that the

A similar situation occurred during the bombing of Serbia by the NATO air force in 1999. During one of the attacks, the headquarters of the Serbian state television RVS was destroyed, causing over a dozen civilian fatalities. NATO recognized that the television station was a legitimate military objective, a tool used to incite Serbian society to commit human rights violations in Kosovo, and a form of propaganda for the regime of President Miloševic. It should be noted, however, that in the light of Article 52 para. 2 of AP I many commentators expressed doubts not only about the fact that a television station was recognized as a military target because of its nature or use, but also about the assessment of whether a specific and concrete military advantage was actually obtained as a result.[274] The above issue was also examined by the Committee at the Office of the Prosecutor of the ICTY, which considered that the attack on RVS stations was justified by the use by the Serbian armed forces of means of communication located in the equipment of the television building, questioning NATO's view that the use of television as a propaganda tool may be an independent premise for an attack on such infrastructure.[275] Frederic L. Borch pointed out that radio and television installations are a typical dual-use object, but their use for military purposes clearly makes a given object a legitimate target within the meaning of the *ius in bello* norms.[276] Anthony P.V. Rogers was of a similar opinion, raising the need to take into account the rule of proportionality.[277] Based on the example cited, it can be concluded that television and radio broadcasting stations cannot be recognized as a military objective by nature but by virtue of their use or exploitation. Historical interpretation leads to opposite conclusions, however. Technical development means that the armed

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overwhelming majority of commentators emphasize that, despite such long-term effects, power plants are very much a legal military target due to their significant contribution to maintaining the combat readiness of a given state's infrastructure; see: A.L. DeSaussure, *The Role of the Law*…; A.P.V. Rogers, *Law*…, p. 75; Y. Dinstein, *Legitimate*…, p. 156; F. Hampson, *Means and Methods of Warfare in the Conflict in the Gulf*, [in:] P. Rowe (ed.), *Gulf War in International and English Law*, New York 2005, p. 64.

274 "In this case, target selection was done more for psychological harassment of the civilian population than for direct military effect" – Human Rights Watch, Civilian Deaths in NATO Air Campaign, p. 26. A. Laursen, *NATO, the War Kosovo and ICTY Investigation*, "American University International Law Review" 2002, vol. 17, pp. 779–790; T. Voon, *Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict*, "American University International Law Review" 2001, vol. 4, p. 1106; similary W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, "European Journal of International Law" 2001, vol. 12, p. 497.

275 N. Ronzitti agrees with the position of the Committee – N. Ronzitti, *Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia Acceptable?*, "International Review of the Red Cross" 2000, vol. 840; A. Balguy-Gallois, *The Protection of Journalists and News Media Personnel in Armed Conflict*, "International Review of the Red Cross" 2004, vol. 86, no. 853, pp. 37–67.

276 F.L. Borch, *Targeting*…, p. 73.

277 A.P.V. Rogers, *Law*…, p. 83.

forces use civilian radio and ground stations to a lesser extent, developing their own communication network to a greater extent, so by nature television as an installation serving the civilian population can become a military facility only after demonstrating that it is used for military purposes. It also seems that the mere fact of using the mass media (radio and television) to influence society, even via propaganda (e.g., in the state media), is not an adequate basis for considering that the destruction of such an object may bring a real military benefit to the belligerent side. Kristen M. Thomasen draws attention to the need to emphasize the importance of the second element of the test, specified in the content of Article 52 para. 2 of AP I, arguing that the above premise is a limitation in terms of the potential treatment of dual-use infrastructure as a military objective.[278]

The issue of possible consequences related to the attack on a dual-use target in the context of the rule of proportionality can also be considered. Many authors believe that accepting such an assessment is unauthorized in the light of AP I.[279] Others postulate that the long-term effects in relation to dual-use objects should also be taken into account in the perspective of the foreseeable effects of military operations.[280] Michael Bothe's point of view is interesting because this author questioned the excessive destruction of objects considered to be military ones (bridges and communication lines) by nature during a combat operation in Serbia which was carried out without regard for obtaining an actual military advantage (these were areas located at a considerable distance from Kosovo, such as the destruction of the bridge in Novi Sad).[281] The above idea was developed by M.N. Schmitt, who pointed out that roads and bridges could not be considered legitimate targets until it was established that their destruction would lead to a specific military advantage. Anthony P.V. Rogers believed that there is no dependence between the elements of the two-member test specified in Article 52 para. 2 of AP I of 1977, which justifies undertaking military operations in the enemy's remote support bases, as well as undertaking diversionary actions.[282] For

278 K.M. Thomasen, *Air Power, Coercion, and Dual-Use Infrastructure: A Legal and Ethical Analysis*, "International Affairs Review", https://www.iar-gwu.org/blog/2008/10/24/air-power-coercion-and-dual-use-infrastructure-a-legal-and-ethical-analysis (accessed: 25.05.2018).

279 W.H. Boothby, *The Law of Targeting*, p. 105; W.H. Parks, *Asymmetries and the Identification of Legitimate Military Objectives*, [in:] W. Heintschel von Heinegg, V. Epping (eds.), *International Humanitarian Law Facing New Challenges: Symposium in Honour of Knut Ipsen*, Berlin 2007, p. 105.

280 M. Odello, R. Piotrowicz, *International Military Missions and International Law*, The Hague 2011, p. 87; A. Muller, *The Relationship Between Economic, Social and Cultural Rights and International Humanitarian Law: An Analysis of Health Related Issues in Non-international Armed Conflicts*, Leiden 2013, p. 176; Report Expert Meeting, *Targeting Military Objectives*, University of Geneva Center for International Humanitarian Law, Geneva 2005, pp. 4–8; H.H. Dinniss, *Cyber*…, pp. 188–189.

281 M. Bothe, *Targeting*, "International Law Studies" 2003, vol. 78, pp. 178–179.

282 A.P.V. Rogers, *Law*…, p. 67.

example, in the case of an operation aimed at northern Serbia, it should be noticed that bridges are traditionally understood as an element of infrastructure of strategic importance and, due to the above, they can be inherently treated as objects making a significant military contribution.[283] However, in a situation in which a given operation is limited only to a certain clear scope of some state's territory and is not, for example, similar in scale to Operation "Desert Storm" of 1991 or "Iraqi Freedom" of 2003, a question arises about the existing military benefit resulting from the destruction of a bridge several hundred kilometers away from the front line. There are no doubts that if there were military garrisons in the northern part of Serbia, the transit of which would have been hindered by the destruction of the bridge, all the criteria of a military objective within the meaning of Article 52 para. 2 of AP I of 1977 would be fulfilled. However, doubts would arise if the destruction of the object did not lead in any way to disrupting the enemy's movements, e.g., through the lack of garrisons using the transit route, which included the bridge. On the other hand, there are strong critical voices in this regard, expressing an unequivocal position on the need to treat bridges as legitimate military objectives by nature.[284] In the above cases, the time criterion was also revealed in the form of the existence of an advantage in a given situation, which, as indicated by M. Sassòli, requires knowledge of the context of warfare, including the current tactical and strategic situation.[285]

Theodor Meron and Marcin Marcinko point out that the so-called dual-use objects provided that the requirements specified under Article 52 para. 2 of AP I, while maintaining the remaining requirements for precautionary and proportionality measures, may be subjected to attack.[286] It should be emphasized, following

283 "The destruction of a bridge which has just a symbolic significance (as was the case, according to Human Rights Watch, of the bridge over the Danube in Novi Sad) is unlawful, since it does not offer a definite military advantage" – M. Roscini, *Targeting*…, p. 430. See the argumentation of the government side in the case concerning the lawsuit filed by the families of the victims of the 1999 NATO bombing before the German judiciary (the so-called Varvarin bridge case, bombed on May 30, 1999, by NATO aircraft; German planes participated in the reconnaissance of the bridge). The government side argued that the attack on the bridge was not a violation of international law, recognizing the "obvious nature of the bridge as a legitimate military target". See: S. Mehring, *The Judgment of the German Bundesverfassungsgericht concerning Reparations for the Victims of the Varvarin Bombing*, "International Criminal Law Review" 2015, vol. 15, p. 191.

284 Y. Dinstein, *The Thirteenth Waldemar A. Solf Lecture in International Law*, "Military Law Review" 2000, vol. 166, p. 107.

285 M. Sassòli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, "International Law Studies" 2014, vol. 90, p. 328.

286 "Yet most of the targets either were strictly military or served both military and civilian uses (dual-use objects), such as bridges, highways, and electric-power installations, and infrastructure. Attacking dual-use objects is not necessarily unlawful, provided that they meet the definition of military objectives in Article 52(2) of Protocol I, the principle of proportionality is observed, and collateral damage is minimized" – T. Meron, *The Humanization of*

M.N. Schmitt and the language of the ICRC *Commentary* on the aforementioned document, that in the case of a strike against dual-use infrastructure, it is particularly important to maintain good faith and common sense in the context of assessing the possible effects of such a strike, both from the military point of view and the possible extent of the effects on the civilian population.[287] In the future, along with the development of civilization, it should be expected that belligerents on the battlefield will increasingly face the dilemma of performing a military campaign against dual-use objects. The postulate based on the above assumption and directed to military commanders is to plan combat operations along with the estimation of their possible negative effects on the civilian population, on the basis of all reasonably available data, in the spirit of battlefield requirements and the premise of humanitarianism.[288] In particular, military considerations should be weighed up when the destruction or damage to a given target brings a short-term military benefit (as in the case of the RVS station, where the interruption in broadcasting lasted only a few hours), which implies the appearance of another negative premise – the lack of a significant and specific military advantage for the attacking party (e.g. the destruction of a power plant supplying power to several hundred thousand households in order to eliminate the power supply to a small military base). In this respect, attention should be paid to the increasing importance of intelligence and analytical information, allowing one to estimate the possible effects of combat operations carried out against particularly sensitive elements of the infrastructure. The above actions also seem justified in the light of the requirements of Article 57 para. 1 of AP I. On the other hand, it is worth noting the view of C. Greenwood, who expressed the belief that long-term effects on the civilian population due to their excessively high variability and unpredictability are not captured by the equation of proportionality made at the time of the attack.[289] Another argument in this respect is also an element of a systematic nature – in Article 52 of AP I, no provision was made relating to the rule of proportionality in the selection of a military target alone.

Humanitarian Law, "American Journal of International Law" 2000, vol. 95, p. 276. M. Marcinko, *Normatywny paradygmat prowadzenia działań zbrojnych w niemiędzynarodowym konflikcie zbrojnym* [*Normative paradigm of conduct of hostilties in non-international armed conflict*], Wrocław 2019, p. 441.

287 Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 2208, pp. 683–684; M.N. Schmitt, *Precision Attack and International Humanitarian Law*, "International Review of the Red Cross" 2005, no. 859, p. 453.

288 "In my opinion, especially for certain categories of targets, an evaluation of the negative consequences of belligerent actions should also take long-term effects into consideration. In particular, due to interconnections in modern civilised societies, limiting such an assessment process to short-term effects can result in short-sighted analysis" – G. Bartolini, *Air Operations*…, p. 252.

289 C. Greenwood, *Legal Issues Regarding Explosive Remnants of War*, CCW/GGE/I/WP.10, para. 23.

8.6. Abstract nature of the definition of military target in AP I

Opening a discussion on the shape of Article 52 para. 2 of AP I, it should be pointed out, following the example of R. Baxter, that the definition is abstract, not specifying the list of objects considered to be legitimate targets due to the awareness that previous attempts to codify the law to this extent contained this element commonly recognized as inconsistent with the changing conditions of the battlefield.[290] William J. Fenrick points out that in this respect, the definition made a conversion from a casuistic definition to a contextual approach.[291] Yoram Dinstein claims that the error during the work on the Protocol I was the failure to include an open catalogue of sample military objectives, which could at least partially enable the determination of the basic scope of targets that can be treated as the foundation of the law of air bombing.[292] The Israeli researcher points out that the design of the test proposed under Article 52 of AP I also includes personnel of the armed forces – understood as targets.[293] Ove Bring claims that the definition added to the framework of Article 52 para. 2 of AP I tends to treat as facilities with the potential to become militarily useful in the future as legal objects of attack, recognizing that this is the effect of historical codifications that had an impact on the creation of AP I of 1977.[294] Horace Robertson concludes that, due to its universal scope of application, the provision gives significant discretion to attackers during the target selection process, subject, however, to the generally prohibiting shape of the norm specified under Article 52 para. 2 of AP I.[295] For this reason, it was decided to use a positive definition of an open and fairly broad nature – among others, the use of an object considered essentially civilian may change its classification and make it a legal target of hostilities.[296] Among the cri-

290 R. Baxter, *The Duties of Combatants*…, p. 119.

291 W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, "European Journal of International Law" 2001, vol. 12, p. 495.

292 Y. Dinstein, *The Conduct of Hostilities*…, p. 83.

293 *Ibidem*, p. 85.

294 "Together the two elements seem to produce quite a strict rule. However, the current interpretation of the rule is not so strict. It includes the right to attack objectives that have a potential of being militarily useful at some point in the future" – O. Bring, *International Humanitarian Law after Kosovo: Is lex lata Sufficient?*, "Nordic Journal of International Law" 2002, vol. 71, p. 41.

295 "The 1977 Protocol led the way in converting the principle from a list of prohibited targets to a more usable concept for a military commander in appraising whether a particular object or person could be lawfully attacked. Both the old-style negative list of prohibited targets and the new-style permissive principle of defining the military objective have their drawbacks" – H.B. Robertson, *The Principle of the Military Objective in the Law of Armed Conflict*, "International Law Studies" 1998, vol. 72, p. 215.

296 "By the «use» criterion, civilian objects may become military objectives when the enemy employs them for military ends" – M.N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, "International Law Studies" 2009, vol. 85, p. 311; *idem*, *Air Warfare*, p. 132.

teria assessing the significant military contribution of a given object according to its nature, location, purpose or use, only the criterion of the "nature" of the facility possesses an invariable value in time and space.[297] Stefan Oeter emphasizes that the two-component test specified under Article 52 para. 2 of AP I is simultaneously subjective and objective. The objective criterion – i.e., one measurable for an external observer – is the capacity of a given object to effectively constitute value added to military operations. The subjective factor is the premise of military necessity resulting from the neutralization of a given objective in given circumstances.[298] This is an important remark in the context of a possible assessment of a given attack. For instance, on January 27, 1991, the US Air Force seriously damaged as many as 8 road bridges over the Euphrates River, not only causing traffic disruptions, but also disrupting telecommunications – an effect that was not immediately obvious from an external perspective.[299]

8.7. Significant contribution to military activity

In this respect, it is worth using the so-called example of three tanks to illustrate the criterion of significant contribution to military operations. The first case is a pre-war model with the status of a monument, or an exhibit displayed in a public space. Leaving aside at this stage all issues related to the protection of cultural property in the event of an armed conflict, it should be noted that although the tank is inherently a military goal, it is certainly a historic vehicle that does not contribute to a military outcome, and its destruction does not affect the enemy's ability to conduct a military operation. The second case is a trainer tank, used during army training, lacking, for example, many fire control systems. In this regard, a question arises about whether the suitability of a given objective for military action is significant, as well as the assessment of the existence of a specific military advantage. It can be assumed that the importance of the functioning of the trainer tank for military action and the training of armored units is a sufficient reason for this return. Destruction of the object may interrupt the training. More doubts arise from how to assess the achievement of a specific military advantage. In a tactical sense, the destruction of a tank with reduced combat capabilities away from the front line does not affect the enemy's conduct of military operations. In strategic terms, neutralizing the tank can be treated as something that might interfere with the ability of future armored forces to function and, in the long run,

297 A. Jachec-Naele, *The Concept of Military Objectives in International Law and Targeting Practice*, Oxon 2015, p. 36 ff.

298 S. Oeter, *Methods and Means*…, p. 157.

299 I. Henderson, *Contemporary*…, p. 49; T. Gill, T. McCormack, R. Geiss, H. Krieger, C. Paulussen (eds.), *Final Report ILA Study Group on the Conduct of Hostilities*, "Yearbook of International Humanitarian Law" 2016, vol. 19, p. 292.

deprive the enemy of qualified combat personnel. Reserve tanks (e.g., armored vehicles located in a large, armored vehicle depot in Kharkiv, Ukraine) are the third example. They are considered capable of moving and conducting combat, but only theoretically due to their obsolescence. As a result, it is controversial to say that their destruction meets the condition of significant contribution to military effort – because if Article 52 para. 2 of AP I had not used the word "significant", the answer to the above question would be quite straightforward. I. Henderson points out that *ipso facto* not every military object is a military target at the same time; it is still necessary to apply the premises specified under Article 52 para. 2 of AP I.[300] Robin Geiss does not agree with this conclusion, pointing out that, in principle, in practical decisions, the recognition of a given object as a target according to nature, location, use or purpose simultaneously results in fulfilling the condition of significant contribution to military operations.[301] However, it seems that the above-mentioned so-called three-tank test clearly indicates the relevance of the two-component test to determine a valid military target.

8.7.1. The problem of the attack on the An-225

One of the symbols of the Russian aggression against Ukraine was the raid of the Russian airborne units (VDV) on the Hostomel airport, located in the immediate vicinity of Kiev, on February 24, 2022. The operation was carried out with the intention of executing a so-called decapitation strike against the political authorities of Ukraine, while using the Antonov plant airport (known for its long runways) to transfer additional forces by air. While the landing was initially successful, it lost momentum because of a Ukrainian counterattack, and the airport itself saw fierce fighting until April 2022.

At the time of the Russian attack, the world's largest An-225 aircraft was parked at the airport. The machine was not evacuated because it was due to be repaired and was completely destroyed in the course of the fighting. To date, it is not clear which party to the conflict is responsible for this act.[302] The An-225 was not a military aircraft, but a transport machine used by Antonov Airlines. The aircraft was widely known as a machine with an enormous payload capacity. In the past, the An-225 was used to transport materials of military significance (e.g., delivering elements of the Iron Dome system to Israel in August 2020). The An-225 was not a military object by nature (it did not have the status of a military aircraft), but due to its exceptional cargo capabilities it could be classified as one on account of its purpose. On the other hand, the An-225 was an

300 I. Henderson, *Contemporary*…, p. 49.

301 R. Geiss, *Cyber Warfare: Implications for Non-international Armed Conflicts*, "International Law Studies" 2013, vol. 89, p. 640.

302 The Russian combat cameras show that the An-225 was not destroyed in the first phase of the assault.

immobilized aircraft at the airport which no longer played its role as a takeoff location (due to the ongoing fighting) and could not be overhauled. Therefore, a question arises whether at the time of its destruction it made a "significant contribution to military effort" and thus whether its destruction was justified in the light of Article 52 of AP I.

At this point, it is also necessary to discuss another possibility, namely the qualification of the An-225 as a target due to its location at Hostomel airport, which became a key battlefield in the first hours of the Russian invasion and had a certain strategic value for the success of the entire Russian plan. The significant value of the airport as an area, the concentration of other military objectives (combatants and armored vehicles) meant that the An-225 could have just been one of the many parts of the Hostomel airport infrastructure that were subject to destruction as a result of fierce fighting within its area limits.[303] However, it should be noted that determining whether a given area may be a target cannot affirm actions contrary to the prohibition of indiscriminate attacks (Article 51 para. 5(a) of AP I).[304]

8.8. Definite military advantage

Michael N. Schmitt points out that the phrase "a definite military advantage" eliminates from the definition of the provision all situations of a speculative or doubtful nature, as well as those that are difficult to materialize at the moment of making a decision about the attack.[305] Cristhopher Greenwood rightly argues that this removes all doubts regarding the well-known practice of so-called morale bombing during World War II, which treats the social demoralization of the working class as an end in itself.[306] Geoffrey S. Corn rightly points out that under field conditions, achieving certainty about the existence of a given military advantage may be difficult in certain situations – the standard of assessment then is to refer to the paradigm of good faith and the model of a reasonable commander.[307] This is certainly one of the most controversial premises for the definition of a military objective, combined with the provision of Article 51 para. 5(b) of AP I in the context of the rule of proportionality, also using the phrase "military advantage". As noted by B. Carnaham, the criterion of the directness of the military premise plays an immanent role in the assessment of historical events such

303 M. Piątkowski, O. Sotula, *Air Warfare over Ukraine*…

304 M. Marcinko, *Normatywny paradygmat*…, p. 409.

305 C.J. Markham, M.N. Schmitt, *Precision Air Warfare and the Law of Armed Conflict*, "International Law Studies" 2013, vol. 89, p. 677; M. Lippman, *Aerial Attacks on Civilians*…, p. 37.

306 C. Greenwood, *The Law of Weaponry*…, p. 200.

307 G.S. Corn, *Targeting, Command Judgment, and a Proposed Quantum of Information Component*, "Brooklyn Law Review" 2011–2012, vol. 77, p. 449.

as the atomic bombing of the Japanese Islands in 1945. This indirectly led to the surrender of Japan and prevented an extremely devastating (in terms of human losses) planned invasion. In this regard, the author postulated that the nature of the military advantage should be reasonably proximate and not remote.[308] Many discussions in this regard have been triggered, for example, by the destruction of Iraqi energy installations, which in turn led to a humanitarian tragedy, resulting in the suspension of electricity supplies to public buildings.[309] Location is a factor affecting the possibility of considering a given land area as a target *per se* – e.g., in the event of clearing the artillery field or the enemy's stationing area.[310] As H. Blix points out, in this respect, that a distinction should be made between the prohibition of indiscriminate attacks, which is described in Article 51 para. 5(b) of AP I – where there are isolated military objectives located in populated areas – and a section of the area, which is a military target in itself.[311] *A contratio*, the principle of distinction is not violated if the armed attack is directed outside the area inhabited by civilians, if military facilities are scattered over a large area – this remark, for example, referred to the bombing (during Operation "Iraqi Freedom" in 2003) of Republican Guard troops in the vicinity of Basra by B-52 bombers.

8.9. AP I and the principle of military energy conservation

It should be noted that in the context of the conducted air operations of AP I, by introducing three components: 1) defining the practice of carpet bombing as illegal; 2) introducing the rule of proportionality in the form of positive law; 3) defining the boundaries of legitimate military operations to those with a military purpose only, it aimed at significant transformations not only in the scope of the law of air warfare itself, but also fundamental doctrinal remodeling. This specific revolution did not result from the increase in humanitarian awareness among the participants of the international discourse. As stated by M.W. Royse, in his pre-war study, states agreed on significant limitations of their capabilities to conduct military operations only in the following cases: 1) when a given weapon became obsolete, 2) when the introduction of regulations did not lead to a diversification of the situation of states, 3) when the weapon was not effective enough.[312] The period after World War II

308 B. Carnaham, *The Law of Air Bombardment*…, p. 57.

309 W.J. Fenrick, *The Law Applicable in Targeting and Proportionality after Operation Allied Force: A View from the Outside*, "Yearbook of International Humanitarian Law" 2000, vol. 3, pp. 68–69.

310 "Their «location» may make them military objectives if they obstruct the field of fire for attack on another valid military objective" – H.B. Robertson, *The Principle*…, p. 49.

311 H. Blix, *Means and Methods*…, p. 147.

312 M.W. Royse, *Aerial Bombardment and the International Regulation*, New York 1928, p. 141 ff.

added a new requirement: that a given weapon should be controllable enough to accommodate a more stringent legal regime by virtue of improvements in its technical accuracy or introducing more precise methods of deployment, as well as another premise: inaccuracy ceased to be a "hidden" advantage of a weapon. Rejecting the first premise in advance, one should look at the other factors influencing the attitude of states in connection with the approval of the standards set out in Section IV of AP I of 1977. In the context of the diversity of the military situation of individual states, it should be noted that the party seemingly harmed by the introduced exacerbations could be the states of the Western bloc.[313] Restrictions related to conducting air bombings benefited all states among, for example, those potentially endangered by air operations. The states of the Eastern bloc treated AP I as an element limiting NATO's air superiority, while leaving the issue of the use of nuclear weapons outside the scope of the treaty.[314] Meanwhile, Western states, including the United States, decided to abandon the carpet bombing model due to direct experiences related to the failure of Operation "Rolling Thunder" and the great political and military success of the "Linebacker I" and "Linebacker II" campaigns at the end of 1972. As a result, each of the camps meeting at the AP I conference table, within the specific geopolitical situation, considered it appropriate to be bound by the provisions of the new international agreement, but for different reasons. The 1977 document is clearly based on the principle of economy of force, which combines the concept of military advantage and the premise of humanitarianism into one balanced and logical model.[315] William H. Parks claims straightforwardly that, e.g., Article 57 of AP I is a copy of the instructions and orders applicable to the US Air Force during the conflict over North Vietnam, due to the inclusion of an element of reconnaissance, intelligence and the correct selection of means and methods.[316] Oeter claims that in the period from 1923 to 1977, states moved from the concept of a mass offensive air force of a strategic nature to so-called limited war, the model of which was consolidated by AP I.[317] It is similarly emphasized by R. Kolb, who uses the distinction between bombing types based on strategic factors

313 C. Lysaght, *The Attitude of Western States*, [in:] A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Naples 1976, p. 369.

314 G.H. Aldrich, *New Life*…, p. 781.

315 M. Sassòli, L. Cameron, *The Protection of Civilian*…, p. 48.

316 "Article 57 coincides with the rules of engagement used by U.S. forces in Vietnam, 10 traditional target intelligence requirements, principles of war such as economy of force, and practical political considerations arising from excessive collateral injury to civilians or civilian objects. While objective criteria are provided, the decision of the commander ultimately is based upon subjective factors, i.e., the best information available to him at the moment of decision" – W.H. Parks, *The 1977 Protocols to the Geneva Convention of 1949*, "International Law Studies" 1995, vol. 68, p. 471. J. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation the Law of Armed Conflict, And the Struggle for a Moral High Ground*, "Air Force Law Review" 2005, vol. 56, pp. 20–21.

317 M.S. Oeter, *Methods and Means*…, p. 157.

and those performed as part of the so-called military advantage bombing. Both authors argue that as part of the concept of total strategic bombing, the concept of belligerent was significantly extended, as were military objectives, understood as an important element impacting the support for the war effort of the Axis states.[318] The opposite of the above model is an air campaign based on the paradigm of the so-called economy of forces, the effect of which was the concentration of military energy on the need to destroy only the objectives being necessary to achieve the ultimate success of a purely military nature.[319]

8.10. Extending the concept of a military objective in The United States's military doctrine

Michael N. Schmitt points out that the United States in its practice has approved a broader understanding of military advantage in the strategic sense understood as the ability to conduct warfare.[320] This is confirmed by the content of the instructions of the US Navy from 1995 and 2007, as well as the latest instruction of the US Department of Defense from 2016. These documents also use the term "capability of war sustaining", while admitting that the above wording is not clearly specified on the basis of customary international law.[321] In this regard, the question arises about the customary definition of a military objective, which, for most of the doctrine, is treated as a direct reflection of Article 52 of AP I and does not have any additional elements beyond the content of the treaty norm[322]. However, this is not a unified view and authors such as W.H. Parks or J.M. Meyer believe that Article 52 para. 2 of AP I imposes restrictions on the combatants that did

318 R. Kolb, *Review Essay: Military Objectives in International Law*, "Leiden Journal of International Law" 2015, vol. 28, p. 697.

319 "The attacks on other selected objectives became a matter of controversy, because, under the principle of economy of force, there was concern whether the use of scarce attack resources might better be applied to military forces themselves, or directly to military installations" – H. Almond, *Comments on Hugh*…, p. 302.

320 M.N. Schmitt, *Asymmetrical Warfare*…, pp. 33–34.

321 "Military action has a broad meaning and is understood to mean the general prosecution of the war. It is not necessary that the object provide immediate tactical or operational gains or that the object make an effective contribution to a specific military operation. Rather, the object's effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient. Although terms such as «war-fighting«, «war-supporting», and «war sustaining» are not explicitly reflected in the treaty definitions of military objective, the United States has interpreted the military objective definition to include these concepts" – Department of Defense, *Law of War Manual*, Office of General Counsel Department of Defense, June 2015 (updated December 2016), p. 214.

322 A.J. Schaap, *Cyber Warfare Operations: Development and Use under International Law*, "Air Force Law Review" 2009, vol. 64, pp. 149–150.

not occur on the basis of customary international law regulating the principles of target selection.[323] It should be noted that the summary of the above wording in relation to the literal wording of Article 52 para. 2 of AP I, which provides only for military activity, is *prima facie* broader in meaning and raises justified doubts about the doctrine of international law. To some extent, these concerns should be considered justified, because in fact it is a return to the broad concept of a military objective characteristic of the guidelines that the British aviation received during World War II, significantly expanding the circle of potential objects, as well as persons who may targeted by an air attack.[324] Recently, the treatment of transports and persons involved in the process of exporting propellants for the structures of the Islamic State as legitimate targets, viewing it an example of action which is both direct participation in military operations and "effective contribution to military action" stirred up controversies.[325] This raises concerns related to an excessively far-reaching classification of certain activities as in fact being part of the generally understood armament effort of the adversary.[326] Against this background, there was also a difference of opinion between the USA and Ukraine in the context of the former state's objections to carrying out strikes against Russian oil installations.[327] The danger is in fact related to the combination of two concepts: direct participation in hostilities and a broad definition of a military objective, which can be invoked as a basis for justifying attacks on so-called quasi-combatants (e.g., personnel supplying airbases with food). The above concept should

323 "Article 52(2) of Protocol I, may not necessarily reflect customary international law or state practice. On its face, Article 52(2) may appear consistent with customary international law and state practice however, the definition of a military objective in Article 52(2) arguably allows for the imposition of new limits on targeting inconsistent with prior customary international law and state practice" – J.M. Meyer, *Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, "Air Force Law Review" 2001, vol. 51, p. 144.

324 "There has been considerable resistance amongst international law scholars towards recognizing a war-sustaining approach. The concern has been that such an approach might ultimately lead to indiscriminate attacks, and the type of wide-ranging aerial assaults with extensive civilian casualties, which were so controversial during World War 11" – K. Watkin, *Targeting "Islamic State" Oil Facilities*, "International Law Studies" 2014, vol. 90, p. 507.

325 "Targeting civilians involved in the illicit trafficking of oil for revenue collection by ISIL would likely produce the same conclusion, but the manual seems to broaden the analysis beyond activities that are «integral» to military operations and leave the door open to directly targeting civilians engaged in war-sustaining activities" – R. Santicola, *War-Sustaining Activities and Direct Participation in the DOD Law of War Manual*, 2015, https://www.justsecurity.org/28339/war-sustaining-activities-direct-participation-dod-law-war-manual/ (accessed: 18.12.2020).

326 B. Van Schaack, *Targeting Tankers Under the Law of War (Part 1)*, 2015, https://www.justsecurity.org/28064/targeting-tankers-law-war-part-1/ (accessed: 18.12.2020).

327 M. Bernhart, *Targeting Russian Oil Refineries*, International Conference Knowledge-Based Organization 2024, vol. XXX, no. 2, p. 4.

be considered doubtful and in opposition to the content of Article 52 para. 2 of AP I. Its danger may reveal itself with full force in the event of possible interstate conflicts and conducting full-scale air operations, under which combatants will classify targets on the basis of criteria characteristic of a so-called economic war, which do not have a sufficient and direct connection with the military actions of the adversary.[328]

A certain aftermath of the American vision of defining a military target was the so-called effect-based operations (EBO) doctrine used during the First Gulf War. It was a new model of conducting an air campaign at the strategic level, assuming the possibility of indirectly influencing the adversary's society by destroying legal military objectives of particular importance and location, as well as attacks on dual-use infrastructure.[329] The strategy did not assume direct losses among the civilian population but used indirect elements of influence on the morale of the enemy's armed forces and civilian population, which as a result was supposed to have created a specific political solution (e.g., a rebellion against dictatorial governments).[330] One of them was the projection of firepower, among others by simultaneously attacking tactical and strategic targets to show the enemy (both at the level of political, military and social leadership) that they are unable to effectively put up resistance. As pointed out by M.N. Schmitt, the main objection directed against the EBO Doctrine by the international humanitarian law is the possibility of adopting a broad interpretation of the AP I provisions relating to the selection of military objectives.[331] While the indirect effects of military operations, also in relation to the civilian population, are not prohibited by the provisions of *ius in bello* (as in peace time, the stress associated with the interrogation of a person suspected of committing a crime does not necessarily affect the disqualification of the values of the testimony given by them), a bottom line in this re-

328 W.H. Boothby, *The Law of Targeting*, p. 106.

329 "The air campaign strategy capitalized on capabilities and highly adaptive attack plans designed to paralyze Saddam's control of forces, then went on to neutralize the enemy's capacity to fight, undermine its will to fight, reduce its military production base, and create the conditions to control its capacity to build weapons of mass destruction" – D. Deptula, *Effect-Based Operations: Change in the Nature of Warfare*, Arlington 2001, p. 3.

330 "In particular, it is claimed, EBO is not about destruction or attrition of enemy forces (except incidentally), occupation of territory, or other classical considerations. Proponents of EBO sometimes stress images such as the will and cohesion of the enemy. Defeating the enemy's strategy rather than his armies. Convincing the enemy's leader to make decisions favorable to our goals" – P.K. Davis, *Effect-Based Operations: A Grand Challenge for the Analytical Community*, Santa Monica 2001, p. 12.

331 "Yet, negative pressures on existing understandings of the law also exist. Particularly disquieting is the rather subtle impact of such concepts on the principle of distinction, especially the reach of the term «military objective»" – M.N. Schmitt, *Effects-Based Operations and the Law of Aerial Warfare*, "Washington University Global Studies Law Review" 2006, vol. 5, p. 292.

spect is a clear indication that a given objective actually contributes to a military campaign, which makes it difficult to subjectively manipulate the list of objectives and extend it.[332] A different view (of a definitely isolated nature) is expressed by J.M. Meyer, who claims that the adversary's military effort does not consist only of military components, prohibiting the achievement of potential psychological and strategic advantage.[333] It seems that the opinion of the American author is wrong in this respect and does not take into account the *ratio* of Article 52 para. 2 of AP I, whose instruction is intended to prevent precisely the aforementioned model of interpretation. The correct direction of construing Article 52 para. 2 of AP I is indicated by the United Kingdom Army's manual (*JSP 383, The Joint Service Manual of the Law of Armed Conflict*), which requires that military assets (even those inherently classified as legitimate targets) must be assessed in terms of their significant contribution to military operations.[334]

8.11. Presumption of the civilian intended use of certain objects

Article 52 para. 3 of AP I introduces a presumption of the civilian nature of objects normally intended for civilian use, provided they are not being used to make an actual contribution to military operations. The above provision is criticized by some American legal scholars as shifting the burden of proof in demonstrating that the object of attack qualifies as a military target within the meaning of Article 52 para. 2 of AP I, onto the attacking party and failing to take into account the lack of so-called passive precautions by the defending party. In the context of aerial operations, this necessitates prior determination of the nature of the aircraft by the attacking party, which assesses its purpose or use, as well as evaluates the significance of its contribution to military operations.[335] Any doubts in this regard should be resolved in accordance with the principle of *in dubio pro humanitate*.

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332 J. Reynolds, *Collateral Damage on the 21st Century Battlefield*…, pp. 82–83.

333 J.M. Meyer, *Tearing Down the Facade*…, pp. 166–167.

334 "The following is a list of examples of possible military objectives. The mere fact that an object is on the list does not mean that it is necessarily a military objective. It must always be tested against the definition in paragraph 5.4.1, especially the question: 'does it make an effective contribution to military action?'" – JSP 383, *The Joint Service Manual of The Law of Armed Conflict*, 2004 Edition, p. 56, https://assets.publishing.service.gov.uk/media/5a7952bfe5274a2acd18bda5/JSP3832004Edition.pdf (accessed: 18.12.2020).

335 "Additionally, Protocol I shifts the burden for determining the precise use of an aircraft, and thus, its legitimacy as a valid military target, away from the state controlling the aircraft to the state which is attacking the aircraft. In case of doubt, that an aircraft, which is designated as civil under the Chicago system is being used to make an effective contribution to military action, or represents an actual threat, the said aircraft must be presumed as non-military and not be attacked" – M. Bourbonniere, L. Haeck, *Military Aircraft and International Law: Chicago Opus 3*, "Journal of Air Law and Commerce" 2001, vol. 66, p. 970.

9. Protection of cultural assets

As mentioned before, Article 27 of the Hague Regulations of 1907 was a provision that essentially represented the only form of limitation on the scope of armed attacks against cities considered defended under Article 25 of the Hague Regulations of 1907.[336] The commander of a given military operation was obligated to take all available measures to maintain the protection of certain categories of buildings, which include public utility structures, places of religious worship, cultural sites, and locations where the injured and sick are gathered. However, the protection of these objects was conditional and applied only when they were not simultaneously being used for military purposes.[337] Furthermore, the provision was weakened by the introduction of the criterion of preserving facilities whenever possible, acknowledging that certain situations may lead to a deviation from the protection of specially protected buildings, for example, due to their location near military objectives.[338] The second sentence of the provision also included an element of employing so-called passive precautions by the defending party, by marking special category objects and notifying their status to the opposite party. The above obligations are essentially reproduced in the provision of Articles 25 and 26 of the 1923 Hague Rules of Air Warfare, which, among other things, introduced the obligation for the party benefiting from protection to display a special marking. Article 26 (introduced at the request of the Italian delegation) ultimately prohibited the placement of military facilities within 500 meters of a specially protected object.

During World War II, cities within which historical monuments and cultural goods were located became the object of aerial strikes by both sides. During the Third Reich's invasion of Poland, particularly severe losses among the monuments of Warsaw were inflicted by the massive Luftwaffe air raid of September 25, 1939, as a result of which, the Royal Castle was damaged, among others. During the German air attacks against London in 1940, the city center was severely devastated, including St. Paul's Cathedral. The 14th-century St. Michael's Cathedral in Coventry was burned down as a result of the (in)famous attack on November 14, 1940. Great losses among cultural assets were sustained in Germany, where the majority of the historical monuments and sights in Lübeck, Dresden, and Brunswick were destroyed.[339] The bombing of the Monte Cassino monastery by the Allied air force in 1944 went down in history.[340]

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336 21st International Conference of the Red Cross, *Reaffirmation and Development*…, p. 71.

337 G.D. Solis, *The Law of Armed Conflict*…, p. 347.

338 T. Krupiy, *A Toolbox for the Application of the Rules of Targeting*, Newcastle 2016, p. 151.

339 A.P.V. Rogers, *Law*…, p. 138.

340 W.H. Parks, *The Law*…, p. 61. A.P.V. Rogers, *Law*…, p. 94. The American author quotes the instruction of Gen. Eisenhower for Allied units from 1943, in which he ordered to take steps "aimed at preserving cultural sites and assets". The case of the attack on the monastery

A turning point in the development of the legal regime protecting cultural property in the event of armed conflict was the adoption of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[341] Article 8 of the Convention established special protection for certain categories of objects, such as shelters used for storing cultural property or other immovable cultural property of immense importance, provided they are sufficiently separated from military objectives which constitute sensitive points (airports, radar stations, arms factories, ports, railway stations, and communication lines), and are not being used for military purposes. A constitutive element of protection is the inclusion of an object on the special list of the International Register of Cultural Property under Special Protection. However, these provisions have no practical application due to the lack of interest from the parties to the Convention.[342] Article 8 of the 1954 Convention is, however, frequently cited as an example of listing military objectives in practical terms and was invoked as the justification for the airstrike on the Serbian radio-television station by NATO in 1999.[343]

Due to the existence of prior regulation in the form of the aforementioned Convention, no provision can be found in the 1973 draft AP I which served as the basis for the later Article 53 of AP I. During the third committee's working group session, at the request of the representative of Greece, supported by the Holy See, Spain, Jordan, and Venezuela, it was proposed to include in Article 47 of draft AP I a paragraph on the protection of cultural heritage and religious objects, based on the Hague Regulations of 1907 and the Hague Convention of 1954 for the Protection of Civilian Property.[344] Interestingly, the adoption of the new provision was not met with unanimous approval, e.g., E. Castrén claimed that the new regulation was a *superfluum* in relation to the already existing solutions of 1907 and 1954.[345] However, it was noted during the preparatory work that a significant number of states at that time were not parties to the 1954 Convention and that, for the sake of completeness, it was necessary to introduce a provision into the text that would properly safeguard the protection of monuments of particular religious, cultural, and historical value.

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raises doubts, although it was not directly used by the German side at the time of the attack, it was located on one of the most important German positions, on the so-called Gustav's line and its exposition could have been used by the German side.

341 F. Kalshoven, *The Netherlands and IHL Applicable in Armed Conflicts*, [in:] *idem* (ed.), *Reflection on the Law of War: Collected Essays*, Leiden 2008, p. 281.

342 See: M. Jankowska-Sabat, *Wzmocniona ochrona dóbr kulturalnych w razie konfliktu zbrojnego – propozycja listy polskich obiektów* [*Enchanced Protection of Cultural Property in Armed Conflict*], „Acta Universitatis Wratislaviensis" 2013, no. 3508.

343 R. Kolb, R. Hyde, *An Introduction to the International Law of Armed Conflicts*, Oxford 2008, p. 134.

344 CDDH/III/SR.15, para. 6, p. 118.

345 "But he considered that the question had already been decided by Article 27 of The Hague Regulations of 1907, annexed to The Hague Convention No. IV of 1907, and was now accepted as customary law, and also by The Hague. Convention of 14 May 1954, for the Protection of Cultural Property, notwithstanding its two provisons" – CDDH/III/SR.15, para. 7, p. 118.

The adoption of the final version of Article 47 bis (later Article 53 of AP I) was significantly influenced by the attitude of the Holy See and the Arab states, which postulated extending special protection to objects of religious worship under international law.[346] Ultimately, the provision supplemented the protection provided by the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Attacks against historical buildings, monuments, works of art, and places of religious worship that constitute national heritage were prohibited, and it was also specified that these properties should not be used for military purposes.

In the explanations provided during the voting, the Dutch delegation stated that the change in the purpose of buildings specified under Article 47 bis would lead to these objects losing their privileged status.[347] Of further important was the comment of the Federal Republic of Germany, in which it was argued that the illegal use of a building protected by the provision would justify a legal strike on the object, which would then become a military target within the meaning of Article 52 para. 2 of AP I.[348] In addition, in the understanding of the Federal Republic of Germany, the 1977 regulation was not intended to replace the customary norm established under Article 27 of the Hague Regulations of 1907.[349] The United Kingdom and the United States also voiced a similar reservation.[350] It should be noted that despite the content of Article 53 of AP I expressly prohibiting making specially protected goods an object of reprisals, it allowed for the possibility of quasi-reprisals related to the actual loss of protected status by an object reclassified for military use.

The II Protocol to the Hague Convention of 1954 specified the requirements related to the existence of a state of imperative military necessity. Under Article 6 para. a and b of the Protocol, it was indicated that a cultural object must constitute a military target (the definition of which was taken from the provisions of Article 52 para. 2 of AP I) and there cannot be any practically available alternative means to achieving a similar military advantage.[351] A party intending to use a giv-

346 CDDH/SR.41, para. 163–171.

347 "It is our understanding that the illegal use of the historical objects for military purposes will cause them to lose effective protection as a result of attacks directed against such military uses" – CDDH/SR.41, p. 195.

348 CDDH/SR.42, p. 225.

349 "It is further the understanding of the Federal Republic of Germany that Article 47 bis was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land protecting a variety of cultural and religious objects" – *ibidem*.

350 "Secondly, my delegation does not understand this article as being intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land" – CDDH/SR. 42, p. 239.

351 P. Ishwara Bhat, *Protection of Cultural Property Under International Humanitarian Law: Some Emerging Trends*, "Israel Yearbook of International Humanitarian Law" 2001, vol. 27, pp. 64–65.

en object for military purposes may rely on a similar justification – a decision to invoke the provisions of Article 4 para. 2 of The Hague Convention of 1954 allows such a decision to be made only by a commander at the battalion level, and the attacking party should, where possible, issue a prior warning of the attack. Articles 7 and 8 of the II Protocol to the 1954 Hague Convention provide for the application of both active and passive precautions, which is essentially a reflection of the provisions of Article 57 of AP I with such modification that the subject of protection in this respect are cultural goods, and not the civilian population. The Second Protocol thus serves as an adaptation of the provisions of the 1954 Hague Convention to the conditions of armed conflict as outlined in AP I, particularly through the interpretation of the term "imperative military advantage", which *prima facie* was not aligned with the definition of a military target as set forth in Article 52 para. 2 of AP I. The degree of ratification or accession to the Second Protocol is not universal – Poland only joined in 2012, while France, Sweden, and the United Kingdom did so in 2017, and many states (including China, the United States, and Russia) have not acceded to the Protocol. Some states have submitted interpretative declarations similar in scope to those previously submitted on the basis of AP I.[352]

Experts, in the HPCR Manual, pointed to the obligation for combatants to refrain not only from using the cultural property itself but also its immediate surroundings for military purposes. They allowed an exception to the above only in cases of absolute military necessity, that is, where no alternative exists for achieving military advantage (Rule 93). The instruction emphasized the need to mark buildings with a special protective emblem as provided for in Article 6 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, but failure in this regard could not serve as a basis for denying the status of cultural property to a given object under international law. The above restrictions *a contratio* resulted in the obligation to refrain from any act of warfare against specially protected objects, which could only be undertaken in conditions of absolute military necessity, as elaborated in the provisions of the II Protocol to the 1954 Convention.

352 See the exemplary interpretative declaration of the United Kingdom: "1. It is the understanding of the United Kingdom that military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time. 2. The United Kingdom understands the term «feasible» as used in the Second Protocol to mean that which is practicable or practically possible, taking into account all circumstances ruling at that time, including humanitarian and military considerations" – UNESCO, Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, 1954, https://www.unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention (accessed: 13.06.2025).

In the ICTY jurisprudence, based on the factual circumstances of the *Strugar* case concerning the artillery bombardment of the Old Town of Dubrovnik, a UNESCO World Heritage site, it was noted that the attacks constituted deliberate destruction of cultural property.[353] It was observed in this regard that there was no factual basis to conclude that the shelling was directed at artillery positions (as suggested by the defendant's explanations).[354] As a consequence, an attack against cultural property will only be deemed lawful if a given asset is being used for military purposes.[355] In this regard, it is also necessary to remember the presumption existing under Article 52 para. 3 of AP I.[356]

10. Environmental protection and the law of air warfare

The solutions introduced in this regard should be viewed as a complete normative novelty, as no restrictions of this nature had ever been considered for combatants with regard to the protection of the natural environment.[357] None of the drafts of air warfare legislation provided for this. It should be noted that during the preparatory work of the AP I of 1977, the attention of the international community was focused on the practice of American combat aviation in Vietnam. It was destroying the forested border areas of South Vietnam to block the famous Ho Chi Minh Trail, through which the communist guerrillas received supplies of ammunition and weapons from North Vietnam. Airdrops of chemicals and pesticides caused serious

353 "Turning now to the crime charged under Article 3(d), the Chamber notes that this provision is based on Article 27 of the Hague Regulations. Moreover, protection of cultural property had developed already in earlier codes. The relevant provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954780 confirm the earlier codes" – *Prosecutor v. Pavle Strugar*, Trial Chamber Judgment 31 January 2005, IT-01-42-T, para. 229; A. Carcano, *The Criminalization and Prosecution of Attacks Against Cultural Property*, [in:] F. Pocar, M. Pedrazzi, M. Frulli (eds.), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation*, Northampton 2013, p. 85.

354 "In view of the foregoing, the Chamber finds that the shelling of the Old Town on 6 December 1991 was not a JNA response at Croatian firing or other military positions, actual or believed, in the Old Town, nor was it caused by firing errors by the Croatian artillery or by deliberate targeting of the Old Town by Croatian forces" – *Prosecutor v. Palve Strugar*, paras. 212–214.

355 R. O'Keefe, *Protection of Cultural Property under International Criminal Law*, "Melbourne Journal of International Law" 2010, vol. 10, p. 349.

356 H. Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, "Harvard Human Rights Journal" 2001, vol. 1, p. 19.

357 L.C. Green, *Essays*…, p. 149.

health and ecological effects (from *Agent Orange*).[358] The symbol of the war in Iraq in 1991 was, in turn, the sight of burning oil wells. An interesting analysis related to the use of smoke as a protective measure by Iraqi armed forces was conducted by L.C. Green, who argued that oil installations would ultimately qualify as military objectives under Article 52 para. 2 of AP I and their destruction could be justified both by an attempt to deprive the Allies of access to fuel sources and by the attempt to create an extensive smoke screen to gain protection against air force operations.[359] Certainly, the actions of the defenders of Polish fortification in the Hel Peninsula in 1939 would be assessed in a similar manner, as they decided to detonate a pre-prepared torpedo barrier near Kuźnica to separate the peninsula from the mainland and halt the German attack.[360] In 1943, the Allied air force carried out a series of strikes in the Ploiesti region of Romania, aiming to destroy the main supply of oil for the European Axis states. M.N. Schmitt, in his extensive work devoted to the aspects of environmental protection during an armed conflict, pointed out that cases of deliberate harm are much more difficult to assess due to the lack of a clear boundary between justified and thoughtless actions (destruction).[361] The assessment of the actions of the Iraqi authorities ranges from the views mentioned above to conclusions recognizing these actions as unjustified and deliberate environmental destruction (A. Roberts).[362]

In the draft AP I there were no proposals regarding the regulation of environmental protection during warfare. Article 55 of AP I does not define the level of destruction that could cause widespread, long-lasting, and severe damage to the natural environment in relation to the conduct of military operations, and especially does not refer to regular, significant, and direct elements of military operations support, as outlined in Article 56 para. 2 of AP I.[363] On the other hand, it is argued that the possibility of actually violating this provision is minimal, due to the need to cumulatively fulfill all three conditions: extent, duration, and serious intensity.[364] In addition, it is necessary for the damage to aim at or potentially lead to (with the outcome unknown at the time of the attack) the infliction of some impact on human health and chances of survival, i.e., damage which is undoubtedly of a qualified nature, with a particular level of intensity. Due to the use of the term "population",

358 J. Terry, *The Vietnam War in Perspective: Lessons Learned in the Law of War As Applied in Subsequent Conflict*, "Naval Law Review" 2007, vol. 54, p. 98.

359 L.C. Green, *The Environment and Conventional Warfare*, "The Canadian Yearbook of International Law" 1991, vol. 29, p. 233.

360 K. Komorowski (ed.), *Boje Polskie 1939–1945. Przewodnik encyklopedyczny* [*Polish Battles 1939–1945. Encyclopedia Guide*], Warszawa 2009, p. 124.

361 M.N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, "Yale Journal of International Law" 1997, vol. 22, p. 53.

362 A. Roberts, *Environmental Issues in International Armed Conflict: The Experience of the 1991 Gulf War*, "International Law Studies" 1996, vol. 69, p. 261.

363 M.N. Schmitt, *Humanitarian Law and Environment*, "Denver Journal of International Law and Policy" 2000, vol. 28, pp. 282–283.

364 K. Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Leiden 2004, p. 79.

the provision does not distinguish in such situations between combatants and non-combatants, e.g., air pollution undoubtedly has unlimited effects.[365] Therefore, there are serious doubts as to whether such phenomena can occur during operations of a conventional nature.[366] According to A. Cassese, in principle, the threshold for the application of the provision will not be triggered under those conditions.[367] In the context of the advisory opinion of the ICJ on the *Legality of Using or the Threat to Use Nuclear Weapons*, it is important to note that when assessing the effects that may arise from the use of certain methods and means, the rule of proportionality is applicable. Additionally, the impact of the methods employed in warfare on the natural environment is analyzed.[368] There is no doubt that certain types of weapons can have a significantly greater impact on the environment compared to others – this is particularly true of cluster munitions, depleted uranium weapons, incendiary weapons, and quasi-incendiary weapons.[369] The norm of Article 35 para. 3 of AP I prohibits the use of methods and means that cause or may cause widespread, severe, and long-term damage to the natural environment. However, the structure of both norms ensures that their application is essentially limited to exceptional and extreme situations, which, in the context of conventional air warfare, may be rare.[370]

Environmental protection in military operations is complemented by the 1976 Convention on the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD), which obligates states to refrain from any environmental modifications for military purposes that could cause widespread, long-lasting, and severe damage. Article 1 of the Convention uses the terms "widespread", "longlasting", and "severe effects", which clearly restricts the scope of the provision to situations involving unnatural disruptions of the ecosystem. Anthony P.V. Rogers provides an example related to the eruption of Mount Vesuvius in 1944, which caused significant disruptions in the con-

365 M. Halpern, *Protecting Vulnerable Environments in Armed Conflict: Deficiencies in International Humanitarian Law*, "Stanford Journal of International Law" 2015, vol. 51, pp. 126–127.

366 "Most legal analysts agree that states intended the threshold to be extremely high since it requires the presence of all three conjunctive elements – widespread, long term, and severe – before coming into play. Generally speaking, the damage caused would have to resemble a shock on «the balance of the ecosystem»" – A. Barnes, C. Waters, *The Arctic Environment and International Humanitarian Law*, "The Canadian Yearbook of International Law" 2011, vol. 49, p. 217.

367 A. Cassese, *Means of Warfare*…, p. 177.

368 ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, para. 31; A.P.V. Rogers, *Law*…, p. 167.

369 A. Breitegger, *Cluster*…, p. 50; G. Bartolini, *Air Operations*…, p. 268.

370 "The criteria 'widespread, long-term and severe' are cumulative, and none of the criteria is defined. It is clear, however, that their cumulative effect is such as to render only the most egregious damage a breach of the rule" – W.H. Boothby, *How Will Weapons Review Address the Challenges Posed by New Technologies*, "Military Law and the Law of War Review" 2013, vol. 52, no. 1, p. 44.

duct of the air campaign by Allied aviation during operations in southern Italy (assuming a similar phenomenon was caused by humans).[371]

It should be emphasized that, unlike other provisions of Section IV of AP I of 1977, the customary status of the standard adopted on the basis of Article 35 para. 3 and Article 55 of AP I. Antonio Cassese believes that the norm introduced by the treaty confirmed the development of a customary law norm, which challenged the possibility of using means and methods of warfare that have a serious impact on the environment. He points out, among other things, that the standard was adopted through consensus at the plenary session of the 1977 conference.[372]

The commentary on the HPCR Manual indicates that most of the experts involved in formulating the document's propositions do not recognize Article 35 para. 3 and Article 55 of AP I together with the ENMOD Convention as part of customary international law.[373] It was also pointed out that deliberate and wanton destruction of the natural environment (e.g., attacking forested areas that simultaneously serve as camouflage for enemy units) for reasons unrelated to military necessity is impermissible (Rule 88). It was confirmed that environmental considerations should affect the proportionality equation.[374] Air operation commanders should, within the planning system, also assess the consequences of airstrikes on the natural environment ("due regard ought to be given to the natural environment"). However, it is worth noting that this standard is lower than in the case of using precautionary measures, as it merely requires considering the potential effects of the attack on the natural environment.[375]

11. Protection of special type infrastructure

The provisions of Articles 54 and 56 of AP I of 1977 introducing protection of certain types of structures necessary for the survival of the civilian population (Article 54) and so-called critical infrastructure (Article 56) were another set of

371 A.P.V. Rogers, *Law*…, p. 165.

372 A. Cassese, *The Geneva Protocols*…, p. 94.

373 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 246; The 2005 ICRC study on customary international humanitarian law raises doubts about interpreting the position of France, the United Kingdom, and the United States, regarding their opposition to the customary nature of Article 35 para. 3 and Article 55 I of AP as an example of a persistent objector. J.-M. Henckaerts, L. Doswald-Beck, *Customary International Law: Volume 1: Rules*, Cambridge 2005, p. 155.

374 *Ibidem*, p. 248.

375 *Ibidem*, p. 249.

regulations with a new form in the law of air warfare. Article 54 para. 1 of AP I expressly prohibits the use of famine as a method of conducting warfare, which is a complete reversal of the customary law norm in this regard. It was repealed by the introduced treaty standard.[376] In order to find the usual sources of this practice, it is enough to refer to the jurisprudence of the United States Military Tribunal in Nuremberg, which confirmed, using the example of the Siege of Leningrad, the permissibility of blockades aimed at cutting off supplies to a city during World War Two.[377] In this context, the dimension of the above provision is similar to the provision of Article 25 of the Hague Regulations of 1907. It was assumed that during an assault on a given locality, it was permissible to direct artillery (or air force) against residential districts of the area in order to compel the defenders to surrender quickly.

Article 54 para. 2 of AP I prohibits attacks on economic resources essential to the population with the aim (and this should be emphasized) of preventing their use. Article 54 para. 3(a) of AP I states that this provision does not apply if the destruction of food resources occurs in relation to those reserves used by the armed forces. In other words, the legality of so-called starvation warfare is maintained solely in situations such as the siege of a military base where no civilian population is present. However, in the case of areas where, in addition to military units, civilians also live, the destruction of goods essential for their survival, which could expose the civilian population to famine, is prohibited.[378] The deliberate blocking of supplies essential for the survival of the civilian population is also prohibited.[379] Yoram Dinstein believes that in this matter, AP I completely fails to take into account the realities of conducting a siege of a city where the civilian population chooses to remain within its boundaries, asserting that it undermines the

376 "Although the statement is clear, its implications are not all equally clear. For example, for a classic siege situation, where a town or encampment is besieged, the sentence is reasonably clear in stipulating that the besieging party is not entitled to compel civilians to remain in the area concerned if it is trying to starve the garrison into submission by blockading the local food supply. That is a clear, and I believe proper, reversal of the customary law" – G.H. Aldrich, *The Laws of War on Land*, p. 53.

377 "We might wish the law were otherwise, but we must administer it as we find it. Consequently, we hold no criminality attaches on this charge' – *The German High Command Trial*, Law Reports of Trials of War Criminals, Vol. XII, United Nations War Crimes Commission, London 1949, p. 84.

378 H. Blix, *Means and Methods*…, p. 143.

379 "This finding is based on the role of Mr Netanyahu and Mr Gallant in impeding humanitarian aid in violation of international humanitarian law and their failure to facilitate relief by all means at its disposal. The Chamber found that their conduct led to the disruption of the ability of humanitarian organisations to provide food and other essential goods to the population in need in Gaza" – *Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant*, 2024, https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges (accessed: 5.06.2025).

very feasibility of conducting a siege *per se*.[380] However, the *ratio legis* of the 1977 regulation was supposed to remodel the practice of belligerents during siege warfare. The problem in this regard is particularly significant as it directly pertains to the principles of conducting air warfare. AP I intends to recognize that the siege warfare is not a factual state justifying a derogation from the general rules specified under Articles 51 and 57 of AP I. The provisions in this regard were inherently designed to shift the focus of military efforts and compel adversaries to engage in warfare aimed solely at effectively combating military objectives, in line with the principle of concentration of military effort. In such a model, the civilian population may only indirectly and unintentionally experience the effects of military operations. The content of Article 51 para. 5(a) and (b) of AP I in conjunction with Article 54 para. 1 of AP I is the best example of the above tactics. Article 54 para. 5 of AP I also limited the use of scorched earth tactics solely to circumstances of imperative military necessity.[381] The provisions of paras. 2 and 3, Article 54 of AP I now seem to be the undisputed norm of customary law, although it should be noted that there are doubts regarding whether they were declaratory or constitutive in nature in 1977.[382] The above belief is confirmed by the content of Rule 97 of the HPCR Manual. It confirms that a legal method of conducting air operations is the method of cutting off supplies to an isolated military garrison, and furthermore, the commentary on the manual argues that the so-called siege warfare is not prohibited by standards of international law.[383]

Article 56 of AP I was, in turn, a completely new normative development, directly related to infrastructural devastation, the consequences of which could cause serious losses among the civilian population. The government expert group argued that the protection proposed in the initial draft version of 1971 should specify certain categories of civilian buildings or structures whose protection should be particularly strengthened.[384] At first, as part of the above classification, infrastructure elements such as floodbanks, dams, as well as electrical installations were taken into account. The initial proposals included a general obligation to refrain from attacking the above-mentioned objects under any circumstances, as their destruction could cause the release of forces in a natural or artificial

380 Y. Dinstein, *Siege Warfare and Starvation of Civilians*, [in:] A.J.M. Delissen, G.J. Tanja (eds.), *Humanitarian Law of Armed Conflict Challenges Ahead*, Leiden 1991, p. 151.

381 P. Macalister-Smith, *Protection of Civilian Population and the Prohibition of Starvation as Method of Warfare, Draft Texts of International Humanitarian Assistance*, "International Review of the Red Cross" 1991, vol. 31, p. 444.

382 S. Hutter, *Starvation as a Weapon – Domestic Policies of Deliberate Starvation as a Means to an End under International Law*, Leiden 2015, p. 205.

383 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, pp. 269–270.

384 ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, *Report on the Work of the Conference, Volume I*, para. 3.136, p. 146.

way.[385] In the draft text of Article 49 of AP I (later Article 56 of AP I), a prohibition on the destruction of installations releasing dangerous forces such as floodbanks, dams and nuclear power plants was included. Many disputes were caused by para. 2 of the aforementioned provision prohibiting in principle the deployment of any military objectives in the immediate vicinity of buildings protected by special immunity. The group of government experts argued for the need to allow the deployment of defensive weapons under the aforementioned provision. The controversies in this regard were obvious due to the inability to effectively determine the deployment of this type of weapon.[386]

During the 1974–1977 conference proceedings, it was emphasized that the protection of civilians from dangers arising from the release of dangerous forces is absolute and independent of the original use of a given structure. The scope of protection for "building structures containing dangerous forces" was contingent on the absence of military objectives in their vicinity.[387] State delegations submitted comments regarding 1) the potential use of the special protection status of an object to shield military objectives, 2) the installation of defensive military equipment or facilities that should not alter the original purpose of the object, and 3) limitation of the absolute nature of protective measures being due to military interests.[388] This concerned, for example, dikes that could serve as sites for defensive resistance.[389] The US delegation emphasized that the solution developed should take into account the use of a given object for military purposes and the fact that exposing the civilian population to certain consequences may have a disproportionately low impact in relation to any military advantage, also noting that not every attack on this installation may have a drastic outcome.[390] Hans Blix stressed that the mere use of, for example, electricity for military purposes cannot justify *per se* the possibility of attacking facilities containing dangerous forces and the provision needs to be complemented with additional premises in this respect.[391] Ultimately, the provision included three elements of protection for the aforementioned buildings and equipment. The first assumption was that dams, floodbanks and nuclear power plants especially are not military facilities. The second was the assumption that if such a facility qualifies as military due to its intended purpose, a special regime applies regarding the possibility of attacking such a facility. The third element was to emphasize that in addition to the

385 See the proposal of the Arab states; ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, *Report on the Work of the Conference, Volume II*, p. 82.
386 ICRC, *Draft Additional Protocols*…, p. 63.
387 CDDH/III/RS.18, para. 16, p. 154.
388 CDDH/III/RS.18, paras. 19–39, pp. 154–157.
389 CDDH/III/RS.18, para. 38, p. 158.
390 CDDH/III/RS.18, paras. 39–40.
391 CDDH/III/SR.19, paras. 11–12.

reservations indicated, there are also general rules under Article 57 AP I of 1977. Article 56 para. 1 of AP I assumed that only attacks in connection with which there is a possibility of triggering dangerous forces and causing significant harm to civilians are prohibited (both conditions must be fulfilled cumulatively).[392] Facilities containing dangerous forces include any installations that may lead to an uncontrolled spread of toxins or radiation of any kind (abstract definition). On the other hand, oil installations were not considered as objects releasing dangerous forces.[393] Three types of installations were granted special status under the mentioned provision: dams, floodbanks and nuclear power plants. According to the above, these structures lose their protected status if they 1) are used in a way other than their normal purpose, 2) constitute an element of regular, significant, and direct support for military operations, and 3) an attack is the only possible means to discontinue such support. The Third Committee's report strongly emphasized the requirement to cumulatively fulfill the above-mentioned criteria.[394] In the context of practical application, the possibility of targeting auxiliary installations was emphasized – for example, hydroelectric power plants utilizing a dam. However, this was contingent upon meeting the requirement for regular (i.e., relatively constant), significant (constituting a measurable component), and direct support for military operations – such uses could include, for example, powering weapons production, supplying electricity to radar systems, or supporting command infrastructure.[395] The understanding of the conditions is subjective, but according to commentators on AP I, the terms are clear and should be interpreted according to common sense.[396]

Article 56 para. 5 of AP I allowed for the use of special defensive devices to protect building structures, but only those that were intended to repel attacks against the defended building structure. The regulation indicated is crucial from the point of view of restrictions on the deployment of anti-aircraft artillery and limiting the possibility of counteraction to its presence by use of aviation, as well as imposing a clear obligation to identify the target.[397] During the Vietnam War (as indicated by the North Vietnamese delegate himself during the diplomatic conference held in 1974–1977, claiming that approx. 600 cases of floodbank bombings were recorded) a number of accusations were made against the US combat aviation related to attacks on floodbanks and dams located in the northern part of the

392 CDDH/215/Rev. 1, para. 87, s. 282.
393 Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, paras. 2146–2151, p. 668.
394 CDDG/215/Rev. 1, para. 88, p. 283.
395 CDDG/215/Rev. 1, para. 91, p. 284.
396 "This triple qualification, which is also found in sub-paragraphs (b) and (c), may seem to be subject to subjective interpretation, but these terms merely express common sense, i.e., their meaning is fairly clear to everyone" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 2162, p. 671.
397 L.C. Green, *Modern Law of War*…, p. 149.

state.[398] The Third Committee's report stated that the deployment of missiles capable of attacking enemy forces from a distance is prohibited.[399] Indeed, this results in an inability to deploy long-range attack assets to screen these facilities, such as ground-to-air missile launch sites.[400]

The customary nature of the norm specified under Article 54 para. 1 of AP I according to C. Greenwood is an example of the progress of international law, which manifests itself as customary law. In the context of Article 56 of AP I, the same author, due to the signatory states' lack of relevant practice, was not able to determine whether the principle contained in this regulation has a normative value stemming from custom.[401] In the context of the United States' position, it was indicated that Article 56 of AP I, insofar as it prohibits attacks on the adversary's power grid, is inconsistent with the customary practice in this regard.[402]

12. Precautions

12.1. General remarks

Undoubtedly, one of the most crucial dimensions of the modern law of air warfare is the obligation resulting from Article 57 of AP I, namely the requirement to apply precautions during an attack.[403] The requirement for appropriate steps inherent in the planning and preparation of a combat operation was already stipulated by the

398 The American side, in turn, reported instances of the deliberate placement of anti-aircraft defense systems within these facilities.

399 CDDG/215/Rev. 1, para 93, p. 284.

400 "In the second case such artillery may only be used against aircraft which are out to attack the protected works or installations, but not against aircraft flying over the works or installations on their way to attacking another military objective. It cannot be denied that this could pose serious difficulties of judgment" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 2175, p. 674.

401 C. Greenwood, *Customary Law Status of the 1977 Geneva Protocol*, [in:] A.J.M. Delisen, G.J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalsohoven*, London 1991, p. 110.

402 G.H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, "American Journal of International Law" 1991, vol. 45, p. 12.

403 "Term «active» precautions may be used when referring to those that the author of the attack must take with regard to the civilian population and non-military objects of the party attacked, and the term «passive» precautions when referring to those which the party attacked must take with regard to the civilian population and non-military objects vis-a-vis the author of the attack" – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Protection of the Civilian Population*…, p. 76.

1923 Hague Rules, and earlier by Article 27 of the Hague Regulations of 1907 as well as Article 5 of the Ninth Hague Convention of 1907. The UNGA referred to them in Resolution 2675 (XXV), constituting a "micro constitution" of the fundamental rights and obligations of parties fighting in armed conflict. In turn, the unanimous resolution of the League of Nations, dated September 30, 1938, was referenced in the 1969 ICRC resolution, listing among the specific obligations of the attacking party: 1) careful identification and selection of the target of the attack, 2) precision in conducting the attack itself, 3) refraining from indiscriminate attacks (unless the object is exclusively an area with military objectives placed within it), as well as imposing on the defending party the obligation to take the so-called passive precautions.[404] In 1969, at the 21st ICRC conference, experts mentioned the need to apply precautions during an attack as the foundation for future civilian protection solutions.[405] The ICRC report addressed to a group of government experts identified as an example of specific actions, among others, an attack on an armament factory at a time of the day when its activity is the lowest possible.[406] It was stated that the set of precautions consists of four essential elements: 1) identification of the target, 2) issuance of a warning, 3) proportionality, 4) correct selection of methods and means of attack.[407] Among the aforementioned principles, the most problematic was the issuance of a warning, the normative value of which appeared to be completely devoid of practical significance and widely disregarded in the practice of belligerents.

12.2. Preparatory work on the content of the precautionary principle

The ICRC document already formulated theses that differed slightly from those later endorsed at the diplomatic conference of 1974–1977, in the form of the obligation to take all "necessary steps to spare the civilian population", as well as verification, warning and proportionality. While working on the AP I project, government experts postulated the introduction of a linguistic "flexibility" that would

404 "The precautions to which allusion is made would include, for the attacking side, the careful choice and identification of military objectives, precision in attack, abstention from target-area bombing (unless the area is almost exclusively military), respect for and abstention from attack on civil defence organizations: the adversary being attacked would take the precaution of evacuating the population from the vicinity of military objectives" – *ibidem*.

405 21st International Conference of the Red Cross, Reaffirmation and Development…, p. 74.

406 "Precautions exist and may be taken with regard to the latter. For example, the attacker would choose to bomb a munitions factory when the workers were not present there" – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Protection of the Civilian Population*…, p. 39.

407 "In a general sense, almost all the experts approved the concepts of proportionality, identification and the choice of weapons and the means of inflicting injury on the enemy, such as they appear in the articles of the Draft Rules mentioned above, without making hardly any reservations as to the wording of these articles" – *ibidem*, p. 82.

reduce the scope of the requirements imposed on the attacking party in order to make these provisions more acceptable.[408] In Article 50 para. 1 (later Article 57 of AP I) the draft provided for the introduction of a general principle of continuous care for the civilian population, individual civilians and civilian facilities. Two draft versions of para. 2 were submitted to the conference for deliberation: one stipulated that the planner of the attack should ascertain the actual nature of their military objectives, and the other obligated a given commander to take all reasonable steps to verify the nature of potential targets. Further paragraphs stipulated the obligation to refrain from attack if it were to cause excessive harm to non-combatants in relation to the anticipated (with a significant caveat "as long as it is possible") specific and direct military advantage, as well as the obligation to verify this rule beforehand. Moreover, an obligation was introduced to select means and methods of combat that will not cause losses among civilian goods, as well as to select targets in such a way as to minimize any danger to the civilian population.[409] Factors taken into consideration during the preparation of an attack, affecting the estimation of the danger facing the civilian population, included the location of the civilian population and civilian goods in relation to military objectives, the elevation, the accuracy of the weapons used, weather conditions, the characteristics of the military objectives, as well as the combatants' targeting skills.[410]

At the conference itself, the work on the final content of Article 57 of AP I proceeded with some difficulties due to the provision of the rule of proportionality specified in Article 51 para. 5(b) of AP I of 1977. During the proceedings, two types of obligations resulting from Article 57 of AP I were indicated: the first consisted of positive obligations in the form of identification, the issuance of a warning and selection of an appropriate means and method of attack, while the other obligation arose from the subjective conviction of the combatants, namely the issue of applying the rule of proportionality and definition of military objectives.[411] Delegations of various states decided that the provision regarding the obligation to refrain from attack should be strengthened if its implementation could lead to excessive losses among the civilian population in relation to a direct and expected military advan-

408 "Several of them stated that the obligations contained in this article would be, from a military point of view, too absolute, and thus impracticable" – ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Report on the Work of The Conference, Vol. I*, para. 3.187, p. 157.

409 ICRC, *Draft Additional Protocols*…, p. 64.

410 "The dangers to civilian population and civilian objects arise from widely differing factors, such as the location of the persons and objects concerned (in the immediate vicinity of a military objective), the configuration of the terrain (danger of landslide, of ricochetting, etc.), the accuracy of the weapons used (relative dispersion according to trajectory; firing range, ammunition used, etc.), meteorological conditions (visibility, effect of wind, etc.), specific nature of the military objectives (ammunition stores, fuel tanks, army nuclear stations, etc.), and combatants' mastery of techniques" – ICRC, *Draft Additional Protocols*…, p. 65.

411 CDDH/III/SR.21, para. 4, p. 182.

tage.[412] The representative of Canada indicated that Article 57 of AP I is a direct reference to the context of air bombing, suggesting the replacement of categorical provisions with conditions based on common sense (reasonable ones – as argued by the delegations of Australia and the United Kingdom).[413]

The experts proposed solutions that would introduce additional elements of precautions in relation to weapons considered to be uncontrolled or "blind", including: 1) the requirement to mark sea mines on maps, 2) equipping weapons that may cause serious injury to the civilian population with a safety device that deactivates the weapon as soon as it is beyond the control of the person who deployed it. During the discussion, a debate arose between the representative of Vietnam and the United States regarding the recognition of the proportionality rule as an element of customary law.[414] When voting on the content of Article 50 (later Article 57 of AP I), the following amendment was adopted as part of the so-called Third Committee: instead of the wording "causes danger", the phrase "may be expected to cause" was adopted. A crucial decision was reached regarding Article 50 para. 3, where it was decided to adopt the phrase "unless circumstances do not permit", instead of "as long as circumstances permit".[415] Nevertheless, a decisive breakthrough in the work on the content of Article 50 para. 2(a)(I) and Article 57 para. 2(a)(i), (ii) of AP I was to introduce the phrase "feasible" ("everything feasible") instead of the word "reasonable".[416]

It is worth paying particular attention here to the content of Article 57 para. 4 of AP I, i.e., the provision concerning the conduct of operations at sea and in the air, whereby each party should take all reasonable precautions to protect the property and civilian population, taking into account the provisions of international law characteristic of these armed conflicts. According to the working group's report, it should be noted that this provision was directly related to the provision indicated only under Article 49 para. 3 of AP I. This consequently implies that Article 57 para. 4 of AP I, in its scope of application, goes beyond the limitations of AP I, which primarily governs the treatment of targets and objects situated on land, and is also applicable to military operations conducted in airspace.[417]

412 CDDH/III/SR.21, para. 13, p. 184.

413 CDDH/III/SR.21, para. 30, p. 186.

414 "As to the principle of proportionality, the aim was to draft a rule which was in his view already established by custom and in practice. Custom was one of the most important sources of international law and it was provided for in the Statute of the International Court of Justice. The rule already existed, and it must be explicitly codified in the documents designed to ensure the protection of the civilian population and civilian objects" – CDDH/III/SR.21, para. 91, p. 194.

415 CDDH/lII/SR.31, paras. 20–32, pp. 302–303.

416 CDDH/215/Rev.1, para. 98, p. 285.

417 "In recognition of the limitation of the scope of this Section, as set forth in article 44, paragraph 1, on the effect on the law applicable to armed conflict at sea or in the air, paragraph was added to article 50 to ensure that all reasonable precautions would nevertheless be taken in the conduct of armed conflict at sea and in the air" – CDDH/215/Rev.1, para. 99, p. 285.

12.3. Interpretation of Article 57 of AP I

Article 57 of AP I, as presented by the working group, received broad support from the state delegates. In its justification, the Turkish delegation remarked that the phrase "everything feasible" should be interpreted in light of the term "practicable", taking into account all the circumstances existing at the time of making a decision and those relevant to the success of a military operation.[418] Switzerland indicated that the obligations defined under Article 57 of AP I may be addressed only to the higher command.[419] Germany stated that this provision applies to persons responsible for planning, deciding and executing an attack based on the assessment of data available from all sources at the time of making a decision.[420] The final assessment based on the rule of the proportionality should consider the overall military advantage gained from the entire scope of the attack, rather than its individual elements.[421] Similar explanations were provided by Italy and the United States.[422] An interesting clarification was put forth by India, indicating that this provision would apply in accordance with the limitations, practicality and legitimacy of the use of means or method of attack in question. Such a provision would be binding upon a given party only to the extent of its actual capabilities, without obliging such a state to take actions outside the above-mentioned limits.[423]

Anthony P.V. Rogers argues that Article 57 of AP I fulfilled its "remedial" role against the degeneration of international law as a result of air bombing during World War II by introducing specific obligations before commencing an attack.[424]

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418 "Mr. SOYSAL (Turkey) said that as far as his delegation was concerned 3 the word «feasible» in Article 50 and other articles should be interpreted as related to what was practicable 3 taking into account all the circumstances at the time and those relevant to the success of military operations" – CDDH/SR.42, para. 41, p. 211.

419 CDDH/SR. 42, para. 43, p. 212.

420 "The Federal Republic of Germany has voted in favour of Article 50 of Protocol I on the understanding that commanders and others responsible for planning, deciding upon or executing an attack necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time" – CDDH/SR.42, p. 226.

421 *Ibidem*.

422 "Commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time. This of course is appropriate for the entire section, including Articles 45 and 47. The reference in Articles 46 and 50 to military advantage anticipated from an attack are intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack. It is the understanding of the United States Government that the word «feasible» when used in draft Protocol I j for example in Articles 50 and 515 refers to that which is practicable or practically possibles taking into account all circumstances at the times including those relevant to the success of military operations" – CDDH/SR.42, p. 241.

423 CDDH/SR. 42, p. 228.

424 A.P.V. Rogers, *Law*…, p. 96.

The provision of Article 57 of AP I in para. 1 provides for the necessity to respect the special status of the civilian population, civilian individuals and civilian goods at all times. Article 57 of AP I refers to the course of military operations, so it is a different concept from that of an attack as defined in the remaining paragraphs of the provision – military operations include not only the act of violence itself, but also aspects related to the movement of troops. Paragraph 2 of the aforementioned provision formulates a list of obligations and required elements of the precautions taken.[425] Peter Barber rightly observes that the requirement of Article 57 para. 2 of the AP I is to satisfy the necessity to complete all the elements indicated in Article 57 para. 2(a)(i) – in the first place, the commander of the operation ("planning and deciding upon an attack") should "do everything feasible" to verify whether the objects to be targeted constitute a legitimate military objective within the meaning of Article 52 para. 2 of the AP I, their attack is not prohibited, for instance, by other provisions of the AP I (an example of the above provisions may include planning air strikes on specially protected facilities and those listed under Article 56 para. 2 of AP I).[426] This step can be defined as an element of target verification (its selection normally is made in advance and generally is dependent on the tactical and strategic doctrine adopted).[427] Once it has been established that the target to be attacked can be attacked from the perspective of international humanitarian law, the next measure to be taken is the so-called weaponeering, namely the selection of the method and means to be used to execute the attack.[428] In this context, the essential criterion is to determine whether the methods planned used to launch a strike are not prohibited in the light of the provisions of Article 51 paras. 4 and 5 of AP I, namely whether the methods and means may lead to the assumption that the attack in question is indiscriminate in nature. Nonetheless, not always should the commander be guided solely by the criterion related to reduction of incidental losses in the selection of weapons for a task, especially if the selection of such weapons may lead to a breach of the operational balance – for instance, in the context of the further progression of the campaign or conducting tasks significantly increasing the risk to his or her armed forces.[429] The instructions provided by states indicate the criteria for selecting weapons and the method of attack. The US AFP-110-31 Manual indicated factors related to the elevation, weather conditions, the distance of people and civilian goods

425 W.A. Solf, W.G. Grandison, *International Humanitarian Law*…, p. 584.

426 "This textual interpretation is not really sensible though as a logical interpretation from the preamble that «Those who plan or decide upon an attack shall»: and the absence of «or» between clauses suggests that the planner must conform to all of the obligations, not just one of them" – P. Barber, *Scuds, Shelters and Retreating Soldiers: The Law of Aerial Bombardment in The Gulf War*, "Alberta Law Review" 1993, vol. 31, p. 687.

427 J. Reynolds, *Collateral Damage on the 21st Century Battlefield*…, p. 25.

428 M.N. Schmitt, *Asymmetrical Warfare*…, p. 41.

429 G.S. Corn, G.P. Corn, *The Law of Operational Targeting*…, pp. 353, 371.

from the target, the currently available bombing technique, as well as issues related to the possible impact of air defense measures.[430] A critical element of planning is to undertake an analysis of possible incidental losses among the civilian population under the rule of proportionality. Consequently, if the foregoing analysis is negative, the planner of the attack must refrain from, or abandon, it. Article 57 para. 2(b) of AP I concerns the circumstances where the situation in the area of the expected attack has changed; in such cases, it is necessary to consult the decision with the commander. Article 57 para. 3 of AP I mandates that the attack against targets whose destruction brings identical military advantage be directed specifically at the one that does not entail the risk of increased civilian casualties. As J. Dill highlights, in practice the latter conditions rarely apply on the battlefield.[431] Nevertheless, it seems that cancelled attacks are not reported by states but are certainly a frequent occurrence – e.g., in 2011, during the operation in Libya, NATO announced the cancellation of hundreds of combat missions due to the unexpected presence of civilians.

As stated in the literature, a fundamental question arises regarding who the addressee of the norm. In accordance with Article 57 para. 2(a) of AP I refers to a person planning or deciding to launch an attack, which excludes personnel other than officers or individuals who actually have a decisive influence on the preparation and execution of a given operation.[432] It should be noted, however, that this premise is not clear in the context of air warfare – e.g., W.H. Boothby indicates that the decision to launch an attack also entails the decision to launch projectiles, bombs and rocket missiles and to guide them.[433] William J. Fenrick, in turn, argues that the concept of "attack" proposed under Article 49 of AP I also includes a single shot from a weapon, but considers that under Article 51 para. 5(b) of AP I and Article 57 para. 2 of AP I this term cannot refer to a single soldier. *Ratio* in this regard is the lack of practical justification for requiring an individual to have access to intelligence and reconnaissance data which is processed at the level of higher command.[434] Ian Henderson deems the position expressed in the United Kingdom's interpretative declaration, according to which Article 57 para. 2 of AP I applies to a person who "has the right or the actual ability to stop or interrupt an attack" to be the most accurate.[435]

The literature indicates specific cases of proper application of precautions in the context of air strikes. The ICRC's commentary on AP I highlights that during World War II the Allied aviation sought to warn forced laborers working in muni-

430 *Air Force Pamphlet AFP 110-31*, pp. 5–10.
431 J. Dill, *Applying the Principle of Proportionality in Combat Operations, Policy Briefing*, Oxford 2010, p. 7.
432 S. Oeter, *Methods and Means*…, p. 182.
433 W.H. Boothby, *The Law of Targeting*, p. 120.
434 W.J. Fenrick, *The Rule of Proportionality and Protocol*…, p. 102.
435 I. Henderson, *The Contemporary*…, p. 159.

tion factories against the air raid.[436] One of the earliest examples was the decision to deploy precision-guided munitions to destroy power installations located in close proximity to water dams in North Vietnam, which prevented their destruction had a conventional method of bombardment been selected.[437] Another example is the attack on the car factory in Kragujevac (NATO in 1999), where only the part of the facility responsible for the production of tanks was destroyed.[438] Several authors argue that during the preparatory work, the Rules of Engagement (ROE) applicable to the US Air Force were used during the "Linebacker I" and "Linebacker II" missions in terms of:

1) permanent respect for the principle of distinction – by formulating an operational plan involving the definition of military objectives;
2) the necessity of prior target identification – when possible, final verification in the form of visual determination as part of a low altitude air attack;
3) selection of appropriate attack methods – prohibition of breaking the formation before the drop of bombs, the use of radiotelegraphic means of combat in order to avoid defensive maneuvers reducing the effectiveness of air attack (against the background of the above-mentioned precautions, there was an incident related to the Bach Mai hospital near Hanoi in 1972);
4) choosing the right measures – allocation of B-52s for strikes against clearly distinguishable industrial targets and allocation of tactical aviation for strikes on targets within urban areas.[439]

436 Y. Sandoz, C. Swiniarski, B. Zimmeramnn, *Commentary*…, para. 2200, p. 682. The author of the work confirms this practice by relying on the personal account of his grandfather, who was a forced laborer at the IG Farben factory near Magdeburg between 1943 and 1945. The airstrike was usually preceded by the appearance of a solitary bomber (known as a "pathfinder" – an aircraft guiding the bomber stream), which, while circling above the target, simultaneously marked it (using radar methods such as H2X radar, or visually with flares or smoke signals) for the attack and warned people in the factories.

437 W.H. Parks, *The 1977 Protocols*…, p. 470.

438 J. Miller, *Commentary*, "International Law Studies" 2003, vol. 78, p. 110.

439 "Under orders from SAC headquarters, maneuvering to avoid SAMs or fighters at any time on the bomb run from the initial point to the target was prohibited. There were several reasons for this prohibition. First, it lessened the possibility of collision. Second, it ensured mutual electronic countermeasures (ECM) protection among the three aircraft in each attacking cell by maintaining cell integrity. Finally, and most important, it reduced the possibility of increased collateral damage caused by bombs straying off target. The prohibition was backed by a threat of court-martial against anyone who violated it. Another precaution taken to avoid harm to civilians was to route axes of attack parallel to, rather than over, populated areas located near targets. Finally, B-52 radar navigators were instructed 1. not to drop their bombs if they were not positive of 100-percent accuracy" – G. Walne, *AFP 110-31: International Law – The Conduct of Armed Conflict and Air Operations and the Linebacker Bombing Campaigns of the Vietnam War*, Alexandria 1987, pp. 14–15. See: W.H. Parks, *Linebacker and the Law of War*, "Air University Review" 1983, vol. 1–2.

A further example was the order issued to American crews executing air strikes against bridges in Baghdad, so that the directions of the raids were perpendicular to the targets to prevent the possibility that missiles might fall accidentally on residential areas located in the vicinity of the bridges.[440] An additional example is the launching of air strikes during times of the day when the civilian population is less active, or the employment of delay-fuse ammunition to evacuate non-combatants.[441] In the event of doubts at the planning stage of a combat operation, the commander should resume the verification process, having become aware that there is a presumption of the civilian nature of the target.[442] A completely new dimension in the context of Article 57 para. 2 of AP I is represented by unmanned aircraft, now an integral part of ISR ("Intelligence, Surveillance and Reconnaissance") missions.[443] It is emphasized in this regard that the removal of human onboard presence from a drone enables its operator to increase the operational risk of losing an aircraft when verifying the target.[444]

The scope of precautions may vary. Obligations under Article 57 para. 2 of AP I belong first and foremost in the dimension of due diligence rather than result.[445] Obligation entails acting thoroughly, but not necessarily attaining the mark of perfection.[446] However, limiting it solely to ethical obligation would be incorrect.[447] It seems certain that the commander of the attack should, in

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440 L. Blank, *International Law and Cyber Threats from Non-State Actors*, "International Law Studies" 2013, vol. 89, p. 434.

441 M. Sassòli, *Le principe de précaution dans la guerre aérienne*, [in:] A.-S. Millet-Devalle (ed.), *Guerre aérienne et droit international humanitaire*, Paris 2015, p. 103; I. Henderson, *The Contemporary*…, p. 169.

442 M. Lippman, *Aerial Attacks on Civilians*…, p. 37.

443 "For example, in a long-distance attack, a commander may rely on information obtained from aerial reconnaissance and intelligence units in determining whether to conduct an attack" – Department of Defense, *Law of War Manual*…, p. 196.

444 "This does not mean that an attacker must necessarily expose the UCAS to great risk from ground or air fire in order to enhance verification, but acceptance of somewhat greater risk than in the case of manned aircraft would seem reasonable when verification of the target can be enhanced, thereby significantly minimizing the risk of mistaken attack" – M.N. Schmitt, *Unmanned Combat Aircraft System and International Humanitarian Law: Simplifying the Oft Benighted Debate*, "Boston University International Law Journal" 2012, vol. 30, p. 614.

445 J.-F. Quéguiner, *Precautions under the Law Governing the Conduct of Hostilities*, "International Review of the Red Cross" 2006, vol. 88, p. 798.

446 D. Rudeill, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care under the Laws of War*, "The Yale Journal of International Law" 2007, vol. 32, p. 533 ff.

447 "While it places an ethical duty on commanders to do everything in their power to ensure their targets and objectives are rational, it does not impose an impossible standard of certain knowledge. It is also in keeping with the principle of diminishing suffering to the maximum extent possible that a duty is imposed to cease attacking once certainty is gained and it becomes apparent that the target is not legitimate" – P. Barber, *Scuds, Shelters and Retreating Soldiers*…, p. 682.

accordance with his or her good faith and common sense, take all practicable measures possible to apply at the time and place in question in order to verify the target of the attack in the first place. As noted in the ILA's 2016 study, this serves not only to protect the civilian population, but also to prevent the waste of war effort (in accordance with the principle of military energy conservation adopted on the basis of the AP I).[448] Specific measures in this regard may include intelligence and reconnaissance practices through aerial photography and satellite imagery, activities of ground controllers and other aircraft; nevertheless, the provision does not indicate the degree of probability with which verification should take place.[449]

The greatest doubts arise regarding the scope of the precautionary measures taken, as well as the issue of the technological imbalance of the adversaries. Jean-François Quéguiner indicates that Article 57 para. 2 of AP I does not create the obligation to use only the latest technology, but only to take the most effective measures already at the attacker's disposal.[450] However, as noted by G. Blum and at least partially confirmed in the documents from the preparatory work of the 1974–1977 diplomatic conference, this criterion may indirectly assume the emergence of a certain legal relativism, differentiating the situation of states depending on their economic and technological potential.[451] This applies in particular to the acquisition, equipment, and actual deployment of precision-guided munitions (which will be elaborated on in Chapter X, point 1).

Another issue is the observation of a certain steady trend in air campaigns conducted by states with technically advanced air forces. It should be stressed that cases of losses among non-combatants were ultimately rare, until the conflicts in Ukraine and notably, Gaza Strip in 2023–2024. This suggests the possibility of assuming that the precautionary measures applied were adequate and fulfil their role, which to some extent justifies the occurrence of incidental losses among civilians and their goods. The perception of doctrine and jurisprudence vary in this respect. The report of the *ad hoc* committee at the ICTY Prosecutor's Office (described in more detail below) demonstrates that the general conduct of the campaign is the primary determinant in this regard. A similar position was

448 International Law Association Study Group on the Conduct of Hostilities in the 21st Century, *The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare*, "International Law Studies" 2017, vol. 93, p. 382.

449 J. Romer, *Killing in a Gray Area between Humanitarian Law and Human Rights: How Can the National Police of Colombia Overcome the Uncertainty of which Branch of International Law to Apply?*, New York 2010, p. 91.

450 J.-F. Quéguiner, *Precautions*…, p. 798; M. Bucholc, *Tendencje rozwoju współczesnych środków walki w kontekście minimalizacji strat ubocznych – wybrane zagadnienia z zakresu teorii* [*Trends in the development of modern combat means in the context of minimizing collateral damage – selected theoretical issues*], "Międzynarodowe Prawo Humanitarne" 2013, vol. 5, p. 235.

451 G. Blum, *On a Differential Law*…, pp. 193–194.

expressed by P. Barber.[452] Ian Henderson, on the other hand, believes that each case of a potential violation of Article 57 of AP I undermines the effectiveness of precautionary measures and should be assessed *per casu*.[453] Established in relation to the armed conflict between the states, the Eritrea-Ethiopia Claims Commission presented an interesting view in this regard, arguing that combatants should modify the guidelines on measures and methods of bombing if they intend to maintain good faith in the fulfilment of the obligation resulting from the content of Article 57 para. 2 of AP I.

William H. Parks states that Article 57 of AP I breaks with the traditional vision of an equal division of responsibility for the protection of the civilian population between the attacking (active) and the defending (passive) parties. The AP I provision constructs a heightened standard of due diligence towards the attacking party, although it frequently does not have full information on the situation in the war zone.[454] Indirectly, the above remark contributed to the non-ratification of AP I by the United States.[455]

The process of applying precautions is believed in the targeting process to be a link between the first step, which is to determine the nature of the target, and the second step, which is the application of the proportionality rule – precautions in many cases will clearly reduce the expected effects of a negative attack, e.g. by using an appropriate type of weapon, method of attack, time or warning.[456] The practical guidelines in this regard are provided by G.S. Corn, who argues that the decision-making process related to the attack (including potentially the air operation) should consist of four *de minimis* elements. The first one is to determine whether the object of attack is a military objective and whether casualties may occur among the civilian population as a result. The second one is to draw attention to the alternative in the selection of methods and measures that would yield the same advantage while reducing the risk of collateral damage. The third one is to assess the so-called equations of proportionality, and the fourth one is to check whether a particular means is precise, i.e., whether it can be directed against a specific target.[457]

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452 "If, in accordance with subparagraph 2(a)(i), the coalition commander had done «everything feasible to verify the objectives to be attacked are neither civilian nor civilian objects» then his expectation of minimal incidental casualties would be justifiable. It is not possible to determine exactly what «everything feasible» incorporates, but if normal intelligence gathering methods that had proven reliable in the past had been used on this occasion, it is probable that this would meet the required standard" – P. Barber, *Scuds, Shelters and Retreating Soldiers*…, p. 689.

453 I. Henderson, *The Contemporary*…, p. 166.

454 "It also is an error to view every civilian casualty as a war crime, and/or to place the entire responsibility for civilian casualties on the party to the conflict that has the least control over them" – W.H. Parks, *Commentary*, "International Law Studies" 2003, vol. 78, p. 288.

455 L. Hogue, *Identifying Customary International Law of War in Protocol I: A Proposed Restatement*, "Loyola International and Comparative Law Journal" 1991, vol. 13, pp. 283–284.

456 G.S. Corn, G.P. Corn, *The Law of Operational Targeting*…, p. 799.

457 G.S. Corn, *Regulating Hostilities in Non-International Armed Conflicts: Thoughts on Bridging the Divide between the Tadi Aspiration and Conflict Realities*, "International Law Studies" 2015, vol. 91, p. 320.

An essential aspect of the obligations resulting from the provisions of Article 57 of AP I, is a requirement to provide a prior warning. It should be noted that this obligation is clearly weakened by the addition of the phrase "as long as the circumstances permit". The obligation to issue a warning may be based, among others, on activities of a general nature. It seems, however, that the nature of a particular state's ongoing engagement in an armed conflict may be deemed too abstract in this regard. In fact, the practice of states – especially in reference to the recent operations in the Gaza Strip in 2009 and 2014 as well as the NATO operation in Libya in 2011 – indicates the extensive use of modern technology to achieve the above-mentioned objectives.[458]

In the context of the precautions, the HPCR Manual asserted that the word "feasible", used both in the treaty law and the manual itself, has a contextual and dynamic nature, depending on a number of variable factors, such as available technical materials or intelligence data at the time and place of decision-making. The commentary emphasized that in evaluating the above factor, the commander should, in accordance with the principles of good faith and common sense, take into consideration all aspects of a humanitarian and military nature, including the safety of his or her own aircraft and its crew; however, the boundary in this regard is the observance of international humanitarian law. In this context, one can cite an example in which a commander overprotects their crew in a manner which is disproportionate to humanitarian considerations.[459] The process of applying the precautionary measures was regulated in Rule 32, which, as part of the obligation of constant care, ordered the commander of an air operation to assess the situation. The rule addressed determination whether the civilian individuals or their property and other specially protected objects are subject to attack.[460] The first dimension of the foregoing injunction was to do everything feasible to conduct a proper verification of the target based on reasonable information from all sources available at the time of decision-making. During an air operation, the classification of such a target may occur in two stages: first, within the operational planning structures, and subsequently, during the execution of the combat mission, such as when a pilot visually determines the nature of the object. Rule 35 stated that in circumstances in which the target is not of a military nature, it is entitled to specific protection. According to this rule, if the attack was disproportionate, it should be abandoned. The second dimension of the obligation to take consistent care is the selection of an appropriate method and means of attack that excludes

458 C.B. Shotwell, *Economy and Humanity in the Use of Force: a Look at the Aerial Rules of Engagement in the 1991 Gulf War*, "United States Air Force Academy Journal of Legal Studies" 1993, vol. 15, p. 36.

459 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 27.

460 *Ibidem*, p. 143.

or eliminates the possibility of collateral damage. The Manual's commentary suggested taking specific steps in the form of: 1) deploying precision-guided munitions, 2) selecting the correct direction of attack in the geographical context, 3) adjusting the method of attack so as to mitigate the consequences arising from the destruction of the target, e.g. in the case of airports used by both military and civilian aviation. Here, damaging a runway with a resultant halt to air operations may be sufficient, while destroying, for example, a passenger terminal (unless members of the enemy's armed forces are present, or it is otherwise used for military purposes) would be disproportionate. The third concretization involves assessing the required rule of proportionality, taking into consideration factors such as 1) the known effects of the type of weapon used, 2) the potential inclusion of civilian buildings within the scope of the attack, 3) the number of civilians who may find themselves within the weapon's destructive range, and 4) the possibility for the civilian population to be evacuated and seek shelter.[461]

Rule 33 duplicates the rule stated by Article 57 para. 3 of AP I regarding the imperative to select a target, whose destruction will pose less danger for the civilian population while ensuring the attainment of similar military advantage. A commentary in this regard cited the example of a power station that serves the civilian population to a significant extent. Its destruction would only lead to a limited impact on the enemy's ability to conduct hostilities: the same benefit could be obtained by destroying transformers, provided this would be less dangerous or less disruptive to the civilian population.

13. The status of non-defended areas

In 1969, during the XXI ICRC conference, focus turned to the need to clearly define and unify the terms "non-defended locality" (a term used as part of the 1907 Hague codification) and "open town" (*prima facie* synonymous formulation used by the ICRC on the basis of the 1956 project).[462] *Ratio legis* of creating various types of zones, areas or locations that would be excluded from the possibility of conducting military operations, also resulted from the provisions of Articles 13 and 14 of the Fourth Geneva Convention of 1949. The most serious issue in this matter turned out to be the determination of clear rules outlining the premises for assessing when a given area is non-defended or open. At the time of commenc-

461 *Ibidem*, p. 145.

462 21st International Conference of the Red Cross, *Reaffirmation and Development*…, p. 70.

ing the preparatory work of the diplomatic conference 1974–1977, the reference points in this respect were the following:

1) the adoption of the general view that military objectives may always be subject to legitimate attack);
2) the mere reliance on the terms "non-defended locality" or "open town" turned out to be insufficient and poorly defined semantically from the point of view of humanitarian principles and historical experience;
3) the need to permanently "neutralize" any reasons that could justify an attack on a given locality in the form of a positive law provision – following the model adopted in the content of Article 16 of the ICRC Draft of 1956.

Yoram Dinstein supplemented the above conclusions with additional elements, indicating that:

1) the fact that a city is located far from the front line does not deprive it of military value;
2) the defense of such a city may be carried out by anti-aircraft artillery and fighter aircraft;
3) the sole presence of anti-aircraft artillery does not necessarily mean that a given city is non-defended, as this test primarily pertains to ground operations;
4) a unilateral declaration recognizing a city located behind the front line as an open one is of no practical value and requires agreement between the belligerents.[463]

In a report submitted to government experts in 1971, the ICRC emphasized the need to develop two distinct regimes: one for non-defended localities and another for neutralized areas (see the provisions of the Fourth Geneva Convention of 1949). It was argued that there is no clear difference in meaning between the terms "open" and "non-defended" and the inadequacy of the 1907 Hague Regulations in the field of air warfare was noted.[464] The 1956 concept expanded the notion of a non-defended locality to such an extent that it departed from the classical view of a uniform criterion for the defense of a given location. Eliminating the possibility of conducting a military operation based on the doctrine of a military objective was deemed more important than the aforementioned element. To achieve this, it turned out to be insufficient to rely on the criterion of a given area being defended. There is no doubt that each location open under Article 16 of the ICRC Draft of 1956 will also be a non-defended area by default. However, it cannot be

463 Y. Dinstein, *The Laws of War*…, pp. 54–55.

464 "Is there a difference between the former conceptions of undefended areas and open towns? In the practice no formal difference between open towns and undefended areas were made; on the contrary, the concept of the open town has superseded that of undefended areas, included in the law formulated at the Hague' – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Protection of the Civilian Population*…, p. 96.

assumed that every non-defended locality will meet the criteria of an open locality, as the absence of resistance points capable of opposing occupation by enemy troops does not imply the absence of military objectives within that locality that could be legitimate targets for military attack.[465] Noticing this issue was a breakthrough moment in the development of the law of air bombing, and its solution is to significantly expand the meaning of the phrase "non-defended localities" with elements related to the concept of an open city.[466] The tool to achieve the above model is to clearly define what a non-defended locality is.[467] According to the authors of the report, the creation of a non-defended zone could only have an effect on areas directly related to the area of active combat, while the establishment of these zones in other areas of a given state will not effectively protect the civilian population. In addition, the party referring to the status of a given non-defended locality not only cannot effectively defend it against the approaching enemy but should also withdraw or remove any military facilities.[468]

The second element of reforming the protection of certain areas against the possibility of conducting hostilities was the introduction of the so-called neutralized zones alongside the status of non-defended zones. The essence of distinguishing between the two concepts was based on three key factors: 1) the placement of the neutralized zone away from areas of direct military conflict, 2) the existence of a clear agreement between the combatants, and 3) the cessation of all military activity.[469] On account of the factors listed above, the fundamental differences between a non-defended locality and a demilitarized zone lie in a different possibility of locating a given zone and the fact that establishing a non-defended area was declared unilaterally by one of the warring parties, while a demilitarized zone was established through an agreement between the

465 "With regard to Article 25 of the Hague Regulations, many authors expressed the opinion that any site which does not constitute an obstacle to the advance of troops should not be considered as a defended area and may not be subjected to bombardment; but, on the other hand, with respect to military objectives located there, they could be destroyed individually. This latter consideration does not appear in Article 16 of the Draft Rules of 1956, in which this risk was intentionally removed in order to achieve as broad a protection as possible" – *ibidem*, p. 97.

466 *Ibidem*.

467 "Since the application of Article 25 of the Hague Convention has never depended on an express agreement, but rather on the recognition of a factual state by the opposing Party, it would be necessary, in developing the law, the define what the state of non-defense means with respect to modern conflicts, having regard to the relative situations and methods of modern warfare" – *ibidem*, p. 98.

468 "A populated area would only be considered as being undefended if it did not offer any effectives resistance to the attacks and advance of the enemy. The Party to the conflict who declines to defend a populated area would be obliged to withdraw the mobile military objectives and no longer use fixed military objectives, or, alternatively, destroy them" – *ibidem*, p. 100.

469 *Ibidem*.

adversaries. As the front line approaches, a demilitarized zone can be transformed into a non-defended zone.[470]

During the meeting of the group of government experts on the AP I draft, it was argued that Article 25 of the Hague Regulations of 1907 was not used due to the activity of aviation in World War I and II.[471] At the same time, it was pointed out (without undermining the binding nature of the regulation) that the 1907 regulation referred in the first place to certain situations of a tactical nature – then the attacking party was obliged to determine whether a given area was defended or not. The commentary on the 1973 Project is even more explicit in this respect, arguing that the protection status of *de facto* non-defended localities is confirmed by customary international law, which is a direct reflection of the stipulation specified in Article 25 of the Hague Regulations of 1907 and Article 1 of the Ninth Hague Convention of 1907.[472] Another regulation allowed a party to unilaterally issue a declaration, introducing the presumption of its non-defended nature. The possibility of concluding an agreement between the combatants to establish a neutralized zone was also highlighted.[473] By definition, non-defended localities were protected against tactical attacks, while neutralized zones were protected from strategic strikes.[474]

The project contained a list of cumulative conditions for considering a given location as a non-defended or neutralized one. Three of them displayed commonality: 1) the requirement to evacuate combatants and mobile military facilities and supplies, 2) deactivation of permanent military facilities 3) the population inhabiting

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470 "Any area under particular protection should be situated, initially away from the combat zone, but if, during the course of the conflict, such an area falls within this zone, it would not automatically lose all its privileges, but only those which are specifically linked to areas under particular protection; such an area should, therefore, be able to become an undefended populated area" – *ibidem*, p. 102.

471 "Article 25 of the Hague Regulations, it was stated, had not been applied during the First World War, mainly because of aerial warfare. Air attacks had been made against military objectives in localities which were not defended, as well as those which were" – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Report on the Work of The Conference, Vol. 1*…, para. 3.211, p. 155.

472 "By virtue of customary international law, non-defended localities are protected once their specific de facto «non-defence» situation is established. Moreover, international treaty law has reaffirmed the immunity of non-defended localities; reference may be made to Article 25 of the Hague Regulations of 1907 and Article 1 of the Hague Convention No. IX of 1907. Thus any subsequent agreement concluded by the Parties to the conflict is of a purely declaratory nature and can only strengthen the protection already due" – ICRC, *Draft Additional Protocol*…, p. 68.

473 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Report on the Work of The Conference, Vol. 1*…, para. 3.212, p. 155.

474 ICRC, *Draft Additional Protocol*…, p. 69.

a given area refraining from military activity. There was a difference in the context of the fourth requirement. In the case of neutralized areas, it was required that any activity related to the military effort of a given state be discontinued, e.g., the cessation of manufacture of military materials by armament factories.[475]

At the diplomatic conference held between 1974 and 1977, it was emphasized that the *ratio legis* of establishing special zones was to ensure full protection of the civilian population, including safeguarding them from incidental losses.[476] The ICRC commentator on the provisions of the project expressed the opinion that the *de facto* status of non-defended localities was determined under Article 52 paras. 2 and 5 (later Article 59 paras. 2 and 5 of AP I of 1977), indicating that the declaration of states is of a purely declaratory nature, unlike neutralized areas, for which concluding an agreement was considered to be a constitutive condition for acquiring protected status. Already in the initial comments, the Canadian delegate regarded the above distinction as unrealistic. Referring in this regard to the practice from the period of World War II, it was postulated, on the example of Rome and Paris, that the commander of an occupied city could be granted the right to make a unilateral statement about discontinuance of attempts to defend the locality against the enemy.[477] Other delegations argued that the determination of the nature of the defended or non-defended zone is left to the subjective assessments of the belligerents.[478] Doubts were expressed as to the use of the phrase "armed forces in contact", considering it unclear[479]. The Federal Republic of Germany directly demanded the removal of the above provision from the content of Article 59 of AP I, arguing that there is no possibility of an objective distinction between areas of active combat and front-line rear facilities, and in actual fact non-defended areas are adequately protected by the norms of the customary law of armed conflicts.[480] An extensive proposal to modify the content of the provision was submitted by Prof. Bierzanek, who argued that, in his opinion, attacking non-defended localities is absolute in nature and cannot be influenced by the content of the statements made during the fighting. According to him, a false statement of the defending party should be treat-

475 "A comparison of the basic conditions which the two categories must meet (Article 52(2), and Article 53(3), shows that there is only one difference, but one which is important: in neutralized localities, any activity linked to the military effort must have ceased. The Party to the conflict which is prepared to agree to the neutralization of a locality in the adversary's power will not want the latter to derive further benefit therefrom for its military effort (e.g., the activities of arms factories or the production of supplies for the armed forces will have to be interrupted)" – *ibidem*, p. 70.

476 CDDH/III/SR.23, para. 3, p. 201.

477 "During the Second World War, two major cities, Paris and Rome, had been temporarily located in the combat zone, where the military commanders had chosen not to defend them" – CDDH/III/SR.23, para. 14, p. 204.

478 CDDH/III/SR.23, para. 17, p. 205.

479 CDDH/III/RS.23, para. 22, p. 207.

480 CDDH/III/SR.23, para. 37, pp. 209–210.

ed as an element of perfidy, but the absence thereof does not exempt the party from examining whether, under Article 25 of the Hague Regulations of 1907, a given locality is non-defended.[481] The FRG delegate demanded that the provision of Article 59 of AP I be supplemented by an additional point regarding the requirement to stop all military activity in relation to non-defended areas, arguing that certain categories of facilities may still hold the status of legitimate military objectives in such locations.[482] It was also noted that the concept of a non-defended area is generally limited only to conducting land-based operations.[483] The above statement was confirmed by the US delegate, indicating that, in their understanding, non-defended localities in the shape proposed by AP I are inhabited areas located in front-line areas that can be occupied by the opposite party without encountering resistance – as in the Hague Regulations of 1907.[484] For this reason, the British delegate argued that the possibility of declaring a given location non-defended should be permissible in all circumstances, regardless of the geographical location of such locality, which would allow the protection of civilians from air bombing.[485] In the context of Article 60 of AP I, it was pointed out in the report of the working group that a decision had been taken to replace the term "neutralized zone" with *demilitarized zone* – the *ratio legis* of the amendment assumed that such a zone is to be understood as an area abandoned by armed forces (in order to fulfill the provisions of Article 60 para. 3 of AP I and the agreement establishing such a zone), and an area where there are no troops fulfilling the provisions of Article 60 para. 3 of AP I and other agreements.[486]

Commentary on AP I in the scope of Article 59 of AP I indicates that it is a reaffirmation and development of Article 25 of the Hague Regulations of 1907, the detailed provisions of which were included in Article 59 para. 2 of AP I, determining detailed requirements for non-defended localities. The authors of the commentary on Article 59 para. 1 of AP I confirmed the prohibition of attacking non-defended localities, regardless of the existence of a unilateral declaration or agreement between the combatants under two conditions:[487] 1) the area should be located in the

481 CDDH/III/RS.23, para. 31, p. 208.

482 CDDH/III/SR.23, para. 38.

483 "Non-defended localities could hardly be connected with any other form of warfare than land warfare" – CDDH/III/SR.46, p. 211.

484 "With regard to Article 52, his delegation believed that non-defended areas as defined in Article 25 of The Hague Regulations meant areas in the contact zone which could be occupied by the adverse Party without resistance or opposition and that that was also the meaning conveyed in the ICRC draft Article 52" – CDDH/III/SR.23, para. 67, p. 215.

485 CDDH/III/SR.23, para. 60, p. 214.

486 CDDH/III/264/Rev. 1, pp. 354–355.

487 "This paragraph reiterates almost entirely the rule contained in Article 25 of the Hague Regulations of 1907. 1 Under this paragraph, which confirms and codifies customary law, a locality becomes a non-defended locality whenever the conditions laid down in the following paragraphs are met" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 2263, pp. 700–701.

zone of direct military contact and 2) it must be open to occupation.[488] It was raised, among other things, that armament factories should stop their production in such a situation, and that transport lines cannot be used by the armed forces even for transit purposes.[489] Commentators pointed out that the flight of an enemy aircraft over a non-defended locality does not change its status due to this circumstance.[490] Article 59 para. 4 of AP I constituted the obligation to notify the creation of the zone to the opposite party. This was a fundamental difference in relation to Article 60 of AP I, which required a clear agreement between the combatants in relation to the demilitarized zone.[491] Another element distinguishing the content of Article 60 para. 3 of AP I in relation to Article 59 para. 2 of AP I is the differing content of the fourth criterion. In the case of non-defended localities, it is forbidden to undertake any activity to support military operations, while in demilitarized zones the support of the war effort is not allowed. Semantically, the distinction indicated in Article 60 para. 3(d) of AP I of 1977 is broader than the indication specified under Article 59 para. 2(d) of AP I of 1977 and according to commentators, it covers the functioning of industry working for the defense of the state.[492] The content of the commentary does not in any way justify the distinction made.

When analyzing the content of the above provisions, it should be noted that despite the acceptance of the above provision by the states and the lack of interpretative declarations on the content of Articles 59 and 60 of AP I of 1977, it should be stated that this provision is not free from the past controversies related to the adoption of the defense criterion in relation to air operations.[493] Article 59

488 "Paragraph 1 lays down the rule, which must be obeyed even in the absence of a declaration or an agreement and the article continues by defining the conditions with which a non-defended locality must comply" – *ibidem*, para. 2267, p. 701.

489 "It is clear that factories situated in the locality should abstain from manufacturing weapons, ammunition or other objects of military use. It is also clear that roads and railways passing through the non-defended locality must not be used for the movement of combatants or military equipment, not even for transit purpose" – *ibidem*, paras. 2271–2272, p. 702.

490 "Article 59 is silent on the question of overflight of non-defended localities by friendly or enemy aircraft. In the absence of a specific provision it must be accepted that such overflight is possible and does not compromise the status of the non-defended locality" – *ibidem*, para. 2275, p. 702.

491 "This paragraph clearly says that the agreement cannot be a tacit one: it requires that a consensus ad idem of the Parties be clearly expressed. The mere notification, when it remains unanswered, is insufficient" – *ibidem*, para. 2307, p. 710.

492 "The language used in Article 60 has a slightly wider scope, and undoubtedly covers those factories which are mainly operating for the armed forces" – *ibidem*, para. 2311, p. 711.

493 C. Levie, *Civilian Sanctuaries: An Impractical Proposal*, "International Law Studies" 1990, vol. 70. "This, of course, raises the historic argument as to the non-military character of a defended place. Who is to decide that action taken by such a defense installation was purely protective and taken with justifiable grounds for anticipating an unlawful attack; and who is to deny the contention of the attacked party that it had no intention of attacking the installation in question, so that the alleged act of defence was in fact one of military offence?" – L.C. Green, *The New Law*…, p. 31.

of AP I, in accordance with the comments made during plenary deliberations, is generally understood to apply to land forces only – in this respect, it presents the classic view mentioned pursuant to Article 25 of the Hague Regulations of 1907. While Article 59 para. 1 of AP I constitutes a norm directly referring to Article 25 of the Hague Regulations with any normative doubts regarding this provision in relation to air warfare, in particular Article 59 para. 3 of AP I defines the specific elements that should be met so that a belligerent could take steps related to a unilateral declaration addressed to the enemy. Undoubtedly, Article 59 para. 3(a), (b) and (c) of AP I impose an obligation on combatants to remove potential military objectives, the absence of which will prevent them from conducting a legitimate military operation. More doubts arise from Article 59 para. 3(d) of AP I, which orders the discontinuation of all activities in support of military operations – comparing this with the instruction of Article 60 para. 3(d) of AP I, this may potentially cause a situation in which, for example, an armament factory operating in a non-defended location for the needs of the armed forces (which is a legal military purpose under Article 52 para. 2 of AP I of 1977) does not qualify as an element of support for military operations – understood, first and foremost, as satisfying the current needs of ground troops operating within the combat contact zone – but it is part of the war sustaining effort of a given state (Article 60 para. 3(d) of AP I).

Another problematic issue is how to determine 1) the framework of the front-line contact zone in a geographical context and 2) whether, under the understanding of the concept of armed forces contact, there is a possibility of designating a given air zone within which aviation, as an element of the armed forces, remains in combat. It should be noted that the systemic and functional interpretation of the provision shows that it applies primarily to operations carried out on land.[494] This means that it is generally not applicable to air operations. This is also confirmed by the position of commentators. The appearance of an enemy aircraft over a non-defended locality does not deprive it of its protected status. In the author's opinion, the division between non-defended areas and demilitarized zones repeats the criticized legislative error of the 1923 Hague Rules of Air Warfare, which relates to the unclear criterion distinguishing between areas located in the vicinity of fighting and front-line facilities. It should be noted that the distinction made between non-defended and demilitarized areas, aside from the doubts regarding the status of a non-defended area under the Hague Regulations of 1907, ultimately weakened the protection of the civilian population. Limiting the possibility of granting a given area the status of a non-defended locality solely to adjacent zones meant that creating a demilitarized area in the rear sections of the front line did not require a unilateral declaration from the combatants but instead necessitated an agreement

494 Y. Dinstein, *The Laws of War*…, p. 55.

between the parties.[495] In fact, this meant that the situation was much more difficult to finalize in practice. From the perspective of the civilian population's needs, protection against strategic bombing of areas located beyond the front line is, first and foremost, decisive. In the event of the so-called tactical operations, in many cases there occurs a prior evacuation of the civilian population or its voluntary departure from areas being at risk of witnessing armed combat. The distinction between non-defended and demilitarized areas, according to the author, violates the principle of uniform protection of the civilian population against the effects of military operations, regardless of the area in which it is located. The return to the concept of prohibiting the bombing of non-defended areas is, in a sense, a contradiction of the long-standing doctrine of international law, which rightly argued that cities, in the context of air warfare, should not be subjected to air attacks – not due to their status (defended or non-defended), but because there are no military facilities to be found there.[496]

14. The Fourth Geneva Convention of 1949 and the Law of Air War

It should be emphasized that the Fourth Geneva Convention of August 12, 1949, relative to the protection of civilian persons in time of war, is a document strictly included in the category of Geneva law within the context of air warfare law. This body of law pertains specifically to the protection of victims of armed conflicts, particularly those under enemy control during periods of armed occupation.[497] Initially, in accordance with the first document of modern international humanitarian law of 1864 and the subsequent convention of 1929, it basically regulated the status of individuals referred to as *hors de combat* who, as combatants, were deprived of the ability to conduct warfare due to illness, wounds suffered or surrender.[498] In the course of the so-called great codification of the Geneva law accom-

495 "Apart from the explicit and implicit cumulative conditions, it is sine qua non that (i) the declared non-defended locality would be in or near the contact zone, and that (ii) it would be open for occupation. A declared nondefended locality cannot be situated in the hinterland-far away from the contact zone-for the simple reason that it is not yet within «the effective grasp of the attacker's land forces»" – Y. Dinstein, *Legitimate*…, p. 160.

496 E. Rauch, *Attack Restraints, Target Limitations and Prohibitions or Restriction of Use of Certain Conventional Weapons*, "Military Law and Law of War Review" 1979, vol. 15, p. 55.

497 E. Crawford, A. Pert, *International*…, p. 15.

498 "Article 1. The present Convention shall apply without prejudice to the stipulations of Part VII: (1) To all persons referred to in Articles 1, 2 and 3 of the Regulations annexed to

plished in 1949, the system of protecting the wounded, sick or capitulating combatants was basically systematized as part of the so-called First, Second and Third Geneva Convention of 1949. The Fourth Geneva Convention of 1949 extended the category of so-called protected persons to all who came under the authority of a party to the conflict or an occupying state of which they are not citizens.[499] It should be emphasized that although the convention did not define the terms "civilians" and "civilian population",[500] it contained provisions protecting non-military residents within so-called special security zones, including the sick, elderly, children and pregnant women (Article 14) and neutralized zones, within which the wounded and sick, combatants and non-combatants, including civilians who do not take part in military operations and do not participate in military works, may seek shelter from the effects of war (Article 15).[501] *Implicite*, the specially protected zones were meant to accommodate persons against whom military operations were prohibited, including, *inter alia*, air operations. In the context of Article 20, it was considered that the theater of air war did not change the interpretation of the phrase "zones of military operations".[502] However, the convention did not clearly define the conditions for the acquisition of special status by the regions, indicating that their creation was conditioned by the existence of an agreement between the belligerents. Article 28 of the Fourth Geneva Convention further stated that the presence of protected persons may not be used to shield certain points or zones from military operations. Despite the introduced solutions, the 1949 document was not an adequate response of international humanitarian law to the phenomenon of unlimited air warfare, which took place during World War II.[503]

Interestingly, the foundations of the principle of distinction were demonstrated based on the regime which applied in non-international armed conflicts,

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the Hague Convention (IV) of 18 October 1907, concerning the Laws and Customs of War on Land, who are captured by the enemy. (2) To all persons belonging the armed forces of belligerents who are captured by the enemy in the course of operations of maritime or aerial war, subject to such exceptions (derogations) as the conditions of such capture render inevitable. Nevertheless these exceptions shall not infringe the fundamental principles of the present Convention; they shall cease from the moment when the captured persons shall have reached a prisoners of war camp".

499 E. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application*, Dordrecht 1992, p. 17.

500 E. Crawford, *Identifying the Enemy*…, p. 38.

501 W.A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, "American University International Law Review" 1986, vol. 1, p. 126.

502 J.S. Pictet, *Commentary, IV Geneva Convention: Relative to the Protection of Civilian Persons in Time of War*, Geneva 1958, p. 165.

503 A.C. Grayling, *Among the Dead Cities: the History and Moral Legacy of the WWII Bombing of Civilians in Germany and Japan*, New York 2006, p. X; D. Lackey, *Moral Principles and Nuclear Weapons*, New Jersey 1984, p. 213.

distinguishing between categories of persons not directly involved in the conflict, as well as armed forces personnel now *hors de combat*.[504] Chronologically, the common Article 3 for the Geneva Conventions introduced a minimum of distinction in this regard, earlier than international humanitarian law applicable in international armed conflicts, as it differentiated individuals located in the vicinity of armed fighting who were not directly involved in military operations and were behaving passively.[505] Article 147 of the Fourth Geneva Convention considered extensive destruction of property unjustified by military necessity and displaying reckless and illegal nature, to be a serious violation of the provisions of the Geneva Convention. This standard is a direct expression of the provisions of Article 23 the Hague Regulations of 1907.

15. The Third Geneva Convention of 1949 and the Law of Air War

Article 62 of the Hague Rules of Air Warfare referred to the rules, conventions, customs and practice of international law applicable to ground troops on the matter of air personnel status. The Third Geneva Convention of 1949 on the Treatment of Prisoners of War is an act of international law that regulates the legal situation of the members of air force who are held in enemy power. One of the dimensions of the so-called belligerent privilege is the protection of a person who is a combatant against criminal proceedings related to acts committed before being captured.[506] During World War II, there were doubts whether this protection was unconditional, especially if the behavior of a captured combatant was contrary to international law. The Geneva Convention of 1929 did not explicitly regulate this issue. The consequence of the above principle was the possibility of depriving

504 "To borrow the phrase of one of the delegates, Article 3 is like a «Convention in miniature». It applies to non-international conflicts only, and will be the only Article applicable to them until such time as a special agreement between the Parties has brought into force between them all or part of the other provisions of the Convention" – J.S. Pictet, *Commentary IV Geneva Convention*…, p. 34.

505 "As we have already mentioned, Article 3 has an extremely wide field of application and covers members of the armed forces as well as persons who do not take part in the hostilities. In this instance, however, the Article naturally applies first and foremost to civilians that is to people who do not bear arms. In the case of members of the armed forces, it is the corresponding Article in the Third Convention to which in most cases appeal will be made" – *ibidem*, p. 40.

506 M.N. Schmitt, *Drone Attacks under the Ius ad Bellum and Ius in Bello: Clearing the "Fog of Law"*, "Yearbook of International Humanitarian Law" 2010, vol. 13, p. 324.

a person who violates the norms of *ius in bello* of their status as a prisoner of war, along with all personal guarantees. In the years 1942–1945, there were several high-profile trials of Allied pilots accused of violating the principles of the law of air warfare (described in Chapter VIII). At the same time, there were also violations of the detaining party's obligation to protect prisoners of war from the civilian population taking justice in their own hands.[507] In the summer of 1944, there were frequent cases of Allied airmen being murdered by the local population. Intercepted information from Ultra indicates that the military leadership of the Third Reich deliberately tried to use these incidents to pressure the Allied air force into halting low-level attacks.[508] In turn, after World War II, the trials of war criminals confirmed the possibility of prosecution and punishment for acts committed before being captured – however, it was unclear whether such a person could still benefit from the privileges and guarantees specified under the 1929 Convention.

The Third Geneva Convention of 1949 provided that persons prosecuted and punished in connection with acts committed before being captured, also in the event of a conviction, continue to enjoy the privileges set out in the convention. The form of the above provision was the subject of numerous disputes and opposing standpoints, primarily from Eastern Bloc states. All members of the Warsaw Pact, along with China, North Korea, the DRV, and Albania, made appropriate reservations, stating that these states "are not obliged to extend the application of the Convention to prisoners of war convicted under the law of the detaining party, in accordance with the Nuremberg principles, for crimes against humanity and war crimes, and will serve sentences under the same conditions as other individuals convicted in this state".[509] Jean S. Pictet's commentary to the Third Geneva Convention of 1949 recognizes that in all conditions the standards set out in the 1949 regulation must be observed, also for individuals who have been convicted of acts contrary to international law.[510]

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507 A well-known incident in this regard is the intervention of 2nd Lt. Stanislaw Skalski in September 1939. After shooting down a German plane, he landed his PZL P-11 fighter and saved the wounded German airmen from being lynched by the local population.

508 Ultra – a British cryptographic center in Bletchey Park in the United Kingdom. N. Wylie, *Muted Applause? British Prisoners of War as Observers and Victims of the Allied Bombing Campaign over Germany*, [in:] C. Baldoli, A. Knapp, R. Overy (eds.), *Bombing, States and Peoples in Western Europe 1940–1945*, Norfolk 2011, p. 266.

509 S. Carvin, *Caught in the Cold: International Humanitarian Law and Prisoners of War During the Cold War*, "Journal of Conflict and Security Law" 2006, vol. 11, p. 75.

510 "The important factor introduced by the Convention is participation by a supervisory body the Protecting Power. Is it desirable that prisoners of war who have been convicted of war crimes or crimes against humanity should be left without any international supervision once they have finally been found guilty? The answer to this question is certainly in the negative. During the conflicts which have occurred since the Second World War, there have been a great many accusations of violations of the laws and customs of war; it is to be feared that accusations of this kind might be brought systematically against a great many members of the armed forces, or at least against certain categories of those forces.

During the Vietnam War, the DRV signaled its intention to treat American military pilots as war criminals, committing acts prohibited under Article 6(b) of the IMT Charter, denying them protection under the Third Geneva Convention of 1949 and treating them as criminals prosecuted under the criminal law of the DRV.[511] The United States strongly protested against the DRV policy, although, apart from the cases of ill-treatment of prisoners of war (e.g., in the form of a "parading" captured US pilots on the streets of Hanoi on July 6, 1966), there was ultimately no criminal trial against American airmen.[512] It should be noted that, in principle, the North Vietnamese government did not question the status of a prisoner of war with regard to downed pilots, members of the US Air Force who performed missions in marked military aircraft over North Vietnam but pointed to the lack of protection against war criminals.[513]

The Third Geneva Convention strengthened the obligation of the retaining party to exercise general custody over the person of a prisoner of war (Article 12). Article 23 of the convention regulates the place of detention for prisoners of war, prohibiting their placement in places that may harm them as a result of military operations or as a form of "human shields". As an example of a violation of the provision, it is reported that during the First Gulf War, captured members

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Supervision of the treatment of convicted prisoners of war therefore seems necessary, even in the case of war crimes or crimes against humanity, and especially when sentence is pronounced during the hostilities" – J.S. Pictet, *The Geneva Conventions of 12 August 1949. Commentary: III Geneva Convention: Relative to the Treatment of Prisoners of War*, Geneva 1960, p. 425.

511 "The lawyer writes that the North Vietnamese Government «deliberately and clear sightedly ruled out (protection for) those prosecuted and accused of war crimes and crimes against mankind» in adhering to the Geneva Prisoner-of-War Convention. This is why, he concludes, U.S. pilots, whom he labels as pirates, saboteurs and criminals, can be tried, and presumably punished, under the North Vietnamese law of 20 January 1953, which he states relates to crimes against the security of North Vietnam" – H. DeSaussure, *The Laws of Air Warfare: Are There Any?*, "International Law Lawyer" 1971, vol. 5, pp. 543–544.

512 "We chose to declare our support for these missing and captive Americans within the context of Law Day to emphasize our belief in the rule of law, especially the law of nations as embodied in the 1194 Geneva Conventions on prisoners of war. These Conventions are the definitive statements in international law concerning treatment of prisoners of war, and both North Vietnam and the NLF have persistently and callously violated them, notwithstanding ratification by North Vietnam on June 28, 1957. Despite ratification and the clear language of the Conventions, Hanoi and the Viet Oong have committed the following calculated violations" – United States Congress House, *Committee On Foreign Affairs. Subcommittee On National Security Policy And Scientific Developments. American prisoners of war in Southeast Asia, Hearings before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs*, House of Representatives, Ninety-first Congress, second session, Washington 1970, p. 20. W. Thompson, *To Hanoi and Back: The United States Air Force and North Vietnam 1966–1973*, Washington 2000, p. 180 ff.

513 C. Levie, *Maltreatment of Prisoners of War in Vietnam*, "International Law Studies" 1998, vol. 70, p. 108.

of the Coalition air force were detained in a building of the Iraqi intelligence service, which was a legitimate military target.[514]

In principle, members of the crew of a military aircraft become prisoners of war from the moment they fall into the power of the detaining party (Article 4 para. A(I)).[515] This also applies to civilian members – in this context, the requirement to properly distinguish oneself from the civilian population is met by manifesting an external sign of belonging to the air force of a given state.[516] Civilian crew members are then considered to be integrated into the structure of the armed forces (Article 4 para. A(4)).[517]

As noted by J.M. Spaight, after World War I and II, there was no instance of denying the status of prisoner of war to a downed crew member due to their lack of a uniform.[518] Today, under Article 4 of the Third Geneva Convention of 1949 and Articles 43 and 44 of AP I, it seems that the mere fact of being a member of the armed forces is a constitutive element in maintaining the status of a combatant.[519] However, this does not apply to situations related to direct participation in military operations. A different opinion on this matter was expressed by Y. Dinstein, who stated that the presence of external markings on a military aircraft does not exempt the crew from the obligation to wear their own identification marks, citing the content of Article 15 of the Hague Rules of Air Warfare.[520] The remark above is confirmed in a 2014 *Air Force Operations and the Law* document.[521]

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514 J. Terry, *The Vietnam War*…, p. 23.

515 "Downed aircrew on the ground are subject to immediate capture and retain combatant status. On reaching the ground in territory controlled by the adversary they should be given the opportunity to surrender before being made the object of attack. They may be attacked if they take part in hostilities, resist capture, undertake evasion or escape, or are behind their own lines. Their prisoner of war status and the protection and the protections thereby afforded begins with their surrender or capture" – Judge Advocate General School, *Air Force Operations and the Law*, Alabama 2014, p. 24. "It refers to all military personnel, whether they belong to the land, sea or air forces' – J.S. Pictet, *The Geneva Conventions of 12 August 1949. Commentary: III Geneva Convention: Relative to the Treatment of Prisoners of War*, Geneva 1960, p. 51.

516 K. Ipsen, *Combatans and Non-Combatans*, [in:] D. Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford 2013, p. 95.

517 L.C. Green, *The Contemporary Law of Armed Conflict*, Manchester 1993, p. 181.

518 J.M. Spaight, *Air Power*…, p. 99.

519 See the controversy regarding the capture of Ukrainian pilot Nadia Savchenko by pro-Russian separatists in eastern Ukraine in the summer of 2014. M. Piątkowski, *Status pilotów i załogi wojskowego statku powietrznego w świetle międzynarodowego prawa humanitarnego i konfliktu zbrojnego na Donbasie – kazus Nadii Sawczenko* [*Status of pilots and crew of the military aircraft in the light of international humanitarian law and armed conflict in Donbass – Nadia Savchenko case*], [in:] T. Lachowski, V. Mazurenko (eds.), *Ukraina po Rewolucji Godności: Prawa człowieka – tożsamość narodowa* [*Ukraine after the Revolution of Dignity: Human Rights and National Identity*], Łódź–Olsztyn 2017, pp. 43–53.

520 Y. Dinstein, *The Conduct of Hostilities*…, p. 38.

521 "Military aircrew on the ground are required to distinguish themselves from the civilian population in the same manner and in the same circumstances, as other combatants. The

16. The Second Geneva Convention of 1949

During World War II, there were some doubts about recognizing as a survivor a member of a military aircraft crew who had evacuated from their aircraft and was forced to make an emergency parachute landing on the water.[522] This was primarily related to the interpretation of the phrase "shipwrecked", essentially related to conducting naval operations. Article 12 of the Second Geneva Convention of 1949 unequivocally removed all ambiguities in this regard, pointing out that "the term 'shipwreck' means shipwreck from any cause and includes forced landings at sea by or from aircraft".[523]

17. Relation of AP I to earlier norms of air bombardment law

It should be noted that the issue of determining the customary status of international air warfare law prior to 1977 is essential for establishing the relationship between both customary and treaty-based norms that were formulated later than the customary norm. Naturally, this necessitates resolving potential conflicts between norms in the context of their type (customary and conventional) and the timing of their crystallization (earlier and later). The above considerations must take into account the specificity of international humanitarian law, including the assessment of whether international humanitarian law displays traits of a self-contained system in the meaning of not only Article 55 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* by the International Law Commission but also in terms of formulating conflict-of-law rules.[524] Such reasoning is not devoid of controversy. It should be emphasized that the ICJ's

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wearing of flying clothing distinctive to and bearing identifying marks or insignia of the armed forces satisfies this requirement" – The Judge Advocate General's School, *Air Force Operations and the Law*…, p. 23.

522 W. Heintschel von Heinegg, *The Development of the Law of Naval Warfare from the Nineteenth to the Twenty-First Century – Some Select Issues*, "Yearbook of International Humanitarian Law" 2014, vol. 17, p. 80.

523 See: M. Naqib Ishan Jan, A. Naseeb Ansari, *The Care of Wounded And Sick and The Protection of Medical Personnel in Time of Armed Conflicts*, "Israel Yearbook of International Humanitarian and Refugee Law" 2011, vol. 11, pp. 57–60.

524 A. O'Donoghue, *Splendid Isolation: International Humanitarian Law, Legal Theory and the International Legal Order*, "Yearbook of International Humanitarian Law" 2011, vol. 14, p. 116.

remark made in the context of the case concerning *United States Diplomatic and Consular Staff in Tehran*, referencing the theory of a self-contained regime, was: 1) limited solely to the scope of state responsibility in the context of violations of diplomatic law, and 2) does not determine the applicability of this statement as a basis for construing the view of the complete autonomy of international humanitarian law, including, for instance, a distinct approach to resolving conflicts of norms.[525] As a consequence, this could lead to a significant limitation in the ability to enforce norms of international humanitarian law and to punish perpetrators of its violations.[526] Jann Kleffner argues that, in his view, the ICJ ruling in the case of *Armed Activities on the Territory of the Congo* serves as evidence that international humanitarian law is not a self-contained system but an integral part of the broader public international legal order. Its universal applicability is not nullified by the conduct of hostilities by one of the states or within the territory of one of the parties to the Geneva Conventions of 1949 (in the case of non-international armed conflicts).[527] Robert Kolb argues that international humanitarian law essentially aims to avoid any controversies in this regard, as a system based on prohibitive norms and imposing restrictions on exercising the sovereign rights during the conduct of hostilities.[528]

It should be noted that from the perspective of the binding force of a given norm, the nature of its origin (customary or treaty-based) is irrelevant, as its normative value is identical.[529] In view of this, there is no possibility of resolving the above conflict other than by referring to the generally accepted principles of law incorporated into international law (Article 38(1)(c) of the Statute of the ICJ).[530] The rule *lex posterior derogat legi priori* is decoded in the content of Article 30 of the Vienna Convention on the Law of Treaties of 1969.[531] In the event that norms

525 ICJ, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment of 24 May 1980*, I.C.J. Reports 1980, para. 86.

526 M.N. Schmitt, *The Conduct of Hostilities during Operation Iraqi Freedom: an International Humanitarian Law Assessment*, "Yearbook of International Humanitarian Law" 2003, vol. 6, p. 63. "To hold that international humanitarian law may be implemented only by its own mechanisms would leave it as a branch of law of a less compulsory character and with large gaps" – M. Sassòli, *State Responsibility for Violations of International Humanitarian Law*, "International Review of the Red Cross" 2002, vol. 84, p. 404.

527 J. Kleffner, *Scope of Application of International Humanitarian Law*, [in:] D. Fleck, T. Gill (eds.), *The Handbook of the International Law of Military Operations*, Oxford 2015, para. 246; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment*, I.C.J. Reports 2005, para. 259.

528 R. Kolb, *Advanced Introduction*…, p. 18.

529 J. Pauwelyn, *Conflict on Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, Cambridge 2003, p. 96.

530 V. Degan, *Sources of International Law*, The Hague 1997, p. 17.

531 M. Rama-Montaldo, *Universalism and Particularism in the Creation Process of International Law*, [in:] S. Yee, J.-Y. Morin (eds.), *Multiculturalism and International Law*, Leiden 2009, p. 144.

(customary or treaty-based) regarding the same subject, but of different content (e.g. rules for conducting air bombing specified under Article 25 of the Hague Regulations of 1907 and Article 24 of the 1923 Hague Rules of Air Warfare and Article 52 of AP I to the Geneva Conventions of 1977) were determined at a later time, then the later norms should prevail over the earlier ones.[532] Mark E. Villiger rightly pointed out that in the case of a conflict between norms of different origins in a temporal context, there is a challenge in determining the temporal boundary at which a customary norm was formed, especially when a given treaty serves as a codification or basis for the crystallization of customary law.[533] The problem arises when more accurate decoding of standards – especially by comparing the content of Article 24 of the 1923 Hague Rules of Air Warfare and Article 52 of AP I – results in the conclusion that both provisions are so specific that it is impossible to determine which rule is more general – thereby preventing the resolution of the conflict using the method of *lex specialis derogat legi generali*.[534] Also, the possibility of applying the conflict-of-law rule related to the hierarchic nature of the norm – *lex superior derogat legi inferiori* – considering the possibility that norms governing air bombings are part of the cardinal principle of distinction, whose status as a peremptory norm under Article 53 of the Vienna Convention on the Law of Treaties (VCLT) of 1969 appears unquestionable, is not an appropriate method for resolving conflicts of norms within the framework of international humanitarian law.[535]

A different view, which represents the most reasonable alternative to the models for resolving norm conflicts outlined above, was presented by R. Kolb and K. Del Mar. They argue that, fundamentally, in international humanitarian law, a modified principle of *lex posterior* "amplificat" *legi priori*[536] can be observed. According to its essence, a new international law treaty does not necessarily replace the previous one (unless explicitly stated in the treaty's provisions, as in the

532 N. Quenivet, *Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict*, [in:] D. Jinks, J. Maogoto, S. Solomon (eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Approach*, The Hague 2014, pp. 37–38.

533 M.E. Villiger, *Customary International Law and Treaties: A Study of their Interactions and Interrelations with Special Consideration of the 1996 Vienna Convention on the Law of Treaties*, Dordrecht 1997, p. 36.

534 C. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge 2005, p. 253.

535 Jurisdictional Immunities of the State, Germany v. Italy: Greece intervening, Judgment, I.C.J. Reports 2012, para. 93; R. Otto, *Targeted Killings and International Law: With Special Regard to Human Rights and International Humanitarian Law*, Heidelberg 2012, p. 358.

536 "It is frequently the case that a newly concluded IHL treaty does not replace an older IHL convention but rather builds upon it. That may mean , on the one hand, that the new convention includes new rules not contained in the older one. Both treaties remain applicable in their respective material and other scopes of application" – R. Kolb, K. Del Mar, *Treaties for Armed Conflict*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, pp. 76–78.

case of Article 34 of the 1929 Geneva Convention)[537] of the previous applicable norm (whether treaty-based or customary), but rather serves as an overlay on the earlier normative framework, complementing it with additional elements. As a consequence, the two standards are still considered to be mutually coexisting. There are many arguments supporting the correctness of the above position in the context of the specificity of international humanitarian law. In the content of Article 1, para. 3 of AP I, it was argued that the provisions of the Protocol supplement the 1949 Geneva Convention. In other parts of the regulations, there is no reference indicating the repeal of the binding force not only of the Hague Regulations of 1907 or the Geneva Conventions of 1949, but also other norms of international humanitarian law applicable in international armed conflicts (see: Article 2(b) of AP I).[538] This is also confirmed by the title of the diplomatic conference, which yielded AP I, as the need to confirm and develop international humanitarian law. According to the report from the XXI International Red Cross Conference in 1969, the confirmation was meant to apply to norms of *ius in bello* that already existed within the context of customary international law.[539] The development aimed at refining and materializing provisions that already existed, often indirectly contained within the applicable norms.[540] It should be emphasized that the value of both the Fourth Hague Convention of 1907, along with the Regulations concerning the laws and customs of war on land, and the Geneva Conventions of 1949, is of particular importance and is recognized as part of the foundation of international humanitarian law (e.g. ICTY in the *Duško Tadić* case, interpreting Article 3 of the Statute of the ICTY, indicated that the concept of violations of the laws and customs of war should first be recognized as violations of the regulations of 1907 and 1949).[541] This view is fur-

537 "This Convention, in relations between the High Contracting Parties, shall replace the Conventions of August 22, 1864, and July 6, 1906" – The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, signed on July 27, 1929.

538 "The two Protocols reflect the experience of the more than one hundred conflicts which have occurred since World War II, serving as an evolutionary rather than revolutionary endeavor to define and refine the law of war as it is practiced by the states of the world. Moreover, as with all law, they serve to update the law to the myriad technological advancements which have occurred since the promulgation of the 1949 Geneva Conventions. In both instances, however, the Protocols supplement rather than supplant existing codifications of the law of war" – W.H. Parks, *The Law of War*…, p. 3.

539 "Reaffirmation for certain rules, certain principles already exist, which are often simply customary or little known' – 21st International Conference of the Red Cross, *Reaffirmation and Development*…, p. 9.

540 "«Develop», because the existing norms and principles should be specified and materialized in a series of rules often implicitly contained in those norms" – *ibidem*.

541 *Prosecutor v. Duško Tadić*, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, 2nd October 1995, IT-94-1-AR72, para. 87. An interesting view on this matter was presented by A. Cassese, who pointed out that although Article 25 of the Hague Regulations of 1907 was the subject of contradictory interpretations, but it survived as "the core of international humanitarian law". A. Cassese, *The Geneva Protocols*…, footnote 40, p. 65.

ther justified in light of the fact that the states which have not ratified Protocol I do not consider all the provisions of the aforementioned regulation as part of customary international humanitarian law, while at the same time being parties to or not questioning the binding nature of the 1907 Hague Conventions.[542] Hans-Peter Gasser argued that "Much of the law contained therein is firmly embedded in the «Hague Law», which itself is considered to be customary law. But Protocol I gives new expression to old ideas and thereby clarifies the content of generally accepted obligations."[543] A similar position was expressed by W.H. Parks.[544] The issue of armed conflicts of a non-international nature also remains. The above considerations may serve as evidence of the specificity of international humanitarian law within the perspective of public international law.[545] Furthermore, as the ICJ stated in the *Nicaragua* case, even if the content of a customary norm and a treaty norm is identical, this does not mean that the customary norm is in a way "consumed" by the treaty norm, thus ceasing to exist independently in the normative framework.[546]

18. Limits of codification of the law of air warfare by AP I

In this context, it should be noted that the provisions of AP I to the 1977 Geneva Conventions are complementary to the customary and treaty norms of the law of air warfare regulating the regime of air bombing. In fact, the provisions of the 1977 regulations: 1) clarified, through the content of Article 59 of AP I, the scope of the phrase "non-defended" places occurring under Article 25 of the 1907 Hague Reg-

542 G. Nolte, *Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-Judicial Proceedings*, [in:] *idem* (ed.), *Treaties and Subsequent Practice*, Oxford 2013, p. 351.

543 H.-P. Gasser, *Negotiating the Protocols – Was It a Waste of Time?*, [in:] A. Delissen, G.J. Tanja (eds.), *Humanitarian Law of Armed Conflict Challenges Ahead. Essays in Honour of Frits Kalshoven*, Dordrecht 1991, p. 85.

544 "The Protocols to the Geneva Conventions are the product of lengthy negotiation and a great deal of compromise between delegations representing diverse political views and geographic areas. They are evolutionary rather than revolutionary, constituting a codification of customary international law rather than embarking upon substantial change of that law" – W.H. Parks, *The 1977 Protocols*…, p. 476.

545 T. Kamenov, *The Origin of State and Entity Responsibility for Violations of International Humanitarian Law in Armed Conflict*, Dordrecht 1989, p. 170.

546 ICJ, *Nicaragua v. United States of America, Military and Paramilitary Activities*, Judgement of 27th June 1986, para. 178.

ulations[547] and 2) were affirmed and developed through the content of Articles 52 and 57 of AP I, Articles 22 and 24 of the 1923 Hague Rules of Air Warfare.[548] Hilaire McCoubrey points out that, in the context of protecting the civilian population during air bombing, the provisions of Protocol I of 1977 are more *affirmatory* than *innovatory* in nature, further reinforcing the normative linkage of the regulations.[549] The above is confirmed by the commentary on the AP I draft of 1972.[550]

Apart from the above premises, it is worth noting that in the final version in Article 49 para. 3 of AP I, it was argued that these rules apply in the case of any air operation that could affect the civilian population, individual civilians or civilian objects on land. The provisions of Section I of Chapter IV apply to all attacks carried out from the air against targets located on the ground but do not override the rules of international law applicable to air warfare.

Comments on the AP I draft of 1972, in reference to the then Article 44 indicated that the scope of the provision's application was limited to the protection of civilians on land. At the same time, it emphasized that civilians aboard merchant ships and aircraft are not deprived of protection afforded by other provisions of international law.[551] In the ICRC report submitted to participants of the relevant diplomatic conference, it was emphasized that in the version proposed in the 1972 draft, the material scope of Article 44 (future Article 49 of AP I) concerns only civilians on land, postulating in the context of the law of naval and air warfare the need to introduce resolutions calling on the States Parties to the Protocol to apply these rules by analogy.[552] It should be noted that during the preparatory work on

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547 "Since the Additional Protocol I was not meant to derogate from customary international law, Article 27 I AP and Article 52 and 53 107 Hague Regulation have to be read in conjunction" – F. Lachenmann, R. Wolfrum, *The Law of Armed Conflict and the Use of Force: The Max Planc Encyclopedia of Public International Law*, Oxford 2017, point 14, p. 311.

548 "For these and other reasons, the Hague Rules of Air Warfare introduced the concept of military objectives, endorsed and further elaborated – with a new – definition – by Protocol I" – Y. Dinstein, *The Conduct of Hostilities*…, p. 111. For example, R. Kolb and R. Hyde raise the circumstance of unification (*utility*) within the framework of the First Additional Protocol to the Geneva Convention of 1977, the provisions of the so-called Hague Law of 1907 – R. Kolb, R. Hyde, *An Introduction*…, p. 249.

549 H. McCoubrey, *International Humanitarian Law and Kosovo Crisis*, [in:] K. Booth (ed.), *The Kosovo Tragedy: The Human Rights Dimensions*, Oxon 2001, p. 192.

550 "As this draft Protocol is intended to supplement the Conventions, it covers, obviously, the persons and objects protected by the Conventions; moreover, by the very fact that it reaffirms and elaborates certain rules that appeared until now outside the framework of the Conventions, 2 in particular in the Hague Regulations of 1907 and in customary international law, its protection is thus extended to new categories of persons' and objects" – ICRC, *Draft Additional Protocols*…, p. 7.

551 "As regards civilians at sea and in the air (in aircraft, balloons and other objects in flight), they are not deprived of all protection, since other norms of international law, principally customary law, are applicable to them" – *ibidem*, p. 54.

552 CDDH/III/SR.2, para. 11, p. 15.

Protocol I, the delegate from the United Kingdom emphasized the necessity to retain the phrase "on land", as, in their view, AP I, affirming the provisions of the Geneva Conventions and the Hague Conventions, is not intended to modify the international law applicable in naval warfare.[553] The author of the commentary argued that the protection of civilians at sea was shaped by customary law of naval warfare (e.g., merchant ships, which are not *per se* classified as military objectives, may use weapons in self-defense). Due to the above, an attempt to unify the regimes protecting civilians in relation to all types of warfare would lead to the creation of conflicting norms (a similar view was expressed by the representative of the United States).[554] It was also pointed out that a similar consequence would apply to the rules governing the law of air warfare, where the subject matter was still unexplored and required unification, but under a different document of international law.[555] A similar position was expressed by E. Castrén, who participated in the conference on behalf of Finland.[556] The representative of Belgium stated that civilians aboard ships or aircraft are not deprived of protection, but based on other norms of international law, this protection is of an equivalent nature.[557] However, it should be emphasized that a significant number of states advocated for the removal of the phrase "on land", and as a result, the above provision was upheld with a vote of 35 "in favor" to 33 "against". In the second vote, after additional discussion, the overwhelming majority of delegates supported the wording of the provision in its original form, retaining the phrase "on land".

During further discussions, it was argued that Article 44 of AP I project must be modified in such a way as to emphasize that the aim of the treaty provision is not in any way to revise the law of naval and air warfare.[558] This was considered both impossible within the time constraints of the convention and extremely

553 CDDH/III/SR.2, para. 23, p. 17.

554 CDDH/III/SR.2, para. 26, p. 17.

555 "Air warfare was an even more difficult subject, because the rules relating to it were in many respects uncertain. It might be desirable for those rules also to be codified and expanded, but that again was a matter for extensive study" – CDDH/III/SR.3, para. 19, p. 21.

556 "His delegation further hoped that the text proposed by the ICRC for article 44 would not be amended. It did not seem possible to delete the term «on land», since contemporary rules of air and sea warfare were different from those of land warfare, especially where the protection of the civilian population was concerned, and the Conference was not in a position to alter them even if it found them unsatisfactory" – CDDH/III/SR.4, para. 11, p. 27.

557 CDDH/III/SR.4, para. 29, p. 29.

558 "Discussions in the Working Group showed almost complete agreement that it would be both difficult and undesirable in the time available to try to review and revise the laws applicable to armed conflict at sea and in the air. Moreover, it was clear that we should be careful not to revise that body of law inadvertently through this article. The solution was found by combining the ICRC text with a sentence which stated clearly that, except for attacks against objectives on land, the law applicable to armed conflict at sea or in the air is unaffected" – CDDH/III/224, p. 328.

difficult from a substantive perspective. Due to the above, it was proposed that a solution be adopted which would, on the one hand, emphasize the existence of other norms of international law applicable to campaigns on land and in the air, while at the same time limiting the scope of application of the provision solely to situations related to air and naval warfare, to the extent that they may affect the civilian population on land. In addition, in order to determine the scope of the supplement to Protocol I, it was decided to add to the provisions listed under Article 44 para. 3 of Part IV of the 1949 Geneva Convention a clear reference to other norms of international law.[559] In accordance with the above, Article 44 para. 3 (Article 49 para. 3 of AP I) stated that the protocol supplements the norms concerning the protection of civilians or civilian objects from the effects of armed conflict on land, at sea, and in the air.[560]

As a consequence of Article 49 para. 3 of the of AP I in connection with Article 49 para. 4 of AP I sets the boundaries for the codification of the law of air warfare in relation to the following customary and treaty-based provisions:

1) Articles 25–27 of the 1907 Hague Regulations on air bombing of non-defended cities and the application of the requirement to give warning;
2) Articles 22–25 of the 1923 Hague Rules of Air Warfare on the Prohibition of Terrorist Bombings.

In view of the above, it should be noted that AP I to the 1977 Geneva Conventions made a significant addition to the law on air bombing that targets objects located on land. The codification also partially covered provisions regulating the status of a military aircraft crew (Article 42 of AP I).[561] In other respects, in accordance with Article 49 para. 3 of AP I, the content of other elements of the law of air warfare remained unchanged.[562] Michael N. Schmitt points out that of AP I cannot be characterized "as a thorough restatement of the legal architecture governing air warfare since it does not address air-to-sea, sea-to-air, ground-to-air, or air-to-air combat except as they have incidental effects on civilians or civilian object on the ground".[563] In this context, it is worth noting, for example, the exclusion of provisions related to the protection of civilians in air warfare from

559 "The precedent that quickly won favour with the Committee was that of Article 44, paragraph 3, which defined the scope of application of the Section dealing with the protection of the civilian population. Thus, in addition to reference to Parts I and III of the fourth Geneva Convention of 1949, reference was also made to «other applicable rules of international law relating to the protection of fundamental human rights during international armed conflicts»" – CDDH/III/224, p. 457.

560 CDDH/50/Rev.1, p. 238; E. Rauch, *The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of the Sea: Repercussions on the Law of Naval Warfare*, Berlin 1984, pp. 65–66.

561 L.C. Green uses the phrase "treaty recognition" here – L.C. Green, *Essays*…, p. 140.

562 C. Levie, *Means and Methods*…, pp. 227–228.

563 M.N. Schmitt, *Air Warfare*, [in:] A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford 2014, p. 124.

AP I, such as the status of civilian aircraft or passenger airliner. According to W.H. Boothby, the principles of Protocol I of 1977, which have gained the status of customary international law, will apply universally, binding states in all types of air operations – both horizontally and vertically. The targeting principles outlined in Section IV of Protocol I, which have not acquired the status of customary international law, will apply to states parties to Protocol I in connection with attacks against ground targets and air-to-air as well as air-to-sea operations that may affect the civilian population, civilian persons, and civilian objects located on land. AP I norms, which are not part of customary law, do not apply to air operations that may affect civilian objects in the air or at sea (examples of such norms may include Articles 55 and 56 of AP I of 1977).[564] The above conclusion is also supported by discussions regarding naval warfare, where the provisions of Section IV of AP I do not cover attacks against naval units.[565]

As a consequence of the above, it is necessary to decode the customary status of other norms of air warfare law derived from the 1923 Hague Rules of Air Warfare. Examples of the above provisions, which have been incorporated into air warfare law in a more or less specific manner, are the following:

1) Article 3 – the obligation to display a distinguishing mark on the external surface of a military aircraft;
2) Articles 13–16 – defining a military aircraft and defining its powers;
3) Article 18 – regarding the non-application of the St. Petersburg Declaration of 1868 in the context of air warfare;
4) Article 19 – prohibiting the use of false state markings;
5) Article 20 – prohibiting attacks on bailing out aviators;
6) Articles 40 and 41 – defining the boundary of the air war theater.[566]

564 W.H. Boothby, *Law of the Targeting*, p. 327.

565 "AP I Article 48 requires States involved in an IAC to «distinguish between the civilian population and combatants and between civilian objects and military objectives» and Article 51(4) prohibits indiscriminate attacks, but as noted above these Articles are in a section of AP I that does not apply to naval warfare. Nevertheless, there is a customary international law obligation to apply the principle of distinction in all aspects of warfare and that is the basis upon which the following discussion unfolds: – D. Letts, *Beyond Hague VIII: Other Legal Limits on Naval Mine Warfare*, "International Law Studies" 2014, vol. 90, p. 456.

566 "The 1923 Hague Rules on Aerial Warfare, regarded by several writers as declaratory of customary international law, establish two basic principles, as far as neutrality is concerned. Belligerent military aircraft are forbidden to enter the jurisdiction of a neutral State (Article 40); a neutral State should prevent the entry into its jurisdiction of belligerent military aircraft (Article 42)" – N. Ronzitti, *Commentary*, "International Law Studies" 2002, vol. 78, p. 119.

CHAPTER VII

SELECTED DETAILED ASPECTS OF THE LAW OF AIR WARFARE

1. Preliminary comments

Despite the great importance of aerial bombing in the military as well as the humanitarian and legal context, this is not the only manifestation of action conducted by military aviation during warfare. Many norms of the law of air warfare also cover other factual situations, often of a technical nature. These norms are addressed to specific recipients (e.g. persons carried on board military aircraft).

2. Status of persons evacuating from a damaged aircraft in an emergency

There is a wealth of confirmed information regarding attacks on pilots and crewmen bailing out of damaged aircraft during World War II.[1] Many years after the event, Capt. Zdzisław Krasnodębski described the moment his plane was shot down on September 3, 1939, during aerial combat of the Pursuit Brigade over Warsaw:

> […] After a while, I looked around the sky and saw that the enemy plane had taken a sharp turn and was heading towards me. I was overcome with fear when I remembered the fact that the previous day one of my comrades had been fired upon at while suspended from his parachute. I did not want to die, and there was no chance of saving myself

1 See: A. Oset, *Lotnicy września 1939 roku: 212 Eskadra Bombowa* [*Pilots of September 1939; 212 Bomber Squadron*], Dłutów 2009, p. 20; Z. Rotocki, *Operations de l'Aviation Allemande en Pologne en 1939 a la Lumiere du Droit International*, "Polish Yearbook of International Law" 1970, vol. 231, pp. 252–253.

> and I was condemned to wait idly for whatever the inexorable fate would bring… Suddenly I look, and here one of our machines is darting flat out towards the Jerry plane. The attack was a complete surprise to the Germans, and after a few seconds, the plane, with no defensive reaction, plummeted in flames to hit the ground along with the crew, while I landed unmolested under the cover of my colleague, who was Lt. Cebrzyński.[2]

In 1940, during the Battle of Britain, the number of similar reports increased significantly. The British commander of Fighter Command, later Marshal Hugh Dowding, commented on the attacks on British pilots as follows:

> Germans descending [by parachute] over England were prospective prisoners and should be immune [from attack], while British pilots descending over England were still potential combatants. German pilots were perfectly entitled to fire on our descending airmen.[3]

Adolf Galland, one of the very best German pilots of World War II, quotes the following reflections from a conversation with Hermann Goering:

> Goering asked me if I had ever thought of attacking British airmen shot down over Great Britain. He believed that pilots were particularly valuable and difficult to replace. I answered him "Yes, Marshal!". Looking at me straight in the eye, he asked me what I thought of the possibility of issuing an order to shoot down airmen bailing out of their. "I should regard it as murder, Herr Reichsmarshal," I replied "and I should do everything in my power to disobey such an order" Goering put both his hands on my shoulders and said, "That is just the reply I expected from you, Galland."[4]

On June 2, 1944, in the instruction addressed to the Allied aviation in connection with the preparation of Operation "Overlord", Gen. Dwight Eisenhower pointed out that enemy airmen disembarking their aircraft cannot be treated as "legitimate military targets and cannot be deliberately attacked".[5] James M. Spaight

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2 The account of Capt. Zdzisław Krasnodębski (then commander of the III/1 Fighter Squadron) from the interception flight against German aircraft on September 3, 1939 – Z. Krasnodębski, *Polskie siły powietrzne w II wojnei światowej* [*Polish Air Force in Second World War*], n.d., http://www.polishairforce.pl/_relacja_krasnodebski2.html (accessed: 22.12.2020).

3 G.D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge 2010, p. 524.

4 A. Galland, *The First and the Last: The Rise and Fall of the German Fighter Forces, 1938–1954*, New York 1954, p. 68.

5 Letter from Supreme Allied Commander General Dwight D. Eisenhower to Air Officer Commanding RAF Bomber Command, Air Chief Marshal Sir Arthur T. Harris and Commander United States Strategic Air Force, Lieutenant General Carl A. Spaatz, 2nd June 1944 – S. Darlow, S. Brown, *D-Day Bombers: The Stories of Allied Heavy Bombers During the Invasion of Normandy*, Mechanicsburg 2010, p. 271.

argues, however, that in the practice of World War II, attacks on descending crewmen were carried out by all parties to the conflict.[6]

In Article 36 of the ICRC draft, which was the subject of discussions by a group of government experts, it was stated that " the occupants of aircraft in distress who parachute to save their lives, or who are compelled to make a forced landing, shall not be attacked during their descent or landing unless their attitude is hostile".[7] In draft AP I of 1973, under Article 39, a decision was made to codify in the form of positive law a customary norm of the law of air warfare regarding the status of a crew member leaving an aircraft in *distress.* It should be emphasized that, as in the case of Article 20 of the 1923 Hague Rules of Air Warfare, this rule applied to the crews of every aircraft, regardless of its status (neutral, hostile) or nature (military, civilian). This remark is obvious to the extent that it essentially stems from the principles of logical inference *ad minori ad maius* – if a crew member leaving an enemy military aircraft is protected, all the more so must be persons who are in similar circumstances related to a factual situation in the form of the inability of an aircraft to fly. The commentary to Article 39 of the draft AP I, as well as the report on the work performed by the conference of government experts indicate the lack of conviction as to the existence of the norm itself in the form of customary law, as well as doubts regarding the *ratio legis* of the provision itself.[8] It was emphasized that in the conditions of air warfare at that time, the height from which an evacuating air crew member would descend would make it difficult to determine the nature of his flight: whether he was leaving the aircraft in distress or conducting an airborne assault.[9] In addition, it was mentioned that the pilot can control the direction of his flight and

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6 J.M. Spaight, *Air Power and War Rights*, London 1947, pp. 158–163.

7 "The occupants of aircraft in distress who parachute to save their lives, or who are compelled to make a forced landing, shall not be attacked during their descent or landing unless their attitude is hostile" – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May – 12 June 1971), *Report on the Work of the Conference*, vol. II, Geneva 1971, p. 6.

8 "As we have stated, the case of airmen in distress descending by parachute requires exhaustive study, for it has not been covered by any written rules. But there does exist a common-law rule: occupants of an aircraft in distress who parachute down to save their lives shall not be attacked in the course of their descent or upon landing unless they manifest a hostile attitude" – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May – 12 June, 1971), *Rules Relative to Behavior of Combatants*, *Vol. 4*, Geneva 1971, p. 8; ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949*, Geneva 1973, p. 45.

9 "Several experts expressed misgivings about this article: in their opinion, it was impossible to determine whether the future attitude of a parachutist would be hostile or not and, consequently, it was impossible to know whether or not flyers should be afforded protection during descent by parachute or, in the case of a forced landing, at the moment when their plane landed" – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session 3 May–3 June 1972, *Report on the Work of the Conference, Vol. I*, Geneva 1972, para. 3.43, p. 132.

try to avoid being captured (e.g., landing on his own territory or one controlled by Allied troops). The provision required that the status of a crew member evacuating from the aircraft be of an obvious *hors de combat* nature. Only one of the experts pointed to the existence of *supefluum* in the adopted treaty solution, indicating the existence of a customary norm of an identical nature.[10]

Government experts emphasized that the protection of an aircraft crew member extending in the air for the duration of the descent has only apparent features of similarity to the situation of a shipwrecked seafarer. Additionally, the status of crew members in the case of their reaching the ground in a safe way was also considered. It was pointed out that an airman may be the object of an attack if, after landing, he resists capture or performs other hostile acts.[11] The experts pointed out that there was no doubt that in all conditions a crew member of a military aircraft is entitled to prisoner-of-war status.[12] The 1973 commentary also argued that a military aircraft which is airborne is always considered a legitimate military target, regardless of the circumstances of it carrying means of attack or defense.[13] Article 39 of the AP I provided that "The occupants of aircraft in distress shall never be attacked when they are obviously hors de combat, whether or not they have abandoned the aircraft in distress. An aircraft is not considered to be in distress solely on account of the fact that its means of combat are out of commission". In addition, the perfidious use of distress signals was prohibited. The draft clearly referred not only to the core crew of military aircraft (pilots, navigators, observers, radio operators, etc.), but also to passengers.[14]

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10 "This proposal was supported by several experts. Another expert declared that the safeguarding of flyers in distress was in conformity with the law in force and proposed the insertion in Article 36 of a new paragraph stipulating that the misleading use of distress signals was forbidden" – *ibidem*, para. 3.46, p. 132.

11 "On the ground, if air crew members resist capture or try to destroy the remains of their aircraft, they may of course be put hors de combat" – ICRC, *Draft Additional Protocols*…, p. 45.

12 "[…] the experts unanimously considered that, even if an airman had committed acts authorizing qualification as a war criminal, when captured he should be treated as a prisoner of war, without prejudice to regular judgement. It was reminded, however, that, while the legal situation was inarguable, there were difficulties in actual practice: the civilian population may feel savage towards the airmen who has just bombed it; in this connection, the expert quoted an example of officers, who had watched civilians lynch parachutists without interfering and who had subsequently been condemned by the Courts of the Allied Powers" – *Rules Relative To Behavior of Combatants, Annex*, pp. 3–4.

13 "A military aircraft which can be flown is, on the other hand, always considered as a military objective, whether or not it has spent its means of defense or attack" – ICRC, *Draft Additional Protocols*…, p. 45.

14 "In the earlier text the emphasis had been on protecting aircrew and passengers who had bailed out from an aircraft in distress as distinct, of course for paratroopers. In the new text such persons were still covered. but so also were those who remained in an aircraft in distress, and, for example made a forced landing, and the emphasis of protection was placed on the latter. That change had created problems" – CDDH/III/SR.30, para. 23, p. 291.

As part of the diplomatic conference, it was argued that Article 39 of the AP I project had no equivalent in the provisions of the 1907 Hague Regulations due to the fact that the conference delegates did not know and could not have foreseen the phenomenon of air warfare.[15] The standard protecting airmen against air attack was the subject of regulations of various armed forces, taking into account the fact that members of airborne troops were excluded from the regulation. The article was applicable only to airmen and aircraft unable to fly. At the same time, it was emphasized that an airman remains under the protection of the regulation after landing – it was argued that this norm also imposes an obligation on the relevant authorities to comply with the provisions (in the event of the airman being captured by civilians).[16] The representative of Israel emphasized that a crew member evacuating from a damaged aircraft was already treated as *hors de combat*, which resulted, among others, from the provisions of Article 20 of the 1923 Hague Rules of Air Warfare. Ultimately, however, it was emphasized that the introduction of the presumption that every person evacuating from an aircraft is protected could lead to abuse by soldiers of airborne assault units.[17] A similar comment was made by E. Castrén.[18] The need to articulate the fact that every aviator who completes their descent will be guaranteed an opportunity to surrender was raised. The delegate of the Soviet Union indicated that the essence of a combatant's protection was to state unequivocally that he had withdrawn from fighting – as *hors de combat*.[19] Ultimately, the draft Article 39 of the AP I was adopted in the forum of the III commission in the identical version, which later became the basis of Article 42 AP I. Para. 1 indicated that no person (i.e. regardless of whether

15 "Reminded participants that as opposed to the preceding articles article 39 had no equivalent in The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land since air warfare had been unknown when the latter had been drawn up" – CDDH/III/SR.30, para. 2, p. 287.

16 "Article 39 applied only to airmen in distress and to disabled aircraft. Once they had reached the ground. all airmen should be afforded the same safeguards as during their descent by parachute whether they landed in a zone held by the military or among an enemy population. In the latter case the authorities should ensure that the provisions of the relevant article were observed" – *ibidem*.

17 "Normally it could be presumed that an airman parachuting from an aircraft in distress was hors de combat, but that presumption could be proved false by the behavior of the airman in question" – CDDH/III/SR.30, para 5, p. 288.

18 "In particular, it would be difficult to determine whether the occupants of an aircraft in flight were in distress and whether the aircraft had exhausted all means of combat" – CDDH/III/SR.30, para. 11, p. 289.

19 "The essential principle in the rules under discussion was the obligation for the combatant to prove that he had withdrawn from the combat: that principle was the source of the concept of being obviously hors de combat, introduced in amendment CDDH/III/244; any feigning would entail the notion of an «act of perfidy» which the sponsors of that amendment proposed to introduce at the end of paragraph 2" – CDDH/III/SR.30, para. 20, p. 290.

they are a crewman or a passenger of each type of aircraft) leaving an aircraft with a parachute (it was decided that in 1977 only this form of evacuation from a damaged aircraft is possible) may be subject to attack during the descent, and their position is similar to the status of shipwrecked persons under the Second Geneva Convention of 1949.[20] Their status after landing was dependent on taking hostile actions, which might involve, for example, preventing an attempt to capture them by the enemy through armed resistance. Basically, the "capturing" side was obliged to offer a possibility of surrender before the attack began. The status of pilots who try to escape the pursuit and at the same time try to be retrieved by units of their own armed forces may seem problematic in this regard (e.g. as part of so-called evade and escape tactics – it seems, however, that if this person, having an opportunity to surrender, does not take this action, e.g. when trying to exfiltrate from the threatened area, they lose the protection resulting from Article 42 para. 2 of AP I),[21] and those who have surrendered and then try to escape should be treated as prisoners of war who are trying to escape from captivity.[22] Loss of protection under Article 42 para. 2 AP I absolutely takes place in the event of a hostile act by the pilot, e.g., destruction of technical equipment or documents.[23] The use of civilian clothing when trying to escape from the landing area will not strip the status of combatant off an air force aviator of a given state (neither will the lack of uniforms worn by the aircraft crew), but undoubtedly it exposes such persons to the charge of espionage.[24] The 2004 British Manual indicates that in case of doubts as to the status of persons descending by parachute (persons evacuating damaged aircraft or soldiers of airborne units), a possible attack should be withheld.[25] This is a clear reference to the content of the 1987 ICRC commentary, which indicated that

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20 R. Sabel, *Chivalry in the Air? Article 42 of the 1977 Protocol I to the Geneva Conventions*, "International Law Studies" 2000, vol. 75, p. 443.

21 L.C. Green, *The Contemporary Law of Armed Conflict*, Manchester 1993, p. 179; I. Henderson, *The Contemporary Law of Targeting*, Leiden 2009, p. 91.

22 "To be sure, sometimes an armed force has been known to recover fallen aviator by force. In itself, that does not obviate the immunity of the parachutist, who might be wounded or might have surrendered, but he may become the stake of the combat and could in that way be exposed to certain actual risks. If he seeks to flee, his situation is analogous to that of the prisoner who tries to escape" – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971, *Rules Relative*…, p. 10.

23 U.C. Jha, *International Humanitarian Law: The Laws of War*, New Delhi 2011, p. 57; A.P.V. Rogers, *Law on the Battlefield*, Manchester 2006, p. 49.

24 U.C. Jha, *International Humanitarian Law*…, p. 58; Judge Advocate General School, *Air Force Operations and the Law*, Alabama 2014, p. 24.

25 JSP 383, *The Joint Service Manual of The Law of Armed Conflict*, 2004 Edition, p. 58, https://assets.publishing.service.gov.uk/media/5a7952bfe5274a2acd18bda5/JSP3832004Edition.pdf (accessed: 18.12.2020).

despite justified and practical difficulties in applying the provision, the paradigm of good faith should still be used in its interpretation.[26]

During the plenary sessions of the conference, the final form of the provision of Article 39 of the AP I draft caused much controversy.[27] It was demanded, among others, that the possibility of protection for an airman who performs hostile acts, such as shelling persons on the ground, be excluded.[28] The second contentious point was the issue of determining the status of a crew member who, by changing the direction of descent in order to head for their own or allied territory, tries to prevent capture by the enemy troops.[29] Jean S. Pictet protested against depriving such a crew member of protection (which was particularly supported by the Arab states), considering the above postulate to be secondary due to the fact that a crew member leaving an aircraft unable to fly becomes a victim of war *per se*, appealing in this respect for the need to give way to the humanitarian perspective to all military prerequisites to this extent.[30] The position of the author of the commentary to the 1952 Geneva Conventions was strongly supported by Western states. Interestingly, during the debate, Syria's representative emphasized that the norm which permitted firing upon a crew member trying to return to their own territory is an element of customary law (referring to the position of L. Oppenheim).[31] The amendment was rejected and finally the version accepted by the working group was adopted by an overwhelming majority – albeit not unanimously.[32] After the vote, the representative of Israel indicated that the norm contained in the content of Article 42 of AP I is a codification of customary law, included in the provisions of Article 20 of the 1923 Hague Rules of Air Warfare.[33] A similar position was

26 Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva 1997, para. 1643, p. 497.

27 R. Erickson, *Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict*, "Vanderbilt Journal of International Law" 1978–1979, vol. 19, pp. 574–575.

28 "It should not be so worded as to give the impression that absolute immunity from attack was granted to a person parachuting from an aircraft in distress even if that person committed a hostile act during the descent" – CDDH/SR.39, para. 71, p. 104.

29 "If Article 38 bis deprived a person in the field of the protection envisaged and of immunity from attack if he attempted to escape, why should more privileged treatment be given to a person descending by parachute who was obviously trying to escape to a territory controlled by his state, or by a friendly state?" – CDDH/SR.39, para. 72, p. 104; CDDH/SR.39, para. 96, p. 108.

30 "The serviceman who to save his life parachuted from an aircraft in distress was a victim, shipwrecked as it were in the air, and that was the idea which should have precedence. Whether an airman landed in friendly or hostile territory, whether he rejoined his unit or was taken prisoner, should remain secondary considerations. A shipwrecked person was a victim of the conflict and should be protected in all circumstances" – CDDH/SR.39, para. 89, p. 107.

31 CDDH/SR.39, para 108, p. 110.

32 Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 1643, p. 497.

33 "The provisions relating to the protection of persons parachuting from an aircraft in distress are a declaratory codification of customary international law as set out inter alia in Article 20 of The Hague Rules of Air Warfare 1922/1923" – CDDH/SR.39, p. 116.

expressed by Y. Dinstein.[34] Antonio Cassese stated that, in fact, the Arab states tried to undermine the customary nature of the rule.[35] The opposite view is taken by W.H. Parks, who argued that the practice of attacking pilots evacuating from damaged aircraft was more of a rule than exception.[36] Robbie Sabel, in turn, points out that the decisive role in the final approval of the text of Article 42 para. 2 of AP I was played by the conclusion of the US-Egypt agreement, which helped break the deadlock in further talks.[37]

Rule 132 of the HPCR Manual reaffirms that it is forbidden to attack persons disembarking from an aircraft as a result of distress. The commentary indicated that this rule, resulting from the content of international treaties and customary international law, applies to the crew of aircraft and passengers, excluding members of airborne troops. Referring to the controversy regarding the scope of the prohibition during the diplomatic conference in Geneva in 1974–1977, it was unequivocally stated that the extent of this rule is absolute and does not depend on whether the evacuee will land in enemy territory, in an area controlled by the opposing party, or in a territory held by Allied forces.[38] After landing, a person evacuating from an aircraft using a parachute should have a possibility to surrender unless they are actively involved in hostilities. The commentary argued that a possible attempt to escape from capture by the enemy, unless it is an illegal act *per se*, does not constitute an act of capitulation in the legal sense, except for escape from retribution of the civilian population.[39]

3. Perfidy, use of false markings

It should be noted that throughout history, combatants have resorted to various means of eliminating the enemy, including those considered dishonorable. The customary limit of the legality of the above-mentioned means was an action that was not treacherous (as opposed to deception). Gary D. Solis gives an example of one of the first criminal trials in the history of people accused of violating the laws and customs of war, which took place in 1873 against a group of Native Ameri-

34 Y. Dinstein, *The Laws of War in the Air*, "Israel Yearbook of Human Rights" 1981, vol. 11, p. 45.
35 A. Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, "Pacific Basin Law Journal" 1984, vol. 55, p. 82.
36 W.H. Parks, *Air War and the Law of War*, "Air Force Law Review" 1990, vol. 32, pp. 109–110.
37 R. Sabel, *Chivalry in the Air?*…, p. 450.
38 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge 2013, p. 334.
39 *Ibidem*, p. 335.

cans who "violating the specific character of the flag of truce" treacherously killed emissaries of the United States Armed Forces.[40] In 1874, during a conference in Brussels, prohibited methods of warfare, as listed in Article 13(b) of the Brussels Declaration, include the treacherous murder of a combatant belonging to an enemy army. During the preparatory work, it was postulated that the phrase "treachery" should be replaced with *perfidy*.[41] At the same time, using enemy markings, uniforms or insignia was considered an action similar to the treacherous killing of an opponent. In Article 13(f) of the Brussels Declaration, illegal methods of conducting operations included the use of false national identification marks, surrender marks and emblems protected by the Geneva Convention (the First Geneva Convention of 1864). The Hague Regulations essentially repeated the content of the solutions adopted in 1874 and Article 23(b) prohibited the treacherous killing or wounding of persons belonging to an enemy army, and Article 23(f) prohibited unlawful use of flags, insignia, enemy uniforms.

Gradually, international humanitarian law led to the adoption of the distinction between two separate prohibited behaviors. The first was an act of perfidy, which is essentially an act of a causative nature (leading to the killing, capturing or wounding of the opponent). The second was an unlawful or incorrect use of national identification marks characteristic of the opponent, which was extended to include the prohibition of using certain emblems protected by specific provisions of *ius in bello* (resulting from the Geneva Conventions and Additional Protocols). The action was a formal violation – the mere use of a enemy mark was prohibited.[42] However, the scope of the above-mentioned rule was ambiguous, especially in relation to whether the use of enemy markings was prohibited at all times or only in situations of direct combat.[43] In international jurisprudence, the controversy was caused, among others, by the issue of the use of enemy national identification marks, e.g., uniforms. It was revealed by the trial of Otto Skorzeny, whose unit (150th Brigade) was tasked with opening the attack routes for the rest of the German army during the "Wacht am Rhein" offensive in the Ardennes at the turn of 1944/1945. Skorzeny's soldiers wore American military uniforms, and they also travelled in captured vehicles equipped with original markings[44]. In 1947, an

40 G.D. Solis, *The Law of Armed Conflict*…, pp. 484–485.

41 F. Martens, C. Samwer, J. Hopf, *Actes de la Conférence réunie à Bruxelles, du 27 juillet au 27 août 1874, pour régler les lois et coutumes de la guerre*, Göttingen 1879, p. 30.

42 "In order to be perfidy, the act must be the proximate cause of the killing, injury, or capture of the enemy" – W.H. Parks, *Special Forces' Wear of Non-Standard Uniform*, "Chicago Journal of International Law" 2003, vol. 4, no. 2, p. 522.

43 W.J. Fenrick, *Methods of Land Warfare*, [in:] R. Liivoja, T. McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict*, New York 2005, p. 260.

44 There is a famous photograph showing a modified Panther tank disguised as an American M10 assault gun, bearing American markings. R.B. Durham, *False Flags, Covert Operations and Propaganda*, Morrisville 2014, p. 128.

American military court investigated the case of the unit's commander and his officers, ultimately issuing acquittals. During the case, the views of, among others, Lauterpacht, Hall, Spaight and Wheaton were cited.[45] As in naval warfare, the decisive factor was that the soldiers of the 150th Brigade wore German uniforms during direct clashes with the American army. Until direct combat contact took place, wearing foreign military uniforms was considered an acceptable military ruse.[46] This exception along with the standpoint on the issue of uniforms in the event of the inability to ensure they are a component of a legal military *ruse de guerre*.[47]

The draft of Article 39 of AP I provided that using hostile flags, markings and uniforms to cover or support military operations was unacceptable.[48] In this respect, the consolidation of the so-called Skorzeny principle, which diversified the use of enemy emblems during and outside combat, definitely prevailed.[49] Ultimately, it was decided to extend the prohibition on using the enemy's national identification marks not only to the time of military contact but also to masking, supporting protection of, or hindering military operations, understood not only as combat contact but also as movement towards the combat area.[50]

From the perspective of the law of air war, it should be noted that in the content of Article 39 of AP I, no provisions were made regarding the use of markings by military aircraft, while reference was made to the rules applicable in naval warfare. For this reason, it should be concluded that this matter, as not regulated by the provisions of AP I and at the same time not included in section IV of AP I, was

45 C. Phillipson, *Wheaton's Elements of International Law*, New York 1916, p. 501.

46 Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission, Vol. IX, Case No. 56, Trial of Otto Skorzeny and Others, General Military Government Court of the U. S Zone of Germany, London 1949, pp. 90–94. "It is perfectly legitimate to use the distinctive emblems of an enemy in order to escape from him or to draw his forces into action; but it is held that soldiers clothed in the uniforms of their enemy must put on a conspicuous mark by which they can be recognised before attacking, and that a vessel using the enemy's flag must hoist its own flag before firing with shot or shell" – W.E. Hall, *A Treatise on International Law*, Oxford 1904, p. 462.

47 "On two points there appears to be universal, or at least general agreement: no violation of international law is involved in the wearing of enemy uniforms not for camouflage purposes, but to cope with a necessity created by lack of other clothing; and the use of the enemy's uniform for the purpose of deceiving the enemy by thus concealing one's hostile status is at least unlawful where this is done in open combat" – M. Koessler, *International Law on Use of Enemy Uniforms as a Stratagem and the Acquittal in the Skorzeny Case*, "Missouri Law Review" 1959, vol. 24, p. 22.

48 CDDH/III/SR.29, para. 15, p. 273.

49 "Finally, there was the well known Skorzeny case of the Second World War, which had established that the firing of weapons while in the uniform of the adverse Party would not have been tolerated. The absolute limit was set out in article 35, and anyone firing while wearing the colors of a benevolent neutral or masquerading as a harmless civilian invariably committed an illegal act" – CDDH/III/SR.29, para. 10, p. 272.

50 Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 1576, p. 468.

entirely left to customary international law, based on the content of the 1923 Hague Rules of Air Warfare. Article 19 of that regulation prohibited the use of false aircraft markings – which referred to any insignia other than that of the state owning a given military aircraft.[51] The analysis of state practice in both World War I and II confirmed the validity of this rule.[52] Unlike naval warfare, the use of false markings is not classified as a legal ruse but was considered an act of perfidy.[53] However, it should be pointed out that in the light of AP I, the insignia and markings of the opposite party do not protect against attack (there is no norm prohibiting so-called friendly fire in international humanitarian law). AP I treats the incorrect use of enemy insignia as a separate violation of international humanitarian law. Rule 114 of the HPCR Manual does not mention feigning the status of an enemy military aircraft as an example of behavior that may constitute perfidy.[54] Nevertheless, it is worth pointing out that there is some inconsistency in the context of air warfare because, for example, the Canadian Manual on The Law of Armed Conflict considers, among others, the use of false markings in the case of aircraft as an act of perfidy (this would be a case if markings are of civilian character e.g. the registration numbers used in international civilian aviation).[55] James M. Spaight referred to only sporadic and unconfirmed reports on the use of false markings by combatants.[56] Two situations should be distinguished from the use of false markings.

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51 A. Gioia, *Neutrality in Air Warfare*, [in:] N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006, p. 187.

52 W.H. Boothby, *Deception in the Modern, Cyber Battlespace*, [in:] J.D. Ohlin, K. Govern, C. Finkelstein (eds.), *Cyberwar: Law and Ethics for Virtual Conflict*, Oxford 2015, p. 201.

53 Y. Dinstein, *The Laws of War*…, p. 43. Interestingly, M. Madden argues that while changing markings on jet aircraft is impossible, in the case of helicopters, such a scenario is considered plausible. "There is no question that such conduct would constitute perfidy, and that it would be illegal under IHL if the helicopter crew killed, injured or captured an enemy while false markings were worn on the helicopter" – M. Madden, *Of Wolves and Sheep*: *A Purposive Analysis of Perfidy Prohibitions in International Humanitarian Law*, "Journal of Conflict and Security Law" 2012, vol. 17, p. 454.

54 "Additionally, the customary law of air warfare does not consider flying under false markings a lawful ruse of war. In this regard it is important to distinguish between protected emblems under international law (such us the symbol of the United Nations or medical signs) and enemy markings. While killing or injury caused while using protected markings could constitute perfidy under Article 39 of Additional Protocol I to the 1949 Geneva Conventions (AP I), the use of the enemy military markings is separate violation (as a misuse) but it is not perfidious (enemy markings are not protected emblems)" – M. Piątkowski, *Military Markings and Unmanned Aerial Vehicles*, 2022, https://lieber.westpoint.edu/military-markings-unmanned-aerial-vehicles/ (accessed: 13.07.2025).

55 "The manual considers it an act of perfidy in air warfare if a hostile act is committed while "using false markings on military aircraft such as the markings of […] enemy aircraft" – International Humanitarian Law Databases, *Practice relating to Rule 62. Improper Use of the Flags or Military Emblems, Insignia or Uniforms of the Adversary*, 1998, https://ihl-databases.icrc.org/en/customary-ihl/v2/rule62 (accessed: 13.07.2025).

56 J.M. Spaight, *Air Power and War Rights*, London 1924, pp. 84–89.

The first one is alteration of markings on aircraft previously belonging to the adversary. Such practice is authenticated by photographic records. Kampfgeschwader 200 (also known as KG 200) was a Luftwaffe unit performing various types of special, training and reconnaissance missions. This squadron was also equipped with captured Allied aircraft (e.g., Flying Fortress B-17).[57] However, no known reports indicate that the Luftwaffe used the aircraft with their original US markings.[58] Similar formations were also established by the Allied states.

Photo 1. German-made aircraft: Junkers Ju 88 and Focke-Wulf Fw 190 as part of the so-called Rafwaffe – a special experimental squadron of the Royal Air Force. The aircraft are marked with RAF insignia

Source: Captured German aircraft of No. 1426 (Enemy Aircraft Circus) Flight at Collyweston, Northamptonshire, undergoing maintenance; Focke Wulf Fw 190A-3, PN999, is undergoing engine servicing while airmen are re-painting the wings of Junkers JU 88S-1, TS472, author: Goodchild, Royal Air Force, 22 February 1945, https://upload.wikimedia.org/wikipedia/commons/thumb/9/96/CH_015610.jpg/300px-CH_015610.jpg (accessed: 23.12.2020).

57 The equipment of KG 200 included, among others, a British Vickers Wellington bomber from the 311th Czechoslovak Squadron, which was forced to land in France in 1941, then seized by the Germans, and incorporated into KG 200 under Luftwaffe markings. *Vickers Wellington*, n.d., https://pl.wikipedia.org/wiki/Vickers_Wellington#/media/Plik:Bundesarchiv_Bild_146-1972-019-88,_Beuteflugzeug,_Vickers_Wellington.jpg (accessed: 23.12.2020).

58 G.J. Thomas, B. Ketley, *Luftwaffe KG 200: The German Air Force's Most Secret Unit of World War II*, Mechanicsburg 2015, p. 77.

Photo 2. American Flying Fortress B-17G in the Luftwaffe colors. Incorporated into KG 200, visible Luftwaffe markings on the lower surface of the wing and the side fuselage, along with the national emblem of the Third Reich

Source: unknown author, https://upload.wikimedia.org/wikipedia/en/thumb/5/57/B17_kg200.jpg/250px-B17_kg200.jpg (accessed: 27.12.2020).

Photo 3. Polish fighter aircraft PZL P.7a in German colors with Luftwaffe markings applied

Source: unknown author, http://www.samolotypolskie.pl/uploads/Products/product_2397/PZL_P-7a_niemcy.jpg (accessed: 27.12.2020).

The second situation is the lack of national identification marks altogether. The 1987 ICRC commentary stated that combatants could immediately use captured equipment belonging to the enemy, provided that the enemy's markings had been removed.[59] The commentary does not address the existence of a similar right regarding military aircraft. It seems that in the context of the law of air warfare the above-mentioned practice is not allowed for three reasons. Firstly, only military aircraft are authorized to exercise the rights of belligerents, and one of the prerequisites for maintaining this status is the possession of external markings indicating affiliation with the air force of a given state. Secondly, the lack of military aircraft marking may have consequences for the crew since their combatant rights might not be acknowledged (as indicated by I. Detter de Lupis). Thirdly, pursuant to the provisions of Article 48 of AP I, parties to a conflict "are obliged to distinguish between the civilian population and combatants in all circumstances".[60]

4. Perfidy vs. ruses

In the history of the law of war, perfidy and ruses[61] have been distinguished right from the beginning. While the international law doctrine strongly condemned all behaviors involving the abuse of good faith in combatants, instances of *ruse de guerre* were considered a justified and legal practice.[62] Deceiving the enemy with regard to one's real intentions was considered consistent with war customs as long as it did not undermine the fundamental principles of trust between combatants (so-called lawful deception[63]). These actions might involve exploiting favorable circumstances, fabricating false intelligence data, or feigning specific movements – for example, warships sailing under a false flag were considered as such, except when a naval unit engaged in combat.[64] The use of new weapons, such as torpedoes or sea mines, by some combatants was often considered treacherous.[65] The above-mentioned customary rule was reaffirmed by regulations of the so-called

59 "For example, it is understood that a tank captured from the enemy on the battlefield may immediately be used against the adversary on condition that the emblems of nationality are removed" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 1576, p. 468.

60 G.D. Solis, *The Law of Armed Conflict*…, p. 225.

61 J. Risley, *The Law of War*, London 1897, p. 108; W. Manning, *Commentaries on the Law of Nations*, London 1839, p. 74.

62 C. van Bynkershoek, *A Treaties on the Law of War*, Philadelphia 1820, p. 3.

63 H.W. Halleck, *Elements of International Law and Laws of War*, Philadelphia 1866, p. 181.

64 L. Oppenheim, *International Law: A Treatise: Vol. II: War and Neutrality*, New York 1906, p. 165.

65 P. Bordwell, *The Law of War of War between Belligerents: A History and Commentary*, Chicago 1908, p. 134.

Lieber Code of 1863 (Article 101), the Brussels Declaration of 1874 (Article 14) and the Hague Regulations of 1907 (Article 24).

As part of the AP I draft, it was decided to combine the concepts of perfidy and ruses within a single provision. Perfidy was defined as an action with the intention of accomplishing treacherous deceit of the enemy – understood as "creating falsely a situation in which the adversary feels obliged by a legal or moral rule to abstain from any hostile act or to neglect to take precautions which would be in fact necessary, thereby putting himself at a disadvantage".[66] The enumeration of situations related to: 1) pretending to be in a state of necessity, in particular the abuse of international marking, 2) feigning intention to surrender, and 3) combatants wearing civilian clothes. A decision was made to recognize as ruse of war that, without undermining the enemy's trust, lead to their deception or force them to act carelessly, such as the use of camouflage, traps or disinformation.[67] During the work of the conference from 1974 to 1977, it was argued that the concept of perfidy encompasses a legal pretense, with particular emphasis placed on simulating surrender to kill the enemy.[68] A part of the delegation expressed doubts regarding the presented definition of perfidy (among other things, well-grounded postulates were put forth by R. Bierzanek, pointing to the need for a precise formulation stipulating that perfidy is an action contrary to international law). An important remark was made by the Belgian delegate, pointing out that the provision stipulates the prohibition of perfidy and may become a supplementary part of the relevant criminal law in the future; therefore, it is necessary to specify it precisely.[69] Erik Castrén pointed out that the wording proposed is erroneous in classifying examples of perfidy and ruses.[70] The United States delegation stated that AP I changes with regard to the combatant status eliminated the requirement to wear uniforms.[71]

The working group's report indicates that the essential dimension of the prohibition is the broadly understood neutralization of the enemy in order to betray their trust – the combatant must, in this regard, use the trust of the enemy (indicated in the provision as good faith) resulting from the circumstances. Hence, for example, feigning death in order to save life is not perfidious under this provision, because it does not meet the condition requiring the intention to kill or otherwise eliminate the enemy.[72] This trust resulted from the provisions of

66 ICRC, *Draft Additional Protocols*…, p. 43.

67 *Ibidem*, p. 42.

68 CDDH/III/SR.27, para. 66, p. 255.

69 CDDH/III/SR.27, paras. 76–77, p. 257.

70 CDDH/III/SR.27, para. 11, p. 261.

71 "There was, in fact, no rule in draft Protocol I which required combatants to wear uniform, nor did he know of any recognized definition of What constituted a uniform" – CDDH/III/SR.27, para. 23, p. 264.

72 "Additionally, it should be noted that, in order to be perfidy as an act must be done «with intent to betray» the confidence created. That was intended to mean that the requisite intent would be to kill injure or capture by means of the betrayal of confidence" – CDDH/236/Rev. 1, p. 382.

international law applicable in armed conflicts.[73] Such a broad understanding of perfidy means that the construction of Article 37 of AP I will also apply to actions not directly regulated by the provisions of AP I, including naval and air warfare.[74] Hence, treachery *per se* is based on a directional intention (*dolus directus coloratus*).[75] Doubts were raised by the requirement to distinguish combatants from civilians – as contrary to the new provisions of AP I (e.g., Article 44 para. 3 of AP I). Some states drew attention to the above-mentioned circumstances during the explanations given before the vote, but the provision of Article 37 of AP I was adopted by consensus.

Article 37 of AP I prohibits perfidy.[76] Para. 1 indicates that it is prohibited to make the adversary incapable of fighting by exploiting their good faith in order to make them erroneously believe that they are obliged to accord protection under the rules of international law or that the adversary has the right to protection, invoking the rules mentioned above. For instance, the third sentence highlights examples of perfidy in the form of feigning 1) capitulation, 2) incapacitation by wounds or sickness, 3) the status of a non-combatant or a civilian, 4) use of the uniforms of the United Nations or of neutral states. The characteristic of the above regulation is the deliberate feigning of the status, situation or person protected under international law in order to confuse the adversary (by using their trust) and ultimately eliminate them (by wounding, killing or capturing).

The 2009 HPCR Manual confirmed the validity of the provisions on perfidy and ruses of air warfare, highlighting the key element of betraying the trust of the hostile combatant, resulting in their killing or wounding – experts raised doubts when assessing whether acts such as capturing a combatant or, for example, destroying a specific asset, are covered by the prohibition of perfidy. The commentary emphasizes that the prohibition of perfidy is effective on the grounds of international humanitarian law, first of all mentioning the use of an ambulance as a means of transporting combatants, which is an abuse of the combatant's trust, but not prohibited *per se* in the light of the provisions of Article 37 of AP I (as it

73 "The Committee agreed that confidence could not be an abstract confidence but must be tied to something more precise and should not be tied to internal or domestic law. In the end, it was decided to refer to confidence in protection under «international law applicable in armed conflicts», by which was meant the laws governing the conduct of armed conflict which were applicable to the conflict in question" – CDDH/236/Rev. 1, para. 15, p. 381.

74 "This is a relatively wide interpretation, and consequently the definition of perfidy extends beyond the prohibition formulated in the first sentence. For example, it encompasses war at sea, even though this subject is not dealt with in the Protocol" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 1500, p. 435.

75 "The difference between that and an unlawful act committed by a true prisoner of war lay in the perfidious intent" – CDDH/III/SR.27, para. 66, p. 255.

76 J. Crowe, K. Weston-Scheuber, *Principles of International Humanitarian Law*, Northampton 2013, pp. 65–66.

does not lead to kill, injury or capture of the adversary). This means that perfidious acts are in general a violation of international humanitarian law, but not all of them are penalized under the Rome Statute of the ICC – only those that ultimately result in the neutralization of the opponent. Rule No. 112 listed prohibited behaviors applicable in the context of air warfare. In addition to the conventionally recognized examples listed above, such as: 1) feigning the status of a protected or civilian person, 2) misuse of the Red Cross emblem or other symbols protected under international humanitarian law, the rule also covered the following prohibited acts: 3) the use of flags signaling surrender and 4) the use of the adversary's national insignia. In the case of air operations, it was acknowledged that an aircraft in flight is not able to raise a flag of surrender. However, ground forces may simulate an intention to surrender in order to avoid an aerial attack – it was emphasized that any simulated use of a truce flag is considered illegal. The crew of a military aircraft may use, for example, radio communication to signal their intention to surrender. The maneuver of landing is considered insufficient in this respect.[77] While Rule No. 128 of the manual granted the crew the right to surrender, as the commentary puts it "[…] the practice of air warfare does not reveal any commonly accepted indication of an aircrew's wish to surrender".[78] The same standard was indicated with regard to the use of incorrect markings characteristic of the enemy's military aircraft.[79]

Rule No. 114 indicated practices related to the recognition of certain behaviors as perfidious during military operations conducted in airspace. The first was simulation of a medical or civilian aircraft. For example, a military aircraft may use transponders and frequencies characteristic of a civilian aircraft. The commentary also emphasized the possibility of applying civilian markings to the surface of a military aircraft, e.g., registration numbers reserved for civilian use. This act was considered equally impermissible as actions of combatants disguising themselves in civilian clothing, emphasizing that in practice, marking a military aircraft with civilian symbols always suggests a deliberate act. The second important issue was the use of low-visibility markings. According to the commentary, the use of less visible markings was not treated as simulating a civilian aircraft.[80] Interestingly, the removal of state designations from the deck of a military aircraft was treated as the lack of one of the necessary elements defining a military aircraft and meant that the aircraft would be prohibited from exercising combatant privileges, which included carrying out attacks. In air warfare, the following acts were considered improper, regardless of whether they were also considered perfidious: 1) an aircraft using signals reserved for emergency situations (however, the use of

77 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 311.

78 *Ibidem*, p. 329.

79 *Ibidem*, p. 307.

80 *Ibidem*, p. 309.

friend-or-foe identification systems was not considered prohibited in this regard), 2) the use of any type of aircraft other than a military one as a means of attack.

Article 37 para. 2 of AP I stipulated that ruses are legal. This provision was structured according to the *a contrario* model. A ruse, like perfidy, is intended to mislead the adversary or to make them act recklessly, but it does not undermine the adversary's confidence in the protection provided by international law and does not violate other provisions of international law *per se*.[81] The second sentence of Article 37 of AP I, para. 2 lists examples of ruses – one of them being the application of camouflage.

5. Camouflage in air warfare

The use of camouflage by military aircraft (from the French *camoufler* – to conceal). During World War I, it quickly became a practice accepted by all combatants.[82] James M. Spaight pointed out that, in his opinion, the use of camouflage colors became a legal practice, even recognizing the right of combatants to copy camouflage patterns.[83] The German Luftstreitkräfte used a characteristic camouflage pattern during World War I – referred to as *Lozenge*. Masking patterns in their very essence are considered a legal ruse, aimed at reducing the chances of detection by the enemy. However, the use of protective color patterns did not mean eliminating one's own nationality markings – due to the need for quick visual identification by Allied units or other military aircraft. As a result, German aircraft used the distinctive *Balkenkreuz* emblem during the entire Great War. This practice was widespread in other states in the interwar period – each state used its own individual camouflage pattern. Certain types of aircraft required special marking, so-called quick identification marks (an example of those include the Messerschmitt Bf 109 aircraft with yellow nose and wingtip, and the invasion stripes used by the Allies during Operation "Overlord").[84]

The AP I commentators pointed out that the existing legal provisions would not eliminate all doubts related to the division of actions into treacherous

81 R. Bierzanek, *Wojna a prawo międzynarodowe* [*War and International Law*], Warszawa 1982, p. 211.

82 Camouflage – understood as an artistic element that replicates animal behavior. Initially, it emerged as a post-impressionism movement – French painters were later employed by the French government during World War I to design new camouflage patterns.

83 J.M. Spaight, *Air Power*…, p. 79.

84 This requirement was linked to the fact that some types of military aircraft – such as the Messerschmitt Bf 109 and the North American P-51 Mustang – were similar to each other.

and perfidious. Fritz Kalshoven and Liesbeth Zegveld argue that perfidy is result-oriented and that only the achievement of the objective, i.e., neutralizing the adversary, complements the prohibition of perfidy in a necessary manner.[85] Importantly, the provision has a purely personal dimension, meaning that the result of a perfidious act is to cause harm to a person, rather than to damage material goods.[86] The commentators of the AP I emphasized the necessity to distinct between perfidy, ruses and illegal ruses.[87] Acceptable ruses included various acoustic elements, creating optical illusions by setting up dummy military equipment, fabricating radio messages, simulating attacks, using diversionary tactics, and removing national symbols from uniforms (which may seem *prima facto* controversial but aligns with the general requirement that a uniform fulfills the premise of distinguishing combatants from civilians[88]). Anthony P.V. Rogers regards a legitimate ruse as a situation when a camouflaged tank allows its adversary to occupy a disadvantageous tactical position and then destroys it at close range.[89]

An example of the above doubts may be found in a case related to air operations over Serbia during the intervention of NATO in Kosovo. On March 24, 1999, one of the Serbian MiG-29s signaled serious problems with the on-board avionics to the pilot after takeoff. Since it was not possible to return to the home air base due to a NATO attack, the pilot decided to land at the Belgrade Nikola Tesla International Airport. In order to protect the valuable fighter from destruction, it was parked under the tail of a civilian passenger aircraft after landing. This event is confirmed by a photo taken during NATO reconnaissance.

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85 "Even then, the combatant feigning death with intent to kill or injure becomes guilty of a violation of Article 37(1) only if he actually kills or injures the adversary" – F. Kalshoven, L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Cambridge 2011, p. 94.

86 "Importantly, perfidious action that results in damage but not in death, injury or capture does not constitute a breach of the law of armed conflict and, by extension, does not amount to a war crime" – W.H. Boothby, *Cyber Deception and Autonomous Attack – Is There a Legal Problem?* [in:] K. Podins, J. Stinsissen, M. Maybaum (eds.), *5th International Conference on Cyber Conflict*, Tallin 2013.

87 "Any ruse based on the violation of a rule of the Protocol by the wrongful use of emblems of a particular nationality, for example, in violation of Article 39 (Emblems of nationality) is a prohibited ruse, rather than an act of perfidy, in the sense of the Protocol at any rate. If this form of deception in addition invites the confidence of the adversary with regard to the protection provided for by the law of armed conflict, for example, by using the uniforms of neutral states, it does constitute an act of perfidy. Thus, a distinction should be made between a ruse, a prohibited ruse, and an act of perfidy" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 1515, p. 441.

88 "Organizing simulated parachute drops and supply operations; moving land marks and route markers or altering road signs; removing the signs indicating rank, unit, nationality or special function from uniforms" – *ibidem*, para. 1521, p. 443.

89 A.P.V. Rogers, *Law*…, p. 37.

Photo 4. Satellite photo of the Belgrade International Airport, showing a MiG-29 belonging to the Serbian Air Force parked under the cover of a passenger aircraft

Source: https://www.nato.int/pictures/1999/990419/b990419c.jpg (accessed: 27.12.2020).

The pilot's behavior may raise serious doubts in the light of the findings made. In the author's opinion, the circumstance described is an example of an illegal ruse, which at the same time did not violate the prohibition of perfidy. The MiG-29 did not simulate civilian status – it maintained its military character; it was placed under the tail of a civilian passenger aircraft to find protection from an attack. Moreover, in order to be covered by the prohibition of perfidy, the MiG-29's civilian disguise would have had to cause an outcome like killing, wounding, or capturing the adversary. On the other hand, the same behavior is a violation of the instruction of Article 51 para. 7 of AP I, as it is the use of the presence of civilians or civilian objects for protection against an attack. The limit of the legality of a *ruse de guerre* is non-violation of the provisions of international law and the good faith of the adversary.[90] There is no doubt that a civilian aircraft – especially one withdrawn from

90 "[…] deceptive measures which neither infringe a rule of law nor invite the confidence of an adversary with respect to its protection" – R. Clarke, *The Club-K Anti-Ship Missile System: A Case Study in Perfidy and its Repression*, "Human Rights Brief" 2012, vol. 20, p. 23; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge 2016, p. 275; D. Richemond-Barak, *Underground Warfare*, Oxford 2018, p. 172.

service – is not a lawful military target within the meaning of Article 52 para. 2 of AP I. In the above situation, a possible decision to attack the Serbian MiG-29 would have had to involve the application of the rule of proportionality. Under these specific conditions, an obsolete passenger aircraft would not have been an obstacle to attack *per se* (assuming that there were no civilians on board), unlike the possibility of damage to the infrastructure of an international airport.

Photo 5. A photograph showing Iraqi warplanes located next to ancient ruins in Iraq

Source: https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.getty.edu%2Fpublications%2Fcultural-heritage-mass-atrocities%2Fpart-5%2F28-sagan%2F&psig=AOvVaw2KjKNJUEs5qLxzoQFDugiB&ust=1749933489703000&source=images&cd=vfe&opi=89978449&ved=0CBQQjRxqFwoTCJj59rGg740DFQAAAAAdAAAAABAl (accessed: 27.12.2020).

The placement of Iraqi fighter planes around ancient temples during the First Gulf War in order to protect them from a possible coalition attack was a different matter. It should be noted that these fighters, although they may be classified as a military target by nature, pursuant to Article 52 para. 2 of AP I, in the circumstances presented in the photo, were not significantly contributing to military operations due to their lack of armament and a suitable airstrip. Their placement was therefore intended to preserve them. Michael Lewis argued that an attack on the Iraqi machines could also have led to a violation of the rule of proportionality,

considering that the level of damage would have been excessive in relation to the military advantage gained from the air attack.[91]

As a side note, it is worth noting that the literal interpretation of Article 37 of AP I applies only to cases related to persons, e.g. feigning civilian status. This may lead to some doubt as to whether this provision can also apply to objects or material goods. However, a similar dimension of linguistic depersonalization occurs in relation to Article 52 para. 1, which only addresses military purposes. Despite the above, there is no doubt that a combatant may be considered a military target pursuant to Article 43 of AP I and likewise regarding Article 37 of AP I.[92]

An interesting part of the above discussion is the capability of modern, autonomous combat vehicles employing stealth technology, understood not only as invisibility to radars, but also as various systems causing physical objects to blend visually with the terrain. This phenomenon is referred to as the use of so-called active camouflage, which operates according to the principle of optical illusion. Currently, it involves the use of the latest LED technologies, and it helps an object blend completely with the terrain, potentially masking it to the fullest possible extent. In 2017, an official requirement for such devices was reported in the U.S. Air Force transport aviation, where concerns arose regarding the survivability of large aircraft such as tankers, early-warning planes, and airlifters in the context of a conventional conflict.[93]

Kaitlin J. Sahni claims that active camouflage technology is not inherently illegal. He argues that despite a soldier's invisibility, they still physically exist, which meets the requirements of presenting a distinctive badge, and overtly bearing arms. A similar view applies to the masking of military objectives in order to make them resemble civilian objects. The author also argues that the mere use of technology does not necessarily imply an intent to undermine the adversary's good faith in

91 "The Iraqis would thus have borne responsibility for any damage to the temple in an attack on the MiGs.' Nevertheless, the decision was made not to attack these aircraft, partly because they were positioned in such a way that they could not be readily armed and launched, and therefore did not confer any military advantage on the enemy (military necessity). They were also not attacked because their military value as aircraft was determined to be outweighed by the risk of damage to the historical religious site (proportionality). Clearly, then, these two concepts are closely related and can, at times, be indistinguishable" – M. Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, "The American Journal of International Law" 2003, vol. 97, p. 488.

92 "But under the Additional Protocol I definition, camouflaging as civilian or protected objects seem to be permissible. Those installations would be camouflaged so they would not be attacked and destroyed, thus the camouflaging lacks the requisite intent to kill, wound, or capture. Or if an army camouflages an arms factory as a less valuable military target like a garment factory, it would seemingly be a ruse, even if the continued existence of the arms factory resulted in more enemy deaths. The lesson, then, is that camouflage is not always easily identified as a ruse". However, doubts arise in this regard as to whether AP I outright excludes the possibility of imitating a protected object. M. Greer, *Redefining Perfidy*, "Georgetown Journal of International Law" 2015, vol. 47, p. 260.

93 K. Mizokami, *The Air Force Wants a "Cloaking Device" for its Tankers*, 2017, http://www.popularmechanics.com/military/aviation/a25962/the-air-force-wants-a-cloaking-device-for-its-tankers/ (accessed: 22.12.2020).

all circumstances.[94] William H. Boothby presents a different perspective on this matter. Firstly, the British author points out that active camouflage has far-reaching consequences beyond conventional camouflage, as it ultimately also camouflages weaponry – something he considers a violation *per se* of the minimum standard for distinguishing combatants. Secondly, the use of active camouflage, especially one that can mimic a different shape, may be classified as an example of perfidy if such deception exploits the adversary's good faith regarding the nature of an object.[95]

First and foremost, it should be emphasized that the defensive use of active camouflage is not equivalent to perfidy in every situation, such as when a given vehicle is being concealed to avoid detection without simultaneously engaging in offensive actions. What is decisive is the behavior of the combatant at the moment of engaging in combat. This means that active camouflage should not function as a permanently enabled feature, as this would blur the distinction between actions taken for defensive or offensive purposes. However, implementing such a specification in air warfare is particularly challenging. For example, as M. Madden points out, the use of civilian markings to occupy a position which is advantageous for launching an attack and changing them to military markings just before its commencement is, in his assessment, an instance of perfidious behavior (because it was used to gain an advantage).[96] In addition, what is important in the context of air warfare, the possible use of camouflage should not lead to the complete concealment of symbols manifesting the aircraft's affiliation – since, according to customary practice, even though these signs may be strikingly apparent, they must still be visible in order for a given aircraft to be classified as military and be entitled to exercise the rights of belligerents.

Rule 115 of the HPCR Manual of 2009 indicated permissible examples of ruses of war during air warfare. The first is a ploy intended to mislead the enemy in order to draw false conclusions e.g., such as one regarding the direction of the planned air strike. The second is disinformation, e.g., behavior of a military aircraft in a manner similar to the enemy's aircraft in order to attack a hostile base. The third legitimate ruse is to employ false identification signs (but not national insignia) in order to weaken the opponent's vigilance (but not undermine their trust) – e.g., by using incorrect friend or foe identification (IFF) or creating false radar images. Another example in this respect may be the general use of stealth tactics to weaken the enemy's ability to detect a military aircraft (rule 116(e)).[97] The last practice considered legal is the use of fake structures, e.g., mock-ups or dummies.

94 See: K.J. Sahni, *The Legality of Invisibility Technology in Modern Warfare*, "Georgetown Law Journal" 2015, vol. 105, p. 1665.

95 W.H. Boothby's opinion in O. Bowcott, A. Ross, *Military 'invisibility cloaks' could breach Geneva conventions*, 2016, https://www.theguardian.com/science/2016/mar/14/military-invisibility-cloaks-stealth-could-breach-geneva-conventions (accessed: 27.12.2020).

96 M. Madden, *Of Wolves and Sheep*…, p. 455.

97 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 316.

6. Markings of military aircraft

It is worth noting that in accordance with the principle set out in Article 7 of the Hague Rules of Air Warfare, external signs must be: 1) permanent, and 2) of appropriate size and be visible from 3) below, 4) from above 5) and from each side.[98] This implies that aircraft should be visibly identifiable from every perspective. Article 3 of the 1923 rules stipulated that a military aircraft should have an external state badge (singular), which at the same time announced the military nature of a given aircraft – usually as a distinctive sign of the air force serving a given state.[99] However, the practice of states in this respect was not uniform. It is worth examining the photos below.

Photo 6. German aircraft Halberstadt CL.II. Markings of the German Luftstreitkräfte on all surface planes of the aircraft. Double markings on the side plane – also on the stabilizer. The so-called Lozenge camouflage draws attention

Source: the author's photo; an aircraft from the collection of the Polish Aviation Museum in Krakow.

98 A. Gioia, *Neutrality in Air*…, p. 186.

99 M.N. Schmitt, *Air Law and Military Operations*, [in:] D. Fleck, T. Gill (eds.), *The Handbook of the International Law of Military Operations*, Oxford 2015, p. 362.

Photo 7. Macchi C.202 Folgore aircraft of the Royal Italian Air Force or Regia Aeronautica Italiana. The aircraft had characteristic signs of the Italian air force on the surface of the upper and lower wing (so-called fasces or lictor rods). There is no clear national marking on the fuselage of the aircraft – except for a white cross with the coat of arms of the Italian royal family on the stabilizer. Use of different markings on different surfaces of the aircraft. White identification strips were widely used. A characteristic type of camouflage of the Italian air force in World War II

Source: unknown author/public domain, https://commons.wikimedia.org/wiki/File:Macchi_MC.202_72ª_Squadriglia_Caccia_17°_Gruppo_CT_Regia_Aeronautica.jpg (accessed: 27.12.2020).

Photo 8. An interesting photo of two Messerschmitt Bf 109 fighters. The one in the foreground belonging to the German Luftwaffe, and the one in the background to the Romanian Air Force. Clear *Balkenkreuz* markings on the upper surface of the wing and the side surface of the fuselage, the official state emblem of the Third Reich on the stabilizer, yellow identification stripes and the organizational number. A similar scheme was used on the aircraft of the Romanian Air Force, with such change that the marking of the Romanian Air Force was also applied to the stabilizer

Source: unknown author, https://pl.pinterest.com/pin/512425263822315960/visual-search/?cropSource=6&h=227&w=491&x=51&y=260 (accessed: 27.12.2020).

Photo 9. Photo of the original PZL P.11c located in the Aviation Museum in Krakow, belonging to the 2nd Aviation Regiment of Krakow, 121 Fighter Squadron, flown by 2Lt. Wacław Król in September 1939. Polish aviation markings placed on the lower and upper surface of the wing and on the stabilizer. The markings on the lower surface of the wing are of considerable size. It should be noted that the markings on the lower surface of the wing were applied without the use of white paint, and therefore the marking of this aircraft was one of the first examples of the use of low-visibility markings, in order to find a compromise between camouflage and the often bright color of the national insignia. The squadron's conspicuous individual badge and blue identification strips are noteworthy

Source: the author's photo; an aircraft from the collection of the Polish Aviation Museum in Krakow.

Photo 10. British Supermarine Spitfire of the Royal Air Force. It is noteworthy that as many as 4 different markings in the colors of the United Kingdom flag are placed on the upper and lower surface of the wing and fuselage. A characteristic element is the so-called fin flash – identification mark on the stabilizer

Source: the author's photo; an aircraft from the collection of the Polish Aviation Museum in Krakow.

Photo 11. P-40 Warhawk aircraft. There is a marking on the upper surface of the wing only over the left wing tip. There is a marking on the lower surface of the wing on the opposite side, also singular. The sign of the United States Army Air Forces is on the fuselage

Source: unknown author, Commons/Wikimedia/Public domain, https://commons.wikimedia.org/wiki/File:Curtiss_P-40_Warhawk_USAF.JPG (accessed: 27.12.2020).

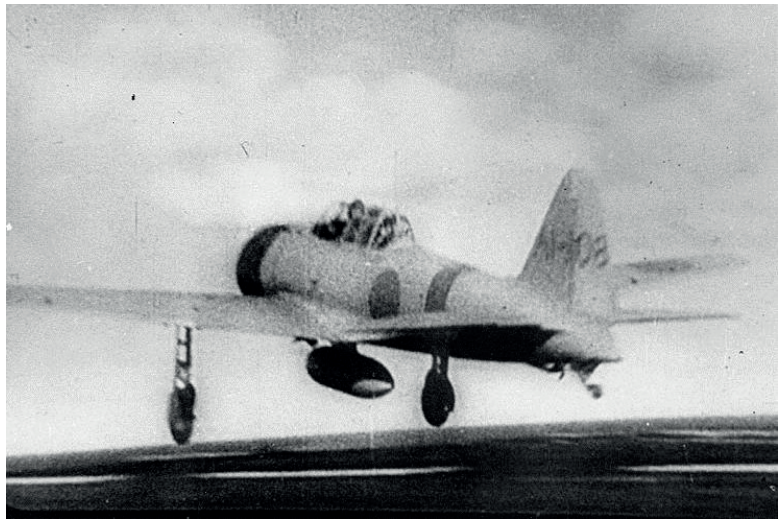

Photo 12. Mitsubishi A6M5 Zero aircraft of the Imperial Navy carrier air force. Uniform markings of the air force (the sign of the rising sun) on all wing surfaces and on the fuselage

Source: unknown author, Commons/Wikimedia/Public domain, https://commons.wikimedia.org/wiki/File:Jap_Zero_leaves_Akagi-Pearl_Harbor.jpg (accessed: 27.12.2020).

Photo 13. Mikoyan-Gurevich MiG-3 fighter aircraft of the Soviet Union Air Force. The lack of national marking on the upper surface of the wing is noteworthy. Double placement of the Red Star sign on the side surface of the fuselage and the stabilizer

Source: unknown author, https://pl.wikipedia.org/wiki/Plik:Mig-3_(14443606821).jpg (accessed: 27.12.2020).

Photo 14. German Focke-Wulf Fw 190 fighter from the final period of World War II. The change in the designation of the air force and the use of a low visibility pattern are noteworthy

Source: unknown author/public domain, https://web.archive.org/web/20220325095849/https://ww2db.com/images/air_fw190_5.jpg (accessed: 31.07.2025).

Photo 15. French aircraft Fouga Magister of the French Air Force. The marking with French aviation signs on all surfaces (upper, side and lower) is noteworthy

Source: the author's photo; an aircraft from the collection of the Polish Aviation Museum in Krakow.

It is worth noting the livery patterns which were in force in Polish aviation during the Polish People's Republic. Following the Soviet model, the placement of air force signs on the upper surface of the wing was abandoned. Instead of them, markings were painted on the side surface of the fuselage and the stabilizer.

Photo 16. A Soviet-built Su-22 fighter-bomber aircraft of the Polish Air Force in a livery from the early 1990s. No signs of Polish aviation on the upper surface of the wing. Double markings on the side surface

Source: the author's photo; an aircraft from the collection of the Polish Aviation Museum in Krakow.

Photo 17. WSK Lim-2 aircraft in the livery which was in force in Polish aviation during the Polish People's Republic

Source: the author's photo; an aircraft from the collection of the Polish Aviation Museum in Krakow.

A new scheme of painting the signs of the Polish Air Force returned to the practice of painting signs on the upper wing surfaces.[100]

100 "On military aircraft, the air force checkerboard is placed on the airframe: 1) of the aircraft – on both sides of the vertical stabilizer (in the case of a twin vertical tail, only on the outer surfaces of the vertical stabilizers) and on the upper and lower surfaces of the left and right wing (in the case of a biplane – on the lower surfaces of the left and right lower wing and on the upper surfaces of the left and right upper wing)" – § 20(1) of the Regulation of the Minister of National Defense of May 4, 2009, on the method of using the symbols of the Armed Forces of the Republic of Poland (Journal of Laws of 2015, item 1133, as amended), amended by the Regulation of the Minister of National Defense of February 6, 2012. A comprehensive study on the markings of Polish military aircraft can be found in R. Tarnogórski, *Oznaczenie polskich samolotów wojskowych w świetle prawa międzynarodowego* [*Markings of the Polish military aircrafts in the light of international law*], "Sprawy Międzynarodowe" 2012, vol. 3, pp. 81–97.

7. Markings with reduced visibility. Markings of unmanned aerial vehicles

The marking of a military aircraft with a marks in gray (so-called low visibility markings) alone, although *prima facie* it does not meet the conditions of visibility, is not considered a violation of the customary norm by states and currently it seems to be its approved modification.[101] According to I. Henderson, the use of so-called reduced visibility signs testifies to a weakening of the practice of states regarding the obligation to mark military aircraft with a distinctive sign of nationality. In the opinion of the Australian author, the law of air warfare thus aims at standardization with the law applicable to land warfare, where there is no obligation to mark land vehicles.[102] Also, from the perspective of international aviation law, the status of a military aircraft is only determined on the basis of being recorded in a military register. However, as indicated in the chapter below, this is not sufficiently measurable in the context of the law of air warfare. On the other hand, it should be noted that the latest information on the designation of unmanned aerial vehicles indicates that currently states have not abandoned the obligation to mark unmanned aircraft, and many authors continue to raise the need to maintain the above practice due to the specific requirements of military aircraft status.[103] Unmanned aircraft operation, in a sense, undermines the primary reason for using a distinctive national insignia, which was, among other things, intended to protect the crew members who are not uniformed from being denied their status as combatants or, more generally, to enable them to exercise combatant rights.[104] The marking of military aircraft also loses significance in the era of the electronic IFF system, which is based on the so-called e-marking of military aircraft. On the other hand, the characteristics of modern air warfare suggest that, due to the speed attained by combat aviation, there are no obstacles to using even bright, conventional colors of state markings, as they do not degrade the camouflage of a given aircraft. Furthermore, according to the customary nature of the norms outlined in the Hague Rules of Air Warfare of 1923, only properly marked

101 *Ibidem*, p. 94.

102 I. Henderson, *Unnamed Aerial Vehicles: Do They Pose Legal Challenges?*, [in:] H. Nasu, R. McLaughlin (eds.), *New Technologies and the Law of Armed Conflict*, The Hague 2014, p. 198.

103 W.H. Boothby, *How Far Will the Law Allow Unmanned Targeting to Go?*, [in:] D. Saxon (ed.), *International Humanitarian Law and the Changing Technology of War*, Leiden 2013, p. 49; *idem*, *The Law of Targeting*, Oxford 2012, p. 280; M. Wagner, *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia*, Oxford 2017, p. 1284.

104 Interestingly, K. Ipsen pointed out that the obligation to apply state affiliation markings applies exclusively to manned military aircraft; K. Ipsen, *Combatants and Non-Combatants*, [in:] D. Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford 2013, p. 100.

military aircraft are allowed to exercise the rights characteristic of combatants, which include participation in hostilities.[105]

Knut Ipsen emphasizes that only military aircraft can perform acts of hostility, and the necessity to bear distinctive marking results from the provisions of Article 44 para. 3 of AP I ordering combatants to distinguish themselves from non-combatants, in the context of air warfare, the author considers this to be an obligation to distinguish between civilian and military aircraft.[106] It should be noted that in the context of land operations, there is no explicit obligation to mark land forces vehicles, e.g., those equipping armored troops, with nationality marks (pursuant to Article 39 of AP I, only the use of false markings is prohibited). In this case, just the fact that the vehicle is of a special nature, which does not occur in civilian use, makes it sufficiently distinguishable from other civilian objects.

The characteristics of air operations, as well as the fact that many types of aircraft are produced for both civilian and military use, mean that the issue of distinctive marking becomes significantly more important than in land operations, bringing this issue closer to the conditions prevailing in naval warfare. Secondly, states are obligated to mark military aircraft on a customary basis, pursuant to the 1923 Hague Rules of Air Warfare.[107] Thirdly, if a non-uniformed member of the armed forces pilots a properly marked military aircraft, they are entitled to combatant status.[108] This is due to the fact that the obligation to distinguish the combatants is already fulfilled by the existence of the correct designations of a given military aircraft.[109] Yoram Dinstein, however, points out that in the event of a crew member being separated from their aircraft, the need to distinguish combatants from the civilian population returns.[110] The above-mentioned necessity is reaffirmed by rule 117 of the HPCR Manual of 2009, which provides for the obligation to distinguish crew members during combat operations in the event of separation from their own aircraft. The commentary on the rule states that while the obligation to distinguish oneself is fulfilled during the flight by presenting external symbols of nationality, in the event that the crew of a military aircraft become separated from it, the obligation to distinguish themselves is reactivated. Failure in this regard may not automatically lead to deprivation of prisoner-of-war status, but failure

105 W.H. Boothby, *How Far Will the Law*…, p. 49.

106 K. Ipsen, *Combatants*..., p. 111.

107 I. Henderson, *International Law Concerning the Status and Marking of Remotely Piloted Aircraft*, "Denver Journal of International Law and Policy" 2011, vol. 39, pp. 624 ff.

108 K. Ipsen, *Combatant*…, p. 111.

109 "While there is some debate about whether the military crew of a manned aircraft needs to wear uniform, the better view is that they do not. This is because in a properly marked military aircraft, sufficient distinction from the civilian population is achieved merely by being on board the aircraft and there is no positive requirement to wear distinguishing military uniforms while on board" – I. Henderson, J. den Dulk, A. Lewis, *Emerging Technology and Perfidy in Armed Conflict*, "International Law Studies" 2015, vol. 91, p. 477.

110 Y. Dinstein, *The Conduct of Hostilities*…, p. 53.

to comply with the above stipulation may expose the crew of a military aircraft to charges of spying or being treated as illegal combatants.[111]

The legal situation of an operator flying a UAV's or operating on board an unmarked aircraft which performs acts of hostility may raise doubts. In the author's opinion, this circumstance may be treated in the light of AP I of 1977 in the following way:

1. If a person is a member of armed forces, then regardless of their uniform, pursuant to Article 44 para. 1 of AP I they should enjoy combatant privilege by the very fact of belonging to armed forces.[112] However, they will lose this privilege if they fail to distinguish themselves from the civilian population during an attack and a military preparatory operation. In the context of air warfare, the marking of a military aircraft is considered sufficient to meet the condition of distinction. Is the uniform of a combatant piloting an unmarked aircraft sufficient to compensate for the lack of markings on it? It would seem not, since for an outside observer this external aircraft marking is a sign of its military status. Therefore, the lack of markings on a military aircraft and its operation by a member of armed forces (regardless of whether they are uniformed or not) may deprive them of the right to prisoner-of-war status under Article 44 para. 4 of AP I. In addition, under certain conditions (simulation of the civilian status of an aircraft), it may also constitute a perfidious act, or be treated as an act of espionage, as claimed by, for example, I. Detter de Lupis Frankopan.[113]
2. If a person is not a member of the armed forces, he/she is not entitled to prisoner-of-war status and may be held criminally liable for illegal participation in hostilities.

Consequently, one has to agree with I. Henderson's stance that from the operational and legal point of view, it is desirable to mark a military aircraft correctly.[114]

In conclusion, even though the recognition of aircraft under the conditions of modern air warfare is very rarely carried out by visual means, the practice of states confirms the validity of this rule, including in relation to unmanned systems, with three variations.

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111 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 317.

112 "A literal, historical and teleological reading of Article 4(A) thus shows that all captured members of regular armed forces automatically have prisoner-of-war status. The decisive criterion for entitlement to prisoner-of war status is solely membership in regular armed forces. Only non-integrated militias or volunteers would therefore have to undergo what some have termed the «legal test for prisoner-of-war status» in order to establish that they were operating in accordance with the four above-mentioned conditions" – T. Pfanner, *Military Uniforms and the Law of War*, "International Review of the Red Cross" 2004, vol. 862, p. 115.

113 I. Detter de Lupis Frankopan I, *The Law of War*, Cambridge 1987, p. 305.

114 "Accordingly, for both legal and operational reasons, the better view is that a military aircraft should be marked and not rely on silhouette" – I. Henderson, *International Law Concerning the Status*…, p. 10. See more: M. Piątkowski, *The Markings of Military Aircraft Under the Law of Aerial Warfare*, "The Military Law and the Law of War Review" 2020, vol. 58, pp. 63–84.

Firstly, practice allows asymmetric marking. The placement of at least one symbol of nationality is considered to meet the above criteria. It should also be pointed out that the modern shape of aircraft (e.g., delta-wing) makes it impossible to precisely delineate the fuselage or the stabilizer – elements traditionally found in aviation.

Secondly, marking aircraft with the use of so-called low-visibility signs is allowed. During World War II, the marking colors began to be replaced with less bright hues (paint schemes) to reconcile the requirement to use markings with camouflage, which is a permitted *ruse de guerre*. In modern military aviation, grey-scale or faded-in-color signs are very common. One of the next states to use this type of marking will be Poland, according to a decision made in 2024.

Thirdly, the armed conflict in Ukraine and the growing deployment of various types of unmanned vehicles by the belligerents indicate a new possible interpretation of the already existing rule, namely the treatment of certain types of aircraft as weapons/missiles exempt from the obligation to bear markings.[115] This refers primarily to loitering munitions and other kamikaze drones, which are characterized by one-off application. However, marking drones produced for commercial purposes and ad hoc adapted for the needs of military operations remains a problem. Considering these craft to be genuine "aircraft" must trigger the application of the rule whereby only military aircraft have the right to participate in hostilities, thus imposing the requirement to bear markings. However, the decisive factor here will be the states' approach towards the above-mentioned issue, in particular, to the proceedings related to the loss of the combatant or prisoner of war status (which also applies to the operators of these unmanned aerial vehicles). One should also remember about the prohibition of perfidy and possible scenarios in which an aircraft (drone) is feigning civilian status in order to capture, injure or kill the enemy.

Il. 1. The design of the air force checkerboard for reduced visibility is provided in Attachment No. 3 to the draft amendment to the Act on the Symbols of the Armed Forces of the Republic of Poland

Source: Journal of Laws of Republic of Poland 2025, item. 295.

115 M. Piątkowski, *Status amunicji krążącej w świetle międzynarodowego prawa humanitarnego* [*Status of loitering munition in the light of international humanitarian law*], "Międzynarodowe Prawo Humanitarne" 2023, vol. XIV, p. 148.

8. The obligation of wearing military uniforms by the crew of a military aircraft

Only combatants are entitled to commit acts of hostility, and thus have the right to be treated as prisoners of war as well as to so-called belligerent immunity, which protects them against being held responsible for mere participation in hostilities and prevents prosecution for acts in accordance with international law. The obligation to distinguish combatants from civilians is a fundamental factor affecting their status. The requirement of the Hague Regulations of 1907 imposed on combatants stipulates that they directly belong to the army of a given state or to the mass levy and volunteer troops, which 1) are led by a person responsible for their subordinates; 2) wear a permanent badge that is recognizable from a distance; 3) openly carry arms; 4) obey the laws and customs of war. However, the regulations concerning uniforms worn by members of regular armed forces were modified significantly under Article 4(A) of Third Geneva Convention of 1949 and the provisions of Articles 43 and 44 of AP I of 1977. The Commentary on Third Geneva Convention of 1949 emphasizes that the traditional requirements of the Hague Regulations should always be met in relation to regular armed forces, pointing out, however, that presentation of an identity card specified under Article 17 of the Third Geneva Convention is sufficient proof of affiliation.[116] For A. Szpak, this is proof that "the content of the Geneva Convention and the preparatory work for the convention, however, do not indicate any necessity for regular forces to meet these conditions [the requirement of military uniforms] in order to obtain prisoner of war status".[117] Article 43, para. 1 in conjunction with Article 44 para. 1 of AP I emphasizes that each member of armed forces becomes a prisoner of war when captured, and AP I commentators point out the irrelevance of military uniforms for a combatant belonging to regular armed forces.[118]

116 "The Convention does not provide for any reciprocal notification of uniforms or insignia, but merely assumes that such items will be well known and that there can be no room for doubt. If need be, any person to whom the provisions of Article 4 are applicable can prove his status by presenting the identity card provided for in Article 17" – J.S. Pictet, *The Geneva Conventions of 12 August 1949. Commentary: III Geneva Convention: Relative to the Treatment of Prisoners of War*, Geneva 1960, p. 52.

117 A. Szpak, *Międzynarodowe prawo humanitarne* [*International humanitarian law*], Toruń 2014, pp. 100–101.

118 "Wearing or not a uniform or outfit is not a decisive criterion for the status of the individual concerned, as we will see in the examination of Article 44 even though the command must require, subject to certain exceptions, that it be worn. Neither can a decisive criterion be found in the fact that individual combatants effectively respect the rules of international law applicable in cases of armed conflict" – Y. Sandoz, C. Swinarski, B. Zimmernann, *Commentary*…, pp. 512–513.

It should be strongly emphasized that the above stance has not been uniformly standardized in the doctrine and is a result of quite significant and fundamental discrepancies. It is argued that, in fact, there is no indication on the basis of Third Geneva Convention that membership of the armed forces alone entitles one to prisoner-of-war status or that the traditional requirements of the Hague Regulations apply only to militia or other volunteer units – such a justification was presented, for example, by the United States in relation to Taliban fighters captured during the first stage of Operation "Enduring Freedom" in 2001.[119] However, in the content of Article 44 para. 7 of AP I of 1977 a provision was included which complicates this assessment, as it specifies that said article cannot be interpreted as repealing the customary nature of the obligation to wear military uniforms incumbent upon the personnel of regular armed forces.[120]

Article 15 of the Hague Rules of Air Warfare stipulated the obligation for crew members to wear a permanent distinguishable sign in the event that the crew become separated from their military aircraft. In addition, it should be recalled at this point that, under Article 14 of the 1923 Rules, a military aircraft may be manned only by members of the armed forces. Joseph Kroell, in turn, pointed out that, in his opinion, there are practically no major doubts as to the status of combatants – crew members of military aircraft, emphasizing, however, the possibility of applying the requirements set out in the 1907 Hague Regulations to aviators.[121] As noted by J.M. Spaight, each branch of the military has developed its own model of distinguishing itself. In the case of land forces, this is a uniform, in the case of naval forces – a flag, while in the context of military aviation it is a symbol that it belongs to an air force.[122] Spaight noticed that the obligation to wear military uniforms by aircraft crew members was in no way a reason to deny them prisoner-of-war status, so he considered the above requirement pointless and impractical.[123] Evidence in the form of an identification document was sufficient in this matter.[124] Yoram Dinstein disagreed with this stance, considering the obligation to have a permanent distinguishing mark to directly stem from the provisions of Article 15 of the Hague Rules of Air Warfare and to become applicable at the moment of a crew member's separation from their military aircraft.[125]

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119 *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, [in:] K. Greenberg, J. Dratel, *The Torture Papers The Road to Abu Ghraib*, Cambridge 2005, p. 140. The justification states that although the conflict in Afghanistan in October 2001 was of an international nature, the failure of the Taliban to meet the criteria of the Hague Regulations of 1907 justifies the refusal to treat them in accordance with the standards set forth in the Third Geneva Convention of 1949.

120 G.D. Solis, *The Law of Armed Conflict*…, p. 239.

121 J. Kroell, *Traité de Droit international public aérien: L'Aéronautique en temps de guerre*, vol. II, Paris 1936, p. 212.

122 J.M. Spaight, *Air Power*…, pp. 76–77.

123 *Ibidem*, p. 102.

124 *Ibidem*, p. 104.

125 Y. Dinstein, *Unlawful Belligerency*, "International Law Studies" 2003, vol. 79, p. 161.

This is also confirmed by rule 117 of the HPCR Manual of 2009, which emphasizes the validity of the requirement stemming from the content of the 1923 document.[126]

In a sense, doubts are dispelled by the American *Air Force Operations and the Law* published in 2014, which states that military aircraft crew members are obliged to distinguish themselves from the civilian population on the same terms as other combatants – wearing a flight suit and external badges was considered sufficient.[127] In this respect, the instruction refers explicitly to the content of Article 15 of the 1923 Hague Rules of Air Warfare.

In the same context, the question arises as to whether aircraft crew members are required to carry arms openly when remaining outside an aircraft. It should be emphasized that both the doctrine and the Hague Rules of Air Warfare do not introduce such requirements. In this context, such circumstances are of a similar nature as in the case of naval warfare, where carrying arms by individual sailors is definitely of secondary importance, and prisoner-of-war status is contingent on being a crew member of a warship belonging to the opposite party and being under the enemy's control. A similar analogy in the case of aircraft crews is pointed out by E. Castrén, for whom the correct identification marking of a military aircraft is the most important.[128]

In any case, however, the obligation to visually identify oneself should be derived from the content of Article 44 para. 3, sentence 1, of AP I, which orders combatants to distinguish themselves from the civilian population at the time of attack or preparation for it.[129] This leads to the conclusion that air force personnel wearing full military uniforms (flight suits) and external badges is of the same importance as marking a military aircraft with national insignia. The lack of military uniform may (in certain circumstances) expose the crew of a military aircraft to charges related to breaching the obligation to distinguish themselves from the civilian population (Article 44 para. 3), espionage (Article 46, para. 2) or perfidy (Article 37, para. 1).[130]

Members of militia and volunteer units that are part of armed forces may find themselves in a similar legal position. This may be relevant in the context of the status of reserve units, such as the Air National Guard of the United States or the Royal Auxiliary Air Force.

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126 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 317.

127 "Uniform: Military aircrew on the ground are required to distinguish themselves from the civilian population in the same manner and in the same circumstances, as other combatants. The wearing of flying clothing distinctive to and bearing identifying marks or insignia of the armed forces satisfies this requirement" – Judge Advocate General School, *Air Force Operations*…, p. 23.

128 E. Castrén, *Ilmasota – kansainvälisoikeudellinen tutkimus*, Helsinki 1938, pp. 140–141.

129 S. Nabors, *A Right to Fight: The Belligerente's Privilege*, [in:] C. Samford, S. Zifcak (eds.), *Rethinking International Law and Justice*, Burlington 2015, p. 50.

130 L.C. Green, *The Contemporary*…, p. 142.

9. Rules governing the legality of military aircraft armament

9.1. Prohibition of causing superfluous injury or unnecessary suffering

A study by the ICRC in 1969 indicated that the regulations on equipping armed forces with a given type of weapon are divided into general and specific norms. The general norms included the provision of Article 22 of the Hague Regulations of 1907, stating that the right of belligerents to adopt means of injuring the enemy is not unlimited, as well as Article 23(e) of the Hague Regulations of 1907, forbidding the employment of arms calculated to cause unnecessary suffering. The second category includes all norms of a specific nature, dedicated to each type of weaponry.[131] In the 1960s, in connection with the restoration of the legal significance held by the principle of distinction, initiated by the adoption of UNGA resolution 2444/1968, the above scheme also began to include the prohibition of employing means and methods that could strike military and civilian targets without distinction.[132]

The Saint Petersburg Declaration of 1868, as part of its preamble, indicated important guidelines that should be followed by the international community with regard to admitting a given type of armament to the equipment inventory of armed forces.[133] The first premise was a reservation whereby achieving the goal of a political-military conflict cannot lead to employing unlimited means of harming the enemy. In this context, it was noted that it is sufficient to take only those actions that will result in the elimination of the enemy's armed forces – by killing or rendering a given person *hors de combat*. On the other hand, any behavior of the belligerent beyond this goal is prohibited, i.e., the use of weapons "which uselessly aggravate the sufferings of disabled men, or render their death inevitable" ("l'emploi d'armes qui aggraveraient inutilement les souffrances des hommes

131 21st International Conference of the Red Cross, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict*, Report submitted by the International Committee of the Red Cross, Geneva 1969, pp. 47–48.

132 ICRC, *Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects*, Geneva 1973, paras. 24–25; J. Tessier, *Shake and Bake: Dual-Use Chemicals, Contexts, and the Illegality of American White Phosphorus Attacks in Iraq*, "Pierce Law Review" 2007, vol. 6, pp. 326–327.

133 Y. Sandoz, *Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Convention on Certain Conventional Weapons)*, United Nations Audiovisual Library of International Law, 2010, p. 1, https://legal.un.org/avl/pdf/ha/cprccc/cprccc_e.pdf (accessed: 14.07.2025).

mis hors de combat ou voudraient leur mort inevitable").[134] The second premise is, therefore, drawing attention to axiological and medical factors related to the use of a given type of armament. In 1868, members of the international military commission recognized that explosive projectiles weighing under 400 grammes cause extensive injuries, and at the same time are not an indispensable type of ammunition, the prohibition of which would exclude the chances of military success. It was no secret that the new type of ammunition invented by the Russians turned out to be highly useful for piercing hard surfaces and causing explosions, but thanks to certain modifications could also be used against soft (human) tissues.[135] It was feared that the possible benefits of introducing this armament on a mass scale could soon lead to structural changes in other armies in the world – this was, of course, a result of cold political and military calculation.[136] Apart from the real reasons for which the states participating in the diplomatic conference in Saint Petersburg in 1868 decided to draw up the document, the Saint Petersburg Declaration established an important axiom in international humanitarian law, which served as the point of reference for later *ius in bello* documents determing what type of armament can be legally used in an armed conflict.

It should be noted that this criterion is of yet another potentially more serious significance. This formulates the question of whether the provisions of a general nature – i.e., Article 22, 23(g) of the Hague Regulations of 1907 and Article 35, para. 2 of AP I of 1977 may form a basis for prohibiting the use of a given weapon *per se*. The answer should be negative. According to H. Meyrowitz, this results from the literal interpretation of the Saint Petersburg Declaration of 1868, under which the states reserved the right to "come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops […]".[137] This is also confirmed by F. Kalshoven's stance.[138] During the diplomatic conference, the Prussian delegation proposed that the future

134 "Far from stopping at this, they went on to explain that even to achieve this essentially legitimate object not every method of warfare was permissible. Disabling the enemy, even the greatest possible number of men – yes, this was permissible but at the same time it was sufficient: more than this was excessive and, hence, inexcusable. And they drew the line at «the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable». Unnecessary suffering, inevitable death: such things were «contrary to the laws of humanity» and beyond the «necessities of war». Weapons entailing such evil consequences ought to be banned from use" – F. Kalshoven, *Wartime Use of Weapons: Legal History, 1868 to 1934*, "Collected Courses of the Hague Academy of International Law" 1985, vol. 191, p. 206.

135 J.A. Farrer, *Military Manners and Customs*, London 1885, pp. 2–3.

136 G.D. Solis, *The Law of Armed Conflict*…, p. 49.

137 H. Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977*, "International Review of the Red Cross" 1994, vol. 299, p. 117.

138 F. Kalshoven, *The History of International Humanitarian Law Treaty-Making*, [in:] R. Liivoja, T. McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict*, Oxon 2016, p. 35.

agreement should be universal and also applicable in the case of "future technical discoveries that may be applicable in armed conflicts".[139] However, this postulate was not accepted. As a result, the provision introduced is dual in nature. As indicated above, in the first place, the model adopted in the very content of the St. Petersburg Declaration of 1868 served as the basis for later treaty rules regarding new weapons. The axioms shaped by the document were a model for states deciding to outlaw a particular type of weaponry.[140] The second consequence, however, is that the ideas mentioned by the Saint Petersburg Declaration are only of an "inspirational" nature and cannot *in abstracto* determine the legality (or illegality) of other weapons – a requirement in this respect will be the conclusion of a dedicated agreement in the future.[141]

The schemes proposed on the basis of the 1868 Declaration were also written into the text of Article 13 of the 1874 Brussels Declaration. In Article 13(e) of the document, in addition to the ban on explosive ammunition weighing less than 400 grams apiece, indicates that weapons causing "excessive injury" (*maux superflus*) are prohibited.[142] Although the acceptance of the adopted provision took place without much discussion, some delegates were unable to interpret it unambiguously – it was argued that under this provision the intention was to outlaw weapons that have a cruel and inhumane purpose.[143] Article 23 of The Hague Regulations of 1899 contained a provision regarding the prohibition of using weapons calculated to cause excessive injuries (superfluous injury/*maux superflus*). The addition of the word "calculated" was considered a legislative error due to the subjunctivization of the concept.[144] During the preparatory work, some of the delegates used phrases such as "useless" or "unnecessary suffering".[145] It is worth

139 R. Mathews, T. McCormack, *The Relationship Between International Humanitarian Law and Arms Control*, [in:] H. Durham, T. McCormack (eds.), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, The Hague 1999, p. 69.

140 "In tandem with these principles, states have from time to time agreed to rules to the effect that certain named weapons are forbidden *per se*" – R.S. Clark, *Methods of Warfare that Cause Unnecessary Suffering or are Inherently Indiscriminate: A Memorial Tribute to Howard Berman*, "California Western International Law Journal" 1998, vol. 28, p. 384.

141 21st International Conference of the Red Cross, *Reaffirmation and Development*…, p. 48; Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 1415, p. 402; O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague 1996, p. 107.

142 "L'emploi d'armes, de projectiles ou de matières propres à causer des maux superflus", the original text of the Brussels Declaration of 1874.

143 Actes de la conférence de Bruxelles de 1874 sur le projet d'une convention internationale concernant la guerre: protocoles des séances plénières: protocoles de la commission déléguée par la conférence: annexes, Bruxelles 1874, p. 41.

144 S. Casey-Maslen, S. Well, *The Use of Weapons in Armed Conflict*, [in:] S. Casey-Maslen (ed.), *Weapons under International Human Rights Law*, Cambridge 2014, p. 257.

145 A speech by J. Ardagh, Third Meeting, June 22, 1899, J.B. Scott, *The Proceedings of the Hague Peace Conferences; Translation of the Official Texts. The Conference of 1907. Volume II. Meetings of the Second, Third and Fourth Commissions*, New York 1921, pp. 267–277.

noting the content of Article 23 of the Hague Regulations of 1899 began with the phrase "besides the prohibitions provided by special Conventions, it is especially prohibited", listing in Article 23(e) weapons, projectiles, or means calculated to cause excessive injury (J. Westlake mentioned examples such as weapons filled with glass, nails, and irregularly shaped pieces of metal).[146] In the context of torpedoes and naval mines, it was thought that since destruction (in terms of kinetic energy) is proportional to the effect, which was the destruction of a naval vessel, there occurs no transgression of the boundaries set by the paradigm established on the grounds of the 1868 Declaration.[147] The reports submitted in the course of the 1899 Conference emphasize that, in the context of "special conventions", the authors regarded the St Petersburg Declaration of 1868 and "any other regulations that may be introduced, especially in parallel with the Hague Convention" as such documents.[148] It is noteworthy that, in essence, the introduced provision modified the content of the complex reservation included in the Declaration of 1868, as it did not require the convening of another assembly to determine the legality of any new means of armament. *Prima facie* it is admissible that the participants of the diplomatic conference intended Article 23 of The Hague Regulations of 1899 to constitute an autonomous basis for assessing the legality of new weapons. However, at the diplomatic conference in 1899, the above conclusion turned out to be erroneous – the additional declarations submitted to the Convention of 1899 (among others, one of them was the XIV Declaration relating to aerial bombardment) included a regulation prohibiting the use of munitions that expand in the human body. If the national delegations were to recognize Article 23(e) of The Hague Regulations of 1907 as an autonomous basis for the prohibition of introducing the aforementioned weapons, new agreements and declarations would prove unnecessary.[149] This constitutes proof, confirmed with regard to other types

146 J. Westlake, *International Law. Part II: War*, Cambridge 1907, p. 82.

147 W.E. Hall, *A Treatise*…, p. 458.

148 "Article 23 begins with the words: «In addition to the prohibitions provided by special conventions, it is especially forbidden». These special conventions are first the Declaration of St. Petersburg of 1868, which continues in force, and then all those of like nature that may be concluded, especially subsequently to the Hague Conference. It seemed to the subcommission that the general formula was preferable to the old reading which mentioned only the Declaration of St. Petersburg" – Report Presented by Mr. Rlin, Annex to the Minutes of the Meeting of July 5, 1899; J.B. Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts, The Conference*, New York 1920, p. 424.

149 "It may be thought that Hague Convention IV of 1907 relative to the Laws and Customs of War on Land, Article 23 e, is broad enough to prohibit the use of expanding bullets. This article reads as follows: «In addition to the prohibitions provided by special conventions, it is especially forbidden: e.g. to employ arms, projectiles, or material calculated to cause unnecessary suffering». This article is identical with Article 23e of Convention II of 1899 which was concluded at the same time as the Declaration of 1899 just quoted. It appears to be conclusive, therefore, that the two provisions relate to different matters, for otherwise it would have been unnecessary to execute two separate agreements as was done. That the

of weapons, such as chemical weapons, that outlawing a given type of weaponry by the axioms set out in the 1868 Declaration could only proceed through the agreement of states or by uniform practice.[150] The above conclusion is confirmed by the ICJ's position in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, although the ICJ stipulated that this practice shall be in place until an advisory opinion is issued.[151]

Article 23 of The Hague Regulations of 1899 was approved without discussion as Article 23 of the Regulations to the Fourth Hague Convention of 1907 on the Laws and Customs of War on Land. The only, yet significant, difference between the text which was in force in 1899 and 1907 is the replacement of the phrase "excessive injuries" with the phrase "unnecessary suffering" – this change, in the author's opinion, is most consistent with the *maux superflus*[152] in the authentic text. The Polish version of the act, as promulgated in 1927, in Article 23(e), the legislator used the phrase *zbyteczne cierpienia*, which is directly translatable as "unnecessary suffering". As part of AP I of 1977, it was decided to combine the concept of excessive injuries and unnecessary suffering.[153] As rightly pointed out

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agreements were regarded by the Conference as distinct is shown by the use in Article 23e of the words «In addition to the prohibitions provided by special conventions». Corroborative of this is the fact that Great Britain did not adhere to the Declaration of 1899 until August 30, 1907, while the Hague Conference was in session and was considering Convention IV of which Article 23e is a part. The conclusion is inevitable that the prohibition of the use of expanding bullets depends upon the provisions of the Declaration of 1899 to which as already pointed out the United States is not a party" – *The Counselor for the Department of State (Lansing) to the Secretary of State, Papers Relating to the Foreign Relations of the United States*, "The Lansing Papers" 1914–1920, vol. I, 763.72111/16791/2, p. 208.

150 M. Piątkowski, *Międzynarodowe prawo humanitarne wobec zastosowania broni zapalającej w konflikcie zbrojnym* [*International humanitarian law and the incendiary weapons in armed conflict*], "Bezpieczeństwo, Teoria i Praktyka" 2017, vol. 2, p. 153; J. Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge 2004, pp. 191–192; "As already pointed out, the question as to whether or not a particular weapon is to be considered as causing unnecessary suffering is one that can be answered only by examining the practice of states" – *Rules Governing Weapons and Methods of Naval Warfare*, "International Law Studies" 1955, vol. 50, p. 54.

151 "The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments" – ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, para. 57.

152 W.H. Boothby, *Weapons and the Law of Armed Conflict*, Oxford 2009, p. 57.

153 "The English version would be the narrower if its contents were taken to add a subjective element to the original rule. In conformity with the authoritative French text, the principle must be stated to be that – irrespective of the belligerents' intentions – any means of combat are prohibited that are apt to cause unnecessary suffering or superfluous injury. While the authentic French text uses the term «superfluous injury» (maux superflus), the phrase «unnecessary suffering» used in the English translation has acquired a relevance of its own through the practice of States. Hence, both concepts are of importance for the assessment of whether particular weapons shall be deemed prohibited for use" – ICRC, *Weapons that may Cause Unnecessary Suffering*…, para. 21, p. 12.

by the authors of the HCPR Commentary, in addition to the semantic distinction, the content of the premise itself seems clear as it takes into account medico-axiological factors.[154] The Polish legislator is semantically inconsistent on this point – Article 35 para. 2 of AP I uses the phrase "unnecessary suffering", while the ICC Rome Statute uses the phrase "unnecessary damage or excessive suffering".[155]

The ICRC draft sent for consideration to government experts referred to the prohibition of using means calculated to cause unnecessary suffering, in particular cruel means and methods.[156] It was also stressed from the outset that the provision was ultimately to be limited to general principles only, without determining the legality of specific types of weapons, despite numerous proposals to include prohibitions referring to nuclear, chemical, incendiary or biological weapons in the provision.[157] In the version formulated by government experts, Article 33 of the draft I Additional Protocol of 1977 referred in its justification to Article 22 and 23(e) of the Hague Regulations of 1907 and through its wording it constituted a reference to the content of the 1868 St. Petersburg Declaration. An important addition to the content of the project was the introduction of the phrase "method" next to the phrase "means", which significantly broadened the scope of the provision, without limiting it solely to the assessment of armament as such but also indicated the possibility of disqualification due to the above-mentioned modification of a given weapon use – including potentially legal weapons. During the Diplomatic Conference between 1974 and 1977, attention was drawn to the need to supplement the provision of the future Article 35 of AP I with an additional paragraph related to the need to protect the natural environment (R. Bierzanek). The Australian delegate argued that, in his opinion, the dimension of the Hague Regulations and the 1868 St. Petersburg Declaration was limited.[158] The representative of the United Kingdom mentioned the need to harmonize the future Article 35 of AP I with the provisions applicable under the Hague Regulations (by adding the phrase "injury").[159] At the same time, the lack of an unambiguous possibility of defining the phrase "unnecessary suffering" was addressed.[160]

154 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 62.

155 M. Piątkowski, *O wartości normatywnej deklaracji petersburskiej z 1868 roku* [*The normative value of the 1868 Saint Petersburg Declaration*], "Międzynarodowe Prawo Humanitarne" 2018, vol. IX, pp. 87–103.

156 "It is forbidden to use weapons, projectiles or substances calculated to cause unnecessary suffering, or particularly cruel methods and means" – Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Report on the Work of the Conference, Vol. I*, p. 127.

157 "ICRC to limit Article 30 to general principles, without including specific prohibitions of particular weapons" – *ibidem*, pp. 128–129, para 3.17–3.21.

158 CDDH/III/SR.26, para. 7, p. 235.

159 CDDH/III/SR.26, para. 28, p. 241.

160 "It was not clear where the limits of «unnecessary sufferings» should be drawn, and a term must therefore be found to strengthen the prohibition to use weapons or means which were likely to aggravate sufferings unnecessarily" – CDDH/III/SR.71, para. 2, p. 245.

This norm has a complicated legal dimension. On the one hand, it is not *per se* a determinant defining a priori which specific type of armament is classified as illegal.[161] This is confirmed by the commentary to the HPCR Manual of 2009, which indicates that there is no established norm or indicator signaling the moment at which a given weapon crosses the threshold of excessive injury and unnecessary suffering.[162] This conclusion is borne out by numerous dedicated treaties regulating specific types of weapons.[163] On the other hand, as the ICJ pointed out when assessing the hypothetical consequences of using nuclear weapons, this armament cannot be reconciled with the requirements of the premise indicated in the text of Article 35 para. 2 of AP I. Certainly, doubts in this respect do not exempt states from the obligation to assess new methods and means on the basis of the above axiom as part of weaponry review specified under Article 36 of AP I.[164] As a result, the actual scope of this norm depends on the attitude and actions taken by states, which may shape it into a custom,

161 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 63. "In short, a survey of State practice proves that while no State denies the existence and the binding value of the general principles, no agreement (outside treaty stipulations) has as yet evolved on the concrete application of those principles to specific weapons. This amounts to saying that the prohibitory intent of those principles has proved scarcely effective" – A. Cassese, *Means of Warfare: The Present and the Emerging Law*, [in:] *idem*, *Respect for Human Rights in Armed Conflict*, Napoli 1976, p. 153. "It is easier to state the proposition [that a given weapon is banned] in abstract to than to reach an agreement as to which actual weapons run afoul of [humanitarian law]. Hence, from the days of the St. Petersburg Declaration onwards it has become quite clear that, in case of doubt, the sole safe means of ensuring that a specific weapon will be interdicted is to say so unequivocally in a binding multilateral treaty […] absent an overt exclusion clause in the lex scripta, there are frequent disagreements which cannot easily be resolved" – Y. Dinstein, *The Conduct of Hostilities*…, p. 61. "In practice, states are reluctant to recognise the principle as an autonomous ground for outlawing specific weapons *per se*" – T. Ruys, *The XM25 Individual Airburst Weapon System: A 'Game Changer' For the (Law on the) Battlefield? Revisiting the Legality of Explosive Projectiles Under The Law of Armed Conflict*, "Israel Law Review" 2012, vol. 45, p. 406.

162 "The concept of «injury» or «suffering» evoked some further comment. It was generally considered that this comprised such factors as mortality rates, the painfulness or severeness of wounds, or the incidence of permanent damage or disfigurement" – ICRC, *Conference of Government Experts on the Use of Certain Conventional Weapons (Lucerne, 24.9–18.10.1974)*, Geneva 1975, para. 23.

163 M. Castellaneta, *New Weapons, Old Crimes?*, [in:] F. Pocar, M. Pedrazzi, M. Frulli (eds.), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation*, Northampton 2013, pp. 194–195.

164 "At each successive stage, namely study, development and acquisition, the Government concerned should determine whether the use of new weapons fell under a general prohibition, directed not only at weapons which caused unnecessary injury, but also at those which had indiscriminate effects, or under some specific prohibition, such as the Protocol of Geneva of 1925 on chemical and bacteriological warfare" – CDDH/III/SR.71, para. 50, p. 252.

an international agreement or their own legislation (e.g., through appropriate provisions in the manuals).[165] An example of the above situation is the position of the UK manual on the use of incendiary weapons against combatants, which indicates that these weapons, although not explicitly prohibited, should not be used against human targets precisely because of the premise prohibiting unnecessary suffering.[166] Antonio Cassese is right in this regard, as he considered the above premise to be "[…] very significant source of inspiration".[167] At the same time, the same author pointed out that the codification of Article 35 of AP I had not made progress in clarifying the content of the above standard.[168] In this regard, it is worth referring to the dissenting opinion of Judge Higgins made on the grounds of the ICJ Advisory Opinion on the *Threat and Legality of the Use of Nuclear Weapons*, which indicated that the premise specified on the basis of Article 35 of AP I equates the level of unnecessary suffering, which is difficult to grasp, with arguments stemming from military rationality. On this basis, states decided to classify the legality of using certain types of weaponry, while leaving some measures, such as, for example, primarily incendiary weapons, unregulated, despite the fact that they can certainly cause suffering of significant intensity.[169] The ICRC's commentary on AP I indicates that

165 "Although the existence of the prohibition of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is not contested, views differ as to whether the rule itself renders a weapon illegal or whether a weapon is illegal only if a specific treaty or customary rule prohibits its use" – ICRC, *Customary IHL Database*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70 (accessed: 22.12.2020); J. Gardam, *Necessity*…, pp. 67–68. "Many assume that the prohibition is devoid of practical meaning in the absence of a multilateral agreement amongst states prohibiting a category of weapons. No category of weapon has been explicitly prohibited by the international community on the basis of the customary rule reflected in Article 35(2) of Additional Protocol I. However, anecdotal evidence suggests that some states have unilaterally prohibited the development of certain weapons systems on the basis of legal opinion that such weapons would offend the customary prohibition" – M. Hagger, T. McCormack, *Regulating the Use of Unmanned Combat Vehicles: Are General Principles of International Humanitarian Law Sufficient?*, "JLIS Special Edition: The Law of Unmanned Vehicles" 2011–2012, vol. 21(2), pp. 80–81.

166 "Such uses are governed by the unnecessary suffering principle so that they should not be used directly against personnel but against armoured vehicles, bunkers, and built-up emplacements, even though personnel inside may be burnt" – JSP 383, *The Joint Service*…, p. 112.

167 A. Cassese, *The Human Dimension of International Law: Selected Papers*, Oxford 2008, p. 214; Similarly S. Oeter, *Means and Methods*, [in:] D. Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflict*, Oxford 1995, p. 121.

168 A. Cassese, *The Geneva Protocols*…, p. 76.

169 "It is this understanding of the principle that explains why States have been able to move to a specific prohibition of dum-dum bullets, whereas certain weapons that cause vastly greater suffering have neither been the subject of specific prohibitions, nor, in general State practice, been regarded as clearly prohibited by application of the «unnecessary suffering»

Article 35 para. 2 of AP I creates a standard relating to the "effects" of using a given weapon.[170]

The final text of Article 35 of AP I included both the premise of unnecessary suffering and excessive injury as the most accurate preservation of the original meaning from the French phrase *maux supefluous*.[171] However, the *ad hoc* group of experts was unable to clearly determine the meaning of the above terms in 1974.[172] Medical determinants indicated in the content of Article 35 para. 2 of AP I were specifically collected as part of R. Coupland's work. The parameters in this respect were mortality rates, representing 25% of any loss resulting from the use of a given weapon, the need to perform, among others, three specialized treatments, staying in medical facilities for more than a month, and so on.[173] However, the practical application of the premise in relation to weapons that are not the subject of dedicated regulation poses fundamental difficulties. In 2003, the Israeli Supreme Court ruled that the Israeli Defense Forces' use of shotgun cartridge does not violate international law, as no treaty prohibits them, referring in this regard to the lack of norms set out under the CCW Convention. The applicants' argument on the issue of unnecessary suffering and excessive injury caused by flechette munitions was not recognized by the Supreme Court.[174]

It is worth mentioning that according to Article 8 para. 2(b)(xx) of the Rome Statute of the ICC, the use of weapons, missiles and materials, and methods of warfare, which by their nature cause unnecessary damage or excessive suffering constitutes a war crime, provided that they are covered by the absolute prohibition and are listed in an annex to the Rome Statute. It is characteristic and revealing that, to this day, such an annex has not been completed. The cumulative premise of being subject to a total prohibition and annex essentially means that the above provision is dead.

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principle. The status of incendiary projectiles, flamethrowers, napalm, high velocity weapons – al1 especially repugnant means of conducting hostilities – have thus remained contested" – *Dissenting Opinion of Judge Higgins*, para. 16, p. 586.

170 "Article 35, paragraph 2, was finally adopted by consensus. It lays down a prohibition relating to the results produced, though not directly a prohibition on the means. However, this does not mean that such prohibitions are necessarily absent in the Protocol, as is clear from other provisions (for example, the prohibition on the use of perfidy, on methods and means of combat with indiscriminate effects, on starvation etc.)" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 1430, p. 409.

171 CDDH/215/Rev. 1, para. 21, p. 268. For a more detailed discussion on the linguistic complexities related to the formula "excessive injury and unnecessary suffering", see: M. Piątkowski, *O wartości normatywnej*…, pp. 87–101.

172 ICRC, *Weapons that may Cause Unnecessary Suffering*…, para. 23, p. 13.

173 R. Coupland, *The Effects of Weapons: Defining Superfluous Injury and Unnecessary Suffering*, "Medicine and Global Survival" 1996, vol. 3, p. 5.

174 *The Palestinian Center for Human Rights v. The State of Israel – Minister of Defense*, The Israeli Supreme Court 8990/2013.

9.2. Obligation to carry out a legal review of weapons

The draft of the group of governmental experts envisaged introducing a provision obliging the parties to the future Additional Protocol to assess the new measure or new method of warfare for compliance with the premise of prohibiting unnecessary suffering. It is worth mentioning that the proposed solution was entirely innovative because no *ius in bello* provision had created an obligation to examine the compliance of a given type of armament with the applicable law. According to the AP I draft, the legal review of weapons should take place at the design and development stages of a given type of armament.[175] The text that was finally adopted extended the above points to include additional elements such as the need to make an assessment during the acquisition (referring to the issue of armament imports) and the introduction of new weapons (the moment of the equipment's entry into the inventory of armed forces). It is argued that in the context of the acquisition of weaponry, the legal review of the weapon by exporter before its delivery (sale) is irrelevant.[176] Significantly, the provision points to prohibitions not only from the provisions of AP I itself, but also from any other provision of international law – including potentially human rights.

From the perspective of the diplomatic conference working group report, the outcome of the review under Article 36 of AP I is not considered binding under international law. The provision only stipulates the obligation to perform it but does not in any way determine the consequences of the analysis or how it is carried out.[177] Furthermore, the analysis only required an assessment of the normal or planned consequences of using the weapon – in particular, a given party was not obliged to examine all possible circumstances in which the weapon might be used.[178] Hans Blix argued that the introduced norm established an obligation to adopt legislation at the national level, allowing for the review of the armament not only in terms of excessive injury and unnecessary suffering but also in relation to the principle of distinction and direct prohibitive treaties.[179] This was in line with the conclusions of the group of government experts from Lucerne in 1974, where the British representative indicated the need to assess the weapons introduced based on three principles: the avoidance of unnecessary suffering, the principle of distinction, and the prohibition of perfidy or other perfidious actions.[180]

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175 ICRC, *Draft Additional Protocol*…, p. 42; G.D. Solis, *The Law of Armed Conflict*…, p. 751.

176 V. Sehrawat, *Changing Horizons of Modern Weaponry in South Asia: A Legal Survey*, [in:] J. Kaul, A. Jha (eds.), *Shifting Horizons of Public International Law: A South Asian Perspective*, New Delhi 2018, p. 339.

177 M. Jacobsson, *Modern Weaponry and Warfare: The Application of Article 36 of Additional Protocol I by Governments*, "International Law Studies" 2006, vol. 82, p. 184.

178 CDDH/215/Rev. 1, para 30–32, pp. 269–270.

179 CDDH/III/SR.27, para. 49–51, p. 252.

180 ICRC, *Report Conference of Government Experts*…, para. 19.

For E. Crawford Article 36 of AP I is a legal "circuit breaker" preventing belligerents from raising the argument that any type of weaponry can be used solely on the basis that it is not regulated by any treaty.[181] On the other hand, the provision recognizes that novelty alone does not determine a weapon's illegality.[182] The manner in which legal reviews of weapons functioned during the preparatory work aroused skepticism because the development process of a given type of armament was treated as closely related to state secrecy and subject to various interpretations – according to E. Castrén.[183] For this reason, the results of research on new weapons and methodology are largely unknown.[184] It is also an indirect argument in favor of the lack of customary character of the norm contained in Article 36 of AP I.[185]

The provisions indicate that the legal review covers all types of novelty means, weapons and methods. While it is clear that each new (which implies each new, developed) military technology should undergo a review, analyzing the context related to the modification of the existing armament poses greater difficulty. James Farrant and Christopher M. Ford cite in this regard the example of the JDAM kit (described below), which is installed to convert non-precision munitions into more controllable munitions. They assessed that the above modification is in fact a new means of combat and must undergo a relevant legal review.[186] In most cases, this will refer to an improvement of a structural nature that changes the method and scope of using a given piece of armament, e.g., expanding it with new tactical capabilities.[187]

Rule No. 9 of the so-called HPCR Manual confirmed the application of the legal weapons review mechanism in the conditions of air warfare.[188]

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181 E. Crawford, A. Pert, *International Humanitarian Law*, Cambridge 2015, p. 199.

182 R. Erickson, *Protocol I: A Merging of the Hague and Geneva*…, p. 563.

183 "[…] said that the existence of article 34 was justified but that the article could be of no great practical value, since the study and development of new weapons and methods of warfare were generally carried out in secret, making any kind of supervision difficult. Furthermore, the nature and effects of such weapons might be subject to different interpretations" – CDDH/III/SR.27, para. 46, p. 252.

184 M. Meier, *Lethal Autonomous Weapons Systems (LAWS): Conducting a Comprehensive Weapons Review*, "Temple International and Comparative Law Journal" 2014, vol. 30, p. 124.

185 N. Jevglevskaja, *Weapons Review Obligation under Customary International Law*, "International Law Studies" 2018, vol. 94, pp. 205–213.

186 J. Farrant, C.M. Ford, *Autonomous Weapons and Weapon Reviews: The UK Second International Weapon Review Forum*, "International Law Studies" 2017, vol. 93, p. 404.

187 J. McClelland, *The Review of Weapons in Accordance with Article 36 of Additional Protocol I*, "International Review of the Red Cross" 2003, vol. 85, p. 405.

188 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 82.

10. Selected issues related to the use of aircraft armament

10.1. Precision-guided munitions

One of the most pressing problems regarding the technical side of conducting air warfare was to improve the effectiveness of air bombing. Primitive aiming devices, despite the gradual improvement of data processing (e.g., the advanced Norden bombsight used during World War II), were not capable of improving the very poor accuracy of conventional air bombing. The dispersion of munition, also known in American terminology as CEP (Circular Error Point), in the context of the B-17 Flying Fortress strategic bomber was approx. 1.5 km. After World War II, it was noticed that the main disadvantage of the air operations conducted was the ineffectiveness of the bomb itself. This led to the creation of the first Paveway I precision-guided missile, which brought CEP under 10 meters. Precision-guided munitions were first used in special aerial missions carried out during Operations "Linebacker I" and "Linebacker II" during the Vietnam War. As indicated in Chapter I of this work, starting in 1991 there occurred a sharp increase in the number of precision-guided missiles, culminating in 2011 in Libya, when, for the first time 100% of the munitions used were precision-guided.[189] However, the acquisition costs of precision-guided missiles or bombs are varied and still significantly exceed the financial capabilities of many states, especially those outside the EU and NATO. The use of the JDAM (Joint Direct Attack Munition) system, which adapts ordinary bombs to a precision-guided standard by equipping them with a GPS receiver, allowed the unit price of bomb conversion to be reduced to approx. 20,000 USD.[190] More advanced missiles, such as JASSM missiles with a range of 1,000 km and a CEP of no more than 3 meters, are purchased at a price of approx. 3,200,000 USD each.[191]

From the perspective of international humanitarian law, the obligation to use precision-guided munitions should be tracked in the content of Article 57

189 See more: M. Piątkowski, *Użycie amunicji precyzyjnego rażenia w świetle prawa konfliktów zbrojnych* [*Usage of precision-guided ammunition in the light of the law of armed conflicts*], [in:] A. Wetoszka, B. Greda, A. Truskowski (eds.), *Taktyka i dowodzenie w lotnictwie wojskowym* [*Tactics and command in military aviation*], Dęblin 2015.

190 *DOT&E FY2000 Annual Report, Joint Direct Attack Munition (JDAM)*, n.d., https://www.globalsecurity.org/military/library/budget/fy2000/dot-e/airforce/00jdam.html (accessed: 22.12.2020).

191 *Polska kupi od Amerykanów pociski JASSM-ER za 940 mln zł* [*Poland will buy from the United States JASSM-ER missile for 940 mln PLN*], 2016, https://www.money.pl/gospodarka/wiadomosci/artykul/jassm-er-umowa-polska-antoni-macierewicz usa,220,0,2225372.html (accessed: 22.12.2020).

para. 2(a)(ii) of AP I, which provides for the selection of means and methods of combat by taking all feasible safety measures to avoid or minimize losses among the civilian population and civilian goods. In fact, this boils down to an interpretation of the phrase "all feasible measures". Therefore, the question arises whether a party to an armed conflict is obliged to acquire, equip and actually use precision-guided weapons in all circumstances.

While drafting the content of Article 57 para. 2 of AP I cited in a previous chapter, the delegations of many states mentioned the need to take into account the actual possible measures, pointing out that the provision ultimately does not create an obligation to incur additional expenses if they exceed the capabilities of a party to the Protocol. Other states, in turn, confirmed the above direction of interpreting the provision as part of their interpretive declaration to the content of AP I, e.g. the United Kingdom considers that the phrase "feasible" "mean that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations".[192] Identical content was included in Article 1 para. 5 of Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons of 1980 for the CCW Convention of October 10, 1980, where measures which are practically available or possible to use were pointed out. In the same spirit, one should also read the report of the committee under the ICTY Prosecutor examining the course of the NATO air campaign in 1999, which clearly stated that the standard of taking all feasible measures is of high priority but is not absolute.[193] This is confirmed in the ICRC's commentary on AP I, which again points to the need to use the paradigm of good faith and common sense when interpreting Article 57 para. 2 of AP I.[194] From a strictly normative point of view, it seems acceptable to interpret Article 57 of AP I as not imposing an obligation *per se* to use the most precise means of combat in all circumstances, and thus *a maiore ad minus* does not impose an obligation to acquire them.[195]

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192 Declaration of the United Kingdom of Great Britain and Northern Ireland, 28.01.1998, https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/gb (accessed: 31.07.2025).

193 "The obligation to do everything feasible is high but not absolute. A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations" – ICTY, *Final Review*…, para. 29.

194 "Once again the interpretation will be a matter of common sense and good faith. What is required of the person launching an offensive is to take the necessary identification measures in good time in order to spare the population as far as possible. It is not clear how the success of military operations could be jeopardized by this" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary*…, para. 2198, p. 682.

195 "In conclusion, under IHL as it stands today, states have no legal obligation to acquire the most precise weapons available on the market, even when they have the financial resources to do so" – J.-F. Quéguiner, *Precautions under the Law Governing the Conduct of Hostilities*, "International Review of the Red Cross" 2006, vol. 88, p. 802. "Currently, there exists

Since the obligation to use precision-guided munitions is not directly grounded in the treaty provisions, the question arises about the possibility of creating possible state practices regarding the existence of a legal obligation to use precision-guided assets against objectives located in urbanized areas.[196] As in the context of the comments made in the previous fragments of the work regarding the 1923 Hague Rules of Air Warfare, determining the actual existence of a customary norm is extremely difficult in the context of the obligation to use precision-guided weapons. As noted by R. Lagoni (citing F. Kalshoven) "it is notoriously difficult to trace a rule of customary law […] it is particularly difficult to determine why belligerent do not use certain methods or means of warfare".[197] The above statement fits very well into the discussion of precision-guided weapons. The main reasons for its use were political and ethical factors (the so-called BBC effect, as a way of influencing the public opinion of states involved in armed conflicts) and military factors (the need to obtain greater precision allowing for more effective destruction of targets). Grant Hammond commented on the sources of extra-legal "obligations" to use precision-guided munitions in an interesting way, indicating that it may well be that "media superiority" is more important than air superiority and that the PGMs (Precision Guided Muntions) which matter most are "precision-guided messages".[198] The indicated circumstances thus call into question the basis for the existence of *opinio juris* – because the practice of states did not derive the need to use precision-guided ammunition from "legal considerations", but for other reasons (as claimed by e.g., C. Puckett).[199] In addition, M.C. Waxman

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no customary requirement for the use of precision weapons nor a requirement for total accountability for the effects of each bombing strike. The law merely requires «reasonable care» in the pressing of attacks against military objectives and good faith efforts to avoid unnecessary or disproportionate levels of loss or suffering" – N.A. Canestaro, *Legal and Policy Constraints on the Conduct of Aerial Precision Warfare*, "Vanderbilt Journal of Transational Law" 2004, vol. 37, p. 483; D.L. Infeld, *Precision-Guided Munitions Demonstrated their Pinpoint Accuracy in Desert Storm; but Is a State Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage*, "George Washington Journal of International Law and Economics" 1992, vol. 109, p. 135.

196 "In fact, when these structures are located in urban areas, it seems there should be specific obligations of conduct on the attacking party to choose modes and means of bombardment that will minimise collateral damage as much as possible (e.g. attacks at night time, use of precision guided munitions, etc." – G. Bartolini, *Air Operations Against Iraq (1991 and 2003)*, [in:] N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006, p. 259.

197 R. Lagoni, *Comments: Methods or Means of Warfare, Belligerent Reprisals, and the Principle of Proportionality*, [in:] I.F. Dekker, H. Post (eds.), *The Gulf War of 1980–1988: The Iran-Iraq War in International Legal Perspective*, The Hague 1992, pp. 116–117.

198 G. Hammond, *Myths of the Air War over Serbia Some "Lessons" Not to Learn*, "Aerospace Power Journal", Winter 2000, p. 81.

199 E. Lucas, *Precision Guided Munitions and Collateral Damage: Does The Law of Armed Conflict Require the Use of Precision Guided Munitions when Conducting Urban Aerial Attack*,

argues that the United States maintains the position of a persistent objector preventing the creation of a norm of customary international law in relation to that state.[200] The consequence of the American position is the delivery of a number of "dumb" bombs with a significant weight (500, 2000 pounds) to the Israeli air force in 2023–2024 in connection with the "Iron Swords" operation in the Gaza Strip.[201]

On the other hand, however, the *usus* itself, at least in relation to EU and NATO states, seems to be an expression of the established and constant practice of the widespread use of precision-guided munitions since 2011 (operation in Libya). In addition, the use of weapons is identified with the obligations of the party under the provisions of international humanitarian law, especially as an element of precautions in actions taking place in built-up areas, where civilian losses can be marginalized through their deployment.[202] The suggested reflection of *opinio juris* may be found, for example, in the content of UNSC Resolution 2139/2014. Another example in this respect is NATO's official response to questions about conducting the "Unified Protector" operation, where the main role of precision-guided munitions as part of the NATO standard of zero civilian casualties was emphasized.[203] However, it also seems that the above-mentioned remarks have become obsolete over the course of hostilities in Ukraine and the Gaza Strip, which have demonstrated the possibility of rapid depletion of precision-guided munitions during full-scale or long-lasting conflicts. Therefore, as of today, the use of precision-guided munitions should be considered an example of the *de lege ferenda*[204] postulate.

In addition, as noted, precision should not be confused with accuracy.[205] The use of precision-guided munitions, even when approaching 100% of all munitions deployed, does not guarantee in any way the complete exclusion of collateral damage.[206] In addition, the overall strategic situation of a given party is also im-

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"Defense Technical Information Center" 2003, pp. 20–21; C. Puckett, *In this Era of "Smart Weapons," Is a State under an International Legal Obligation to Use Precision-Guided Technology in Armed Conflict?*, "Emory International Law Review" 2004, vol. 18, pp. 705–707.

200 M.C. Waxman, *International Law and the Politics of Urban Air Operations*, Santa Monica 2000, pp. 12–13.

201 T. Copp, *Why the U.S. paused the delivery of 2,000-pound bombs to Israel ahead of a possible assault on Rafah*, 2024, https://www.pbs.org/newshour/world/why-the-u-s-paused-the-delivery-of-2000-pound-bombs-to-israel-ahead-of-a-possible-assault-on-rafah (accessed: 13.06.2025).

202 See: S. Belt, *Missiles over Kosovo: Emergence, Lex Lata, of Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, "Naval Law Review" 2000, vol. 47, pp. 151–166.

203 NATO Legal Adviser, *Respond on behalf of the NATO to the Commission's letters of 11 November and 15 December, 2011*, OLA(2012)006, p. 5.

204 J.F. Murphy, *Some Legal (and a Few Ethical) Dimensions of the Collateral Damage Resulting from NATO's Kosovo Campaign*, "Israel Yearbook on Human Rights" 2001, vol. 31, pp. 61–62.

205 M.N. Schmitt, *Precision Attack and International Humanitarian Law*, "International Review of the Red Cross" 2005, vol. 87, p. 446.

206 J.D. Wright, '*Excessive' Ambiguity: Analysing and Refining the Proportionality Standard*, "International Review of the Red Cross" 2012, vol. 94, p. 846.

portant, which may consequently lead to the necessity of maintaining stockpiles of precision-guided missiles for the needs of a future air campaign.[207] Neither is it justified to use such munitions under all operating conditions.[208] However, it seems that looking through the lens of Article 57 para. 2 of AP I, it should be noted that the possession of precision-guided munitions by a given party significantly increases the operational autonomy of this party in the context of tasks that would be difficult to perform in conventional circumstances due to the possibility of excessive losses, or may be considered an example of an indiscriminate attack in the light of Article 51 paras. 4 and 5 of AP I.[209] A similar model is used in this respect in the HPCR Manual of 2009.[210] Yves Sandoz, Isabel Robinson and Ellen Nohle make a valid point here, pointing out that if precision-based weapons are available and their use would be practical in given conditions, a party being

207 I. Henderson, *The Contemporary*…, p. 169.

208 "In considering the level of damage sought, reducing the risk to civilians, and risk to the attacking force, the decision to use tactical aircraft was made in about as much time as it has taken to summarize the force options available and factors considered. This decision process highlights another law of war principal: a nation is not legally obligated to use its most precise means to attack a target. A balancing process exists, and a reasonable commander is entitled to make his decisions based upon the mission, his assessment of force risk, and other information reasonably available to him at the time" – W.H. Parks, *Lessons from the 1986 Libya Airstrike*, "New England Law Review" 2002, vol. 36, p. 763.

209 T. Krupiy, *A Toolbox of the Application of the Rules of Targeting*, Cambridge 2016, p. 71. "Therefore, although PGMs may actually increase the numbers of targets that one could justifiably strike by lowering to tolerable levels the collateral damage coincident to striking them, international law includes nothing that requires their use against any target of military value. Thus, judge advocates should assist in the drafting of ROE to ensure that no one misinterprets the requirements of international law and that no one places restrictions based upon erroneous applications of the law on planning and executing air operations" – R. Reed, *Chariots of Fire: Rules of Engagement in Operation Deliberate Force*, [in:] R. Owen (ed.), *Deliberate Force: A Case Study in Effective Air Campaigning*, Maxwell 2000, p. 420; T. Marauhn, S. Kirchner, *Target Area Bombing*, [in:] N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare*: *Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006, pp. 101–102. "Smart weaponry, if available, has increased the options open to the attacker. From a legal point of view, he needs not only to assess what feasible precautions can be taken to minimize incidental loss, but also to make a comparison between different tactics or weapons so as to be able to choose the least damaging course of action compatible with military success" – A.P.V. Rogers, *Zero-casualty Warfare*, "International Review of the Red Cross" 2000, vol. 837.

210 Rule No. 8 of the 2009 HPCR Manual stated that there is no explicit obligation to use precision-guided munitions. However, the second sentence of the rule indicates that the failure to use precision-guided munitions may lead to a violation of the prohibition on indiscriminate attacks if they are not capable of reducing the risk of collateral damage. The commentary argued that international law does not impose an obligation to acquire precision-guided weapons, and furthermore, operational considerations may limit the use of such munitions (e.g., by employing them only in urban combat areas). Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 83.

in possession of such munitions is obliged to use them.[211] Virgil Wiebe believes that whenever PGMs are capable of reducing associated losses, are held in the attacker's arsenal and can be used without endangering one's own flight crews, they should be used.[212] This does not mean, however, that such an attack would be illegal by the mere fact that conventional weapons were used – W.H. Boothby indicates that in such a scenario the operation should be planned more carefully, e.g., by using different tactics, the obligation of visual identification or lowering the ceiling or speed.[213] The same model of interpretation of Article 57 para. 2 of AP I is upheld by the 2004 UK Manual.[214] Jonathan D. Herbach holds a valid position in this regard. He indicates that the standard of doing everything that is feasible is not a commitment with regard to the effect, but an obligation to act carefully based on existing resources.[215] This does not exclude the possibility of the occurrence of certain errors justified by good faith.[216]

There are also secondary consequences associated with the use of precision-guided munitions, which are partly due to so-called normative relativism, associated with the existence of a higher legal standard for states with access to more advanced technologies and greater financial resources (which applies mainly to NATO, G-20 or EU states). Greater precision and accuracy of the available means results in reduced possibilities of treating a potentially legitimate dispersion of munitions as an excuse for the occurrence of losses among the civilian population. Moreover, as the precision of weaponry increases, there should be greater signaling of the attacker's intention to strike a specific target (legitimate

211 "As the law currently stands, the answer to this question is somewhat nuanced. Despite arguments to the contrary, there is no existing legal obligation to acquire the most precise weapons available on the market, or, once obtained, to use precision-guided munitions in all situations. However, where such weapons are available, and their use is feasible, and they would allow the attacking party to avoid or minimize the expected incidental harm (including the reasonably foreseeable reverberating effects), they should be used" – I. Robinson, E. Nohle, *Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas*, "International Review of the Red Cross" 2016, vol. 98, p. 141; Y. Sandoz, *Commentary*, "International Law Studies" 2003, vol. 78, p. 278.

212 V. Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons under International Humanitarian Law*, "Michigan Journal of International Law" 2000, vol. 22, p. 106.

213 W.H. Boothby, *The Law of Targeting*, pp. 179–180.

214 "The employment of 'dumb' bombs has not been rendered unlawful by the advent of precision guided or 'smart' bombs, but developing technology does bring with it a change in the standards affecting the choice of munitions when taking the precautions" – JSP 383, *The Joint Service…*, p. 323.

215 J.D. Herbach, *Into the Caves of Steel: Precaution, Cognition and Robotics Weapon Systems under the International Law of Armed Conflict*, "Amsterdam Law Forum" 2012, vol. 3, p. 11.

216 G.S. Corn, J. Dapper, W. Williams, *Targeting and the Law of Armed Conflict*, [in:] G.S. Corn, R.E. VanLandingham, S.R. Reeves (eds.), *U.S. Military Operations: Law, Policy and Practice*, Oxford 2016, p. 186.

or prohibited one).[217] According to the supporters of the above theory, double standards are derived from the content of Article 57 of AP I, the contextuality and subjectivity of which are reflected, among others, in the selection of means practically available at the time of making a decision to attack.[218] The nature of legal relativism and the acceptance of different assessment standards for states with greater technical capabilities is not uniformly accepted in the doctrine everywhere. Some specialists argue that a higher level of diligence can and should be enforced in the case of parties with greater military and technological capabilities.[219] For example, H. Olásolo indicates that the obligation to apply precautions is borne by each party of the armed conflict, but a greater scope of duties will rest on the side with a technological advantage.[220] An example of this view is furnished by opinions regarding the obligation to use new technologies in conditions in which their use would have the desired results from the perspective of so-called active precautionary measures, such as unmanned aerial vehicles used as tools in an ISR mission.[221] However, there is a second group of experts claiming that there is no possibility to differentiate the legal assessment of the conduct of states, and an attempt to undermine the principle of belligerents' equality of rights and obligations in an

217 "For instance, assume there is a military objective in a populated area. It will be difficult to suggest that a weapon falling within its circular error probable was fired indiscriminately if there is no additional evidence of reckless disregard. Instead, the issue would more likely be styled as one of proportionality (see discussion below). On the other hand, if the weapon falls well outside its circular error probable, then it is reasonable to initially conclude that the attack was not directed at the military objective in question. Thus, as a factual matter, those employing precision weapons will have greater difficulty shielding themselves from allegations of indiscriminate attack than those who do not" – M.N. Schmitt, *Precision Attack*…, p. 455.

218 "For critics and defenders alike, it is evident that the application of the principle of proportionality is highly contingent on interpretation, context, and ultimately, the development of a sub-codex of rules for particular circumstances. These are susceptible to considerations of relative power, capabilities, and resources, all of which potentially affect the application of the standard to differently situated parties. This final point is demonstrated when one considers the corollary duty to employ precautions in attack" – G. Blum, *On a Differential Law of War*, "Harvard International Law Journal" 2011, vol. 52, p. 192.

219 "Through the rules concerning the possession of weapons are the same for all, the consequences of those rules depend on the weapons one actually possess. That is, the owner of the cat does not have the same responsibilities as the owner of a panther' – Y. Sandoz, *International Humanitarian Law in the Twenty-First Century*, "Yearbook of International Humanitarian Law" 2003, vol. 6, p. 9; A. Boivin, *The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare*, "University Center for International Humanitarian Law, Research Paper Series" 2006, no. 2.

220 H. Olásolo, *Unlawful Attacks in Combat Situations: From ICTY's Case Law to the Rome Statute*, Leiden 2008, p. 135.

221 O. Gross, *The New Way of War: Is There a Duty to Use Drones?*, "Florida Law Review" 2016, vol. 67, pp. 61–63.

armed conflict is unacceptable.[222] *Per analogiam*, one can cite the arguments of C. Greenwood, who rejected the possibility of adopting a stricter standard against NATO's actions in Serbia in 1999, due to its intervention motivated by humanitarian concerns.[223]

10.2. Incendiary munitions under 400 grams

The above-mentioned declaration on small-caliber explosive projectiles, adopted on December 11, 1868, in St. Petersburg, contained a ban on land and sea troops using any explosive projectiles or those containing explosive or incendiary substances weighing less than 400 grams. By definition, this document only referred to small arms ammunition, leaving weapons of a larger caliber outside its scope,[224] as it had been considered acceptable from the beginning to use projectiles with explosive payloads in artillery.[225] However, 40 years after the adoption of the St. Petersburg Declaration, the need to produce small-caliber projectiles for the air force arose in connection with the bombing of the British Isles by German airships.

In 1916, it was decided to equip British fighters with incendiary ammunition,[226] which turned out to be extremely effective against enemy airships (triggering hydrogen explosions), and tracer rounds effectively improved the accuracy of onboard weaponry,[227] Although the use of shells of this type was a clear violation of the 1868 regulations, the above practice was fully approved by the belligerents.[228] Fritz Kalshoven considered it to be "a clear case of customary law setting aside

222 "It is quite another to propose that developed states should accept standards that could disadvantage them in armed conflict. Since many, perhaps most, developing states would be unable to comply with a rule requiring the use of precision weapons in attacks on urban areas, this is a good reason not to have such a rule in the first place" – J.F. Murphy, *Some Legal*…, p. 243; T. Marauhn, S. Kirchner, *Target Area*…, p. 101. "Also suggests a double standard – a very high standard for the United States and a limited number of other Western democracies, and a lower standard for the rest of the world' – W.H. Parks, *Commentary*, "International Law Studies" 2003, vol. 78, p. 284; Y. Dinstein, *The Conduct of Hostilities*…, p. 126; N.A. Canestaro, *Legal and Policy*…, p. 465. "This type of criticism is typical of the capabilities-based paradigm and a departure from the IHL standard that all parties to an armed conflict – regardless of their relative resources or abilities – are held to the same legal standard" – J. Kessler, *The Goldstone Report: Politicization of the Law of Armed Conflict and Those Left Behind*, "Military Law Review" 2011, vol. 69, p. 108.

223 C. Greenwood, *The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign*, "International Law Studies" 2003, vol. 78, p. 50.

224 A. Breitegger, *Cluster Munitions and International Law: Disarmament with a Human Face?*, Routledge 2012, pp. 40–41.

225 D. Fleck (ed.), *The Handbook*…, pp. 406–407.

226 J.M. Spaight, *Air Power*…, p. 166.

227 D. Johnson, *Rights in Air Space*, Manchester 1965, pp. 26–27.

228 J.M. Spaight, *Air Power*…, p. 170.

a rule of treaty law".[229] In the doctrine, there were some doubts as to whether this weapon could also be used against aircraft.[230] James M. Spaight postulated that the use of incendiary ammunition against lighter-than-air vessels should be allowed in air warfare, with the proviso that these weapons should still be banned against conventional military aircraft.[231] The author raised doubts regarding the occurrence of fire and potential extensive injuries to the aircraft crew and criticized Article 18 of the Hague Rules of Air Warfare (see Chapter V).[232] Joseph M. Kroell seems to confirm James M. Spaight's opinion on the illegality of fielding incendiary projectiles in air warfare too, recognizing that setting enemy aircraft alight during air combat would prevent the crew from bailing out.[233]

Gregor Schwarzenberger pointed out that the negotiations conducted in 1868 could not in any way relate to the potential use of weapons during air warfare.[234] Hans Blix argues that the solutions regarding the prohibition of using explosive and incendiary projectiles below 400 grams were not adopted in the case of air warfare, both in relation to ammunition carried by a given aircraft and anti-aircraft weapons, but this is a *desuetudo* of an extremely limited nature and the *ratio* of the declaration is still valid.[235] Therefore, it is doubtful whether the authorization to the use of incendiary projectiles by aircraft also applies to the permission to attack human targets. However, the experts of international humanitarian law indicate that attacking ground troops with incendiary munitions is permissible and is based on the provision of Article 18 of the Hague Rules of Air Warfare and the position of the Commission of Jurist. Therefore, aircraft can also fire these projectiles at ground troops, as they cannot change the type of ammunition during the flight due to the specifics of air operations.[236] Gary D. Solis partially agrees with B.M. Carnahan on the use of incendiary munitions against other aircraft, but believes that in other cases, the use of this type of projectile may only affect non-human targets.[237] William H. Boothby, in turn,

229 F. Kalshoven, *The History*…, p. 41.

230 J.W. Garner, *International Regulation of Air Law and the World War: Vol I*, London 1920, p. 110.

231 J.M. Spaight, *Air Power*…, p. 188.

232 *Ibidem*, p. 194.

233 J. Kroell, *Traité*…, p. 68.

234 G. Schwarzenberger, *The Law of Air Warfare and the Trend Towards Total War*, "University of Malaya Law Review" 1959, vol. 1, p. 123.

235 H. Blix, *Means and Methods of Combat*, [in:] United Nations Educational, Scientific and Cultural Organization, *International Dimensions of Humanitarian Law*, Dordrecht 1998, p. 139.

236 "The universal use of these [explosive or incendiary] bullets in the last war [WWII] and the lack of any protest strongly suggest their legitimation, and the desuetude of the prohibition at least in aerial war" – B.M. Carnahan, *Unnecessary Suffering, the Red Cross and Tactical Laser Weapons*, "Loyola of Los Angeles International and Comparative Law Journal" 1996, vol. 18, p. 717; Y. Dinstein, *The Conduct of Hostilities*…, p. 79.

237 G.D. Solis, *The Law of Armed Conflict*…, p. 50.

points out that the historical circumstances for the introduction of the 1868 regulation, as well as the practice of states during World War II, considered the use of incendiary munitions by and against aircraft[238] to be legal. Yoram Dinstein confirms that Article 18 of the Hague Rules of Air Warfare makes an exception in this respect.[239]

Rule No. 6(e) of the 2009 Manual relating to the prohibition of using small-caliber ammunition calculated to cause an explosion in the human body indicated that in accordance with customary international law defined in accordance with Article 18 of the 1923 Hague Rules of Air Warfare, all anti-aircraft projectiles are excluded from the application of the provision, as well as in relation to the original norm of the 1868 St. Petersburg Declaration. In addition, the commentary affirms the principle also resulting from the 1923 rules, under which it is also permissible for aircraft to use incendiary projectiles, arguing that the practice of states confirmed the lack of practicality in maintaining the obligation to change the type of ammunition in the case of small-caliber incendiary projectiles of land force units.[240]

10.3. Incendiary bombs

As indicated in point above, the 1868 document, as a result of the restrictions adopted under it, did not apply to munitions whose weight exceeded 400 grams. The advent of bomber aviation quickly opened the way to research on the possibility of using aerial bombs with explosive or incendiary properties. During World War I, the first experiments related to electron-shielded thermite bombs (electron being an alloy of magnesium, aluminum and zinc), producing a temperature of up to 2,000 degrees, sufficient for igniting, were launched. This construction was so successful that it was still the equipment of Polish and German aviation during World War II. Incendiary bomb attacks were effective attack against urban areas, immediately igniting mixed brick and wooden structures found in urban areas. During the Spanish Civil War on April 26, 1937, German crews, using incendiary bombs, dropped several tons of electron bombs on Guernica.[241] The diaries of Wolfram von Richthofen, the commander of the operation, indicate the destructive effect of bombing built-up areas which were completely destroyed or devastated as a consequence of the resulting fires, achieving the goal of blocking the communication route running through the town. The temperature and the huge area of devastation also made it impossible to carry out an effective fire ex-

238 W.H. Boothby, *Weapons*…, p. 142.
239 Y. Dinstein, *The Laws of War*…, p. 43.
240 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 70.
241 A. Beevor, *The Battle for Spain: The Spanish Civil War 1936–1939*, London 2006, p. 232.

tinguishing operation.[242] During the September campaign in 1939, German combat aircraft used incendiary weapons during the attack on Wieluń (September 1, 1939) and Warsaw (September 25, 1939), achieving similar destructive effects.[243] The Luftwaffe used the experience again over Coventry in November 1940, where a so-called firestorm was created in a night bomb attack, using a mixed bombing technique involving demolition bombs as well as incendiary and fuel bombs. The igniting substances were later modified by the Allies by adding new chemical agents, including more fuel components. This resulted in a new generation of incendiary bombs, which largely contributed to the destruction of urbanized areas in Germany and Japan. Especially in the latter state, due to the wooden urban constructions, the bomb attacks caused more damage than the atomic bombs dropped on Hiroshima and Nagasaki.[244] The lack of raw materials during World War II contributed to the creation of another incendiary substance – napalm, as an agent added to fuels, causing an increase in density and viscosity. After 1945, napalm became one of the most effective means of striking military personnel, used on a large scale during the conflict in Korea and Vietnam. The medical consequences of air strikes using munitions based on napalm and its derivatives were extremely drastic, as this substance adhered to the body, causing the severest degree of burns (napalm can reach almost 1,000 degrees Celsius) and even suffocation due to oxygen consumption in the area of the explosion.[245]

The first discussions on the *ius in bello* regulations applying to incendiary bombs took place in the period preceding the outbreak of World War II at the forum of the League of Nations. However, they did not receive much response from the international community (probably for the same reasons why the states did not want to regulate the principles of air warfare during this period). The 1923 Hague Rules of Air Warfare did not regulate the use of air incendiary bombs. The 1938 ILA draft was a *de lege ferenda* postulate, which in Article 8 referred in detail to the issue of incendiary munitions.[246] This article prohibited the use of means intended to cause fire *per se*, excluding anti-aircraft defense. It was permissible to use all projectiles that could only bring about an increased risk of ignition as a side effect (this comment referred to explosive bombs). Fritz Kalshoven points

242 I. Patterson, *Guernica and Total War*, Cambridge 2007, pp. 47–48.

243 "On the other hand, the enemy kept carrying out continuous bombing raids, using 50% incendiary bombs – the reason for this was the constant fire engulfing Warsaw. The heaviest bombardment and artillery shelling occurred on September 25th, when the enemy bombarded indiscriminately from 6:00 AM until 5:00 PM. It was a day of judgment for Warsaw" – Italy, December 8, 1945, *Report by Lt. Col. Adam Dzianott, commander of the 9th Heavy Artillery Regiment, and later commander of the artillery section "Warsaw West"*, "Niepodległość i Pamięć" 2010, vol. 17, no. 1, p. 298.

244 See more: E. Hoyt, *Inferno: The Fire Bombing of Japan, March 9 – August 15, 1945*, Oxford 2000.

245 M. Piątkowski, *Międzynarodowe prawo humanitarne*…, pp. 147–149.

246 D. Schindler, J. Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, Dordrecht 1988, p. 225.

out, using the example of the unsuccessful disarmament conference in 1932–1934, the lack of determination of the international community to introduce a ban on the use of aerial incendiary bombs, while noting the serious risk that would be associated with the use of this type of weaponry, among others, for the civilian population.[247] By the end of the interwar period, no major attempts were made to regulate this issue at the treaty level, and there is no convincing *opinio juris* in this regard. The standpoint expressed by the Stockholm International Peace Research Institute (SIPRI) in a widely commented monograph from 1975 seems to be isolated.[248]

Pursuant to Article 14 of the 1956 ICRC draft document of New Delhi, the regulation indicated above introduced a ban on the use of incendiary munition.[249] It should be noted, however, that the aim of the provision generally referred to the civilian population only. This regulation did not refer to provisions from other documents of international law regarding the prohibition of excessive damage and "unnecessary suffering", which limited the use of certain means of warfare, including against military personnel. Instead, reference was made to harmful effects that are uncontrolled in time and space, threatening the civilian population. This solution was the first attempt at a limitation of incendiary weapons in an international treaty, albeit limited to the civilian population only. Most likely, while creating regulations in New Delhi, there were insufficient premises justifying the prohibition of the use of incendiary weapons against military objectives too, especially against military personnel. The "International Law Studies" in the 1950s pointed out that, although there are some voices regarding the recognition of incendiary weapons as contrary to the postulate of not causing superfluous injury and unnecessary suffering, the practice of states at the time did not confirm this view and expressed the position opposing the use these weapons in a way that would cause excessive suffering.[250]

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247 F. Kalshoven, *Reflections on the Law of War: Collected Essays*, Leiden 2007, pp. 343–346.

248 "Before 1939 incendiary weapons were generally regarded as illegal and inhumane, in the same category as weapons, such as mustard gas, which cause chemical burns" – Stockholm International Peace Research Institute, *Incendiary Weapons*, Cambridge 1975, p. 5.

249 "Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population. This prohibition also applies to delayed-action weapons, the dangerous effects of which are liable to be felt by the civilian population" – ICRC, *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War*, Geneva 1956.

250 "Weapons employing fire include tracer ammunition, flame-throwers, napalm, and other incendiary instruments and projectiles. Although the use of such weapons occasionally has been questioned, principally upon the ground that they inflict unnecessary suffering, the practice of states may be considered as sanctioning their employment" – R.W. Tucker, *The Law of War and Neutrality at Sea*, "International Law Studies" 1955, vol. 45, p. 51.

However, the situation changed with the intervention of the United States in Vietnam in 1965–1973, where the American aviation used aerial incendiary bombs and napalm, among others, on a large scale. The media image of the conflict, broadcast for the first time on such a large scale, caused a stir among the international community, who demanded a discussion on limiting the use of certain types of weaponry.[251] This issue was also resolved on the forum of the United Nations, which required the Secretary-General of the United Nations to present a detailed report assessing the legality and possible legislative directions, allowing a potential introduction of a ban on incendiary weapons. In 1972, a specially appointed group of experts commented on the application and consequences of using this type of weaponry, carrying out a broad historical, military and medical analysis of these means of combat. In this respect, the statements of the states concerned regarding specific theses of the document are also interesting. The United Kingdom indicated that napalm is a legal weapon in the context of its use against military objectives. The Kingdom of Sweden argued that the restriction of the ban on the use of incendiary weapons to air operations is unsatisfactory, as it does not address the issue of protection against unnecessary suffering of military personnel.[252] The report became the basis for subsequent UN General Assembly resolutions (3255/1975), which called on states parties to the ongoing diplomatic conference in Geneva on the amendment of international humanitarian law to consider the introduction of bans and appropriate restrictions on the use of incendiary weapons, considering them to cause unnecessary suffering.[253]

In 1974, the government experts under the aegis of the ICRC drafted a comprehensive document devoted to the technical and legal aspects of using incendiary weapons, pointing to significant definition-related and legal difficulties in determining the general normative grid. The lack of decisiveness was emphasized with regard to: 1) the recognition of incendiary weapons as causing unnecessary suffering to a greater extent than other types of armament, 2) their potential to strike indiscriminately at civilian or military objectives, 3) the scope of future regulation (prohibition or restriction).[254] The use of incendiary ammunition during the bombing of military objectives located in built-up areas was also mentioned, but no agreement was reached in this regard.[255] A significant

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251 *The Fire of War: Napalm and Other Incendiary Weapons*, "U.N Monthly Chronicles" 1973, vol. 10, p. 50.

252 United Nations, *Report by the Secretary General on Napalm and Other Incendiary Weapons and all Aspects of their Possible Use*, UN, 1972, A/8803.

253 UN GA Resolution 3464 (XXX), *Napalm and Other Incendiary Weapons and all Aspects of their Possible Use*.

254 ICRC, *Report Conference of Government Experts*…, paras. 105–117.

255 "Views Regarding the prohibition of incendiary weapons had fallen into two groups the one advocating their outright prohibition and the other holding that insufficient grounds for such a sweeping conclusion had been shown. One interesting detail in the debate had

achievement of the efforts of the group of government experts was a definition of incendiary ammunition.[256]

In 1980, a groundbreaking solution in this regard was the adoption at the Geneva conference of the Convention on the Prohibition or Restriction of the Use of Certain Conventional Weapons Which May Be Deemed to Cause Excessive Suffering or Have Indiscriminate Effects, dated October 10, 1980 (CCW Convention), along with the so-called III Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons. On December 21, 2001, the scope of the CCW Convention was extended to conflicts specified under the so-called joint Article 3 of the 1949 Geneva Conventions.[257] The above protocol is multi-purpose, as it includes provisions typical of disarmament law alongside regulations referring to The Hague law by restricting certain methods and means of conducting armed conflict. Article 1 of the III Protocol defines incendiary weapons as those primarily designed to set fire to objects and cause burns, including projectiles, rockets, and bombs containing incendiary substances. The effect of such weapons in this regard does not include potential side effects, such as the consequences of specific kinetic or thermal energy generated by the ammunition. The protocol's regulations exclude weapons that are of a penetrative-fragmentation type, designed to overcome specific protections of combat vehicles or other military objects, as well as signaling, smoke, and illuminating weapons (Article 1 para. 1(b). Other definitions contained in Article 1 raise doubts. As W.H. Boothby rightly pointed out, Article 1 para. 3 – contrary to the interpretation of Article 52 para. 2 of AP I – limits the phrase "military objective" to material objects only.[258] Additionally, it is worth noting the difference between the Polish translation of AP I, where the term *cel wojskowy* – "military objective" (or rather directly translating *military target*) is used, and the term *obiekt wojskowy* – "military object" is used in the context of the III Protocol. In the context of Article 1 para. 2 W.J. Fenrick addresses the possibility of attacking military objectives located in isolated and uninhabited

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concerned the possibility of attacks on military objectives situated within population centers. While an expert from the first group had pointed to the risk that incendiary weapons when used in such attacks might start fires spreading over the whole area outside the target an expert from the other group had pointed to the responsibility of the authorities of a state, who should ensure that no vital military objectives were situated in civilian population centers" – Ad Hoc Committee on Conventional Weapons, *Summary Records of the Eight to Twenty-First Meetings held at the International Conference Center Geneva from 12 February to 15 April 1975*, CDDH/IV/SR.8.

256 "For the purposes of this Conference, an incendiary munition has been considered to be any munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame and/or heat produced by a chemical reaction of a substance delivered on the target" – ICRC, *Conference of Government Experts*…, p. 105.

257 S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford 2012, p. 339.

258 W.H. Boothby, *Weapons*…, p. 203.

parts of urban centers.[259] Article 2 regulates the use of incendiary weapons, prohibiting their direct use against the civilian population (one may wonder whether this solution is not a *superfluum*, since no armed attack can be directed against the civilian population under the provisions of AP I). Article 2 para. 2 refers to air operations and prohibits bombings using aerial incendiary munitions (this term should be understood broadly – i.e., incendiary bombs, rockets, and projectiles) against military objectives located in areas with concentrations of civilian population (this term, in the context of the Protocol III to the CCW Convention, includes not only built-up areas but also groups of refugees, evacuees, or nomadic camps). William H. Parks points out that the language of Article 2 para. 2 is not aligned in this respect with Article 51 para. 5 of AP I – i.e., it does not consider the possibility of conducting an attack using incendiary weapons in light of the rule of proportionality. Additionally, the American author correctly points out that during the preparatory work, aerial bombing was not considered a sufficiently precise method of warfare since the prohibition applies solely to this method of conducting military operations. This is an important observation because, in fact, given the current state of aviation technology, the actual *ratio* of the provision may no longer be relevant – aerial weapons can be a more precise means of combat than artillery shelling.[260] Fritz Kalshoven argues that, unlike air attacks, which can be carried out against military objectives located within concentrations of the civilian population, Article 2 para. 2 of the Protocol III establishes an exception in this regard, prohibiting this generally legal practice (unless it is an indiscriminate attack). This is due to the specifics of how incendiary munitions work.[261] On the other hand, III Protocol to the CCW Convention does not prohibit the use of incendiary ammunition against military objectives that are not located near areas of civilian concentration. According to the position expressed in the 2009 HPCR

259 "In large cities there may be areas in which a military objective could be placed without its being located within a concentration of civilians" – W.J. Fenrick, *The Conventional Weapons Convention: A Modest but Useful Treaty*, "International Review of the Red Cross" 1990, vol. 279, p. 508.

260 "[…] a commander may be forced by the language contained in paragraph 2 to employ artillery fire or an air-delivered high-explosive munition that would be less accurate or more destructive than an air-delivered incendiary weapon, resulting in greater collateral civilian casualties or damage to civilian objects" – W.H. Parks, *The Protocol on Incendiary Weapons*, "International Review of the Red Cross" 1990, vol. 279, p. 548. It should be noted that in the case of conventional artillery, the weapon's dispersion (CEP) in the circumstances of the *Gotovina* case could have been as much as 400 meters. In comparison, for JDAM-type munitions, the CEP is a maximum of 10 meters. However, the belief in the inherent inaccuracy of aerial bombing is still present in doctrine, see: W.A.D.J. Sumanadasa, *Principle of Proportionality: The Criticized Compromising Formula of International Humanitarian Law*, "Israel Yearbook of International Humanitarian and Refugee Law" 2010, vol. 10, p. 25.

261 F. Kalshoven, *Arms, Armaments and International Law*, "Recueil des cours, Collected Courses of the Hague Academy of International Law" 1985, vol. 191, p. 258.

Manual, Protocol III restricts but does not prohibit the use of incendiary weapons *per se*.[262] Michael N. Schmitt also points out that in certain circumstances, incendiary weapons are the only means of destroying stockpiles of biological or chemical weapons.[263]

However, a current issue arises with regard to using incendiary weapons against lawful military objectives and substances not explicitly mentioned in the Protocol. Theoretically, from a humanitarian point of view, combatants are covered by the protection resulting from the provisions of Article 23 of the Hague Regulations of 1907 and Article 35 of AP I, as well as the customary nature of protection against unnecessary suffering, which also extends to non-international armed conflicts. Lessie C. Green believes that, for this reason, military aircraft should refrain from attacking human targets on the ground using incendiary ammunition in aerial warfare.[264] William J. Fenrick believes that the Protocol III contains no regulations regarding the use of incendiary weapons against combatants.[265] Anthony P.V. Rogers expresses a similar position.[266] The ICRC *Study on Customary International Law* presents a position whereby incendiary means used against combatants should be a measure of last resort.[267] Other specialists point out that the use of incendiary weapons against armored vehicles is legal, even if they are manned.[268] The theses of ICRC in this regard are, however, criticized for not being based on the analysis of the actual practice of states.[269]

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262 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 79.

263 M.N. Schmitt, *Air Warfare*…, p. 142.

264 L.C. Green, *Essays on the Modern Law of War*, New York 1985, p. 145.

265 "There are no provisions on the use of incendiaries against combatants. Even though there was a measure of support for some restriction in this area, it was not possible to achieve consensus on the subject. As a result, the pre-existing law applies and the use of incendiary weapons to cause unnecessary suffering is prohibited. A value judgment must be made in particular circumstances to determine whether or not the suffering caused is unnecessary" – W.J. Fenrick, *The Conventional Weapons Convention*…, p. 508.

266 "It follows that the use of incendiary weapons against military objectives such as fortified military positions may be perfectly legitimate, even if that has horrible consequences for the enemy military personnel inside. Furthermore, there is nothing in treaty law to suggest that the use of incendiary weapons directly against military personnel is prohibited" – A.P.V. Rogers, I.J. MacLeod, *The Use of White Phosphorus and the Law of War*, "Yearbook of International Humanitarian Law" 2007, vol. 10, p. 94.

267 J.-M. Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, "International Review of The Red Cross" 2005, vol. 857, p. 206.

268 "The use of napalm against tanks, or white phosphorus against trucks would seem to be acceptable, even though the tanks and trucks are manned" – H. Harris, *Modern Weapons and the Law of Land Warfare*, "Military Law and Law Review" 1973, vol. 12, p. 19.

269 "Rule 85 is therefore unusual among these regulations in not being based on a treaty provision; the evidence cited is a number of military manuals and official statements, plus – more problematically – accusations of the use of incendiary weapons in a few instances that have

10.4. White phosphorus

The greatest doubts and objections arise from the very definition of incendiary weapons, which by design excludes any means where incineration or burning are only incidental – an example of such an agent is white phosphorus.[270] White phosphorus is a dual-purpose substance. The first application is the widespread use of this substance as a component of various types of smoke grenades and bombs, creating an effective and dense smoke barrier. For this reason, at the experts' meeting in Lucerne in 1974, it was essentially excluded from the definition of incendiary weapons.[271] The second area of the operational use of this substance is the installation of containers with this ammunition, which explode in the air, generating extremely high temperatures. White phosphorus not only causes deep third-degree burns but also penetrates internal organs, and when inhaled, it leads to permanent injury and complications. Due to the drastic medical consequences of using this weapon, a question arises about the legality of employing this type of ammunition.

The first documented use of the substance dates back to World War I, when white phosphorus began to be used as a component in artillery shells and portable personal weapons. The tactical use of this weapon had similar characteristics to those of napalm, but white phosphorus was more often used in urban warfare and against enemy personnel (especially during World War II). Cases of white phosphorus use in Vietnam are known, as are controversial incidents involving U.S. military operations in Fallujah in 2004 and Israeli Defense Forces' actions in the Gaza Strip in 2009, which were confirmed by the ICRC and the United Nations investigative commission.[272] It is also claimed that this substance has been widely used in the civil war in Syria since 2011.

The first issue is the assessment of the use of these means in the context of Article 23(g) of the Hague Regulations of 1907 and Article 35 of AP I of 1977, as well as adequate norms of customary law. The doubts regarding the application of this provision and its role in the system for assessing the legality of using a particular

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never been confirmed. It is surely unsound to base a statement of customary international law on unconfirmed State practice, particularly when there is no other evidence to substantiate the claim as to the law" – D. Turns, *Weapons in The ICRC Study on Customary International Humanitarian Law*, „Journal of Conflict and Security Law" 2006, vol. 11, p. 232.

270 "First, Protocol III's design-based definition of incendiary weapons arguably excludes most multipurpose incendiary munitions" – Human Rights Watch, *An Overdue Review: Addressing Incendiary Weapons in the Contemporary Context Memorandum to Delegates at the Meeting of States Parties to the Convention on Conventional Weapons*, November 2017, p. 12. "Therefore, for a weapon to be considered an incendiary weapon, it must intentionally set fire or burn. If it only ignites fire or burns as a side effect, it is not an incendiary weapon under the Protocol" – R. Reyhani, *The Legality of the Use of White Phosphorus by the United States Military During the 2004 Fallujah Assaults*, "Journal of Law and Social Change" 2007, vol. 10, p. 33.

271 ICRC, *Report Conference*, para. 48, p. 16.

272 R. Reyhani, *The Legality*…, pp. 3–4.

weapon on the battlefield are identical to those concerning incendiary weapons. The premise of the prohibition of causing excessive injury and unnecessary suffering, according to the ICRC commentary on Rule 70, is a topic of controversy. It is debated whether these provisions provide a sufficient basis to prohibit a given weapon, or whether a dedicated treaty or a norm is required.[273] There is no doubt that the effects of using white phosphorus on the life and health of both combatants and civilians are extremely serious. Nevertheless, in light of the Protocol III to the CCW Convention, contrary to the position of non-governmental organizations, white phosphorus is not considered an incendiary weapon due to the lack of evidence of its primary intended purpose.[274] Thus, its use is subject only to the general principles of international humanitarian law.[275]

10.5. The use of bombs of significant weight in urban conditions

There is no doubt that employing the heaviest aerial bombs, such as the FAB-3000 or the 2,000-pound Mk 84 bomb in urban areas raises questions about the legality of air attacks in which these types of munitions are used. Regardless of whether these weapons are characterized by precision (e.g. through the use of packages that allow these weapons to be guided, such as JDAM), their impact on the surroundings is serious due to the quantity of explosive charge contained in the heaviest aircraft bombs. In theory, this would have to mean that the military objective being attacked is so extensive that the use of a weapon of significant weight is justified by the need to neutralize it. In conditions of dense urban development, an attack, e.g. on a group of combatants located near residential buildings, may cause significant destruction and damage to infrastructure located near a military target, which should affect the issues of estimation under the proportionality rule. According to a report by the UN Office of the High Commissioner for Human

273 "Although the existence of the prohibition of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is not contested, views differ as to whether the rule itself renders a weapon illegal or whether a weapon is illegal only if a specific treaty or customary rule prohibits its use" – J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules*, Cambridge 2005, p. 242.

274 "Not the least of these is White Phosphorous (WP), a device used primarily as a screening and marking agent, or as a combined smoke and antipersonnel agent. WP ignites spontaneously when exposed to air, forming a dense white smoke of phosphorous pentoxide. It is not an effective antimateriel weapon, and is of limited effect as an antipersonnel weapon" – W.H. Parks, *The Protocol*…, p. 544; Human Rights Watch, *Rain of Fire: Israel's Unlawful Use of White Phosphorus in Gaza*, 2009, p. 63, https://www.hrw.org/report/2009/03/25/rain-fire/israels-unlawful-use-white-phosphorus-gaza (accessed: 26.10.2020); P. Hashey, *White Phosphorus Munitions: International Controversy in Modern Military Conflict*, "New England Journal of International and Comparative Law" 2011, vol. 17, pp. 309–310.

275 E. Crawford, A. Pert, *International*…, p. 222.

Rights assessing the use of heavy aerial bombs by the IDF in the Gaza Strip in 2023, the extent of the damage was so extensive that it actually resulted in simultaneous bombing of military objectives and civilian objects, thus violating the prohibition of indiscriminate bombing.[276]

The practice of the parties to the conflict in the Gaza Strip and Ukraine stands in contrast to the initiative undertaken in 2021 by the ICRC, NGOs and some states (Ireland) to limit the use of explosive weapons with a wide impact area in urban conditions.[277] These actions remain in the sphere of *de lege ferenda* postulates as desirable from the point of view of improving the level of protection of the civilian population against the effects of air bombings in urbanized places. Today, it should be noted that per se, the use of heavy bombs is not prohibited by any norm of international law, nor is striking military objectives in urban areas either. The specific circumstances surrounding the decision to launch an attack using heavy aircraft bombs is a complex problem, and undoubtedly one of the factors is the size of the specific military advantage obtained. The commander of an air operation involving heavy bomb drops will be faced with the difficult task of carrying out an attack in accordance with the principle of distinction (prohibition of the simultaneous bombing of military objectives and civilian objects), the rule of proportionality (the need to take into account the possible extensive scope of damage to the civilian population and civilian property) and the resulting precautionary considerations. It cannot be ruled out that in some cases military necessity may justify the use of heavyweight bombs, but the benefit would have to be significant.

11. Air warfare under international aviation law

11.1. Paris Convention of 1919

As noted by A.K. Kuhn, during the preparatory work for the 1919 Paris Convention, the issue of air warfare was completely omitted, including the regulation of neutrality issues. The American lawyer pointed out that the reasons for the omission of the issue of air warfare law were partly due to the unfavorable post-war climate, which halted the development of new norms, as well as the

276 *UN report: Israeli use of heavy bombs in Gaza raises serious concerns under the laws of war*, 2024, https://www.ohchr.org/en/press-releases/2024/06/un-report-israeli-use-heavy-bombs-gaza-raises-serious-concerns-under-laws (accessed: 23.09.2025).

277 CRC, *Explosive Weapons With Wide Area Effects: A Deadly Choice in Populated Areas*, Geneva 2022.

focus of states on work related to the establishment of a regime governing civilian air traffic.[278] In 1930, the Air Law Committee at the International Law Association emphasized that the norms of air warfare law should not be regulated within the framework of a unified air navigation system during peacetime.[279]

The only reference to the issue related to the use of military aviation was Article 31 of The Paris Convention, which stated that a military aircraft is any aircraft commanded by a person in the military service of a given state.[280] The above definition was replicated in the draft convention regarding the rights and duties of neutral states in naval and air warfare.[281] By the end of the 1920s, the Germans, due to the restrictions imposed by the Treaty of Versailles, proposed their own four-element definition as follows: 1) the obligation to have state markings; 2) the aircraft should be armored and capable of carrying weapons such as guns, machine guns, bombs, and torpedoes; 3) the aircraft is piloted by a crew that is part of the armed forces personnel; 4) the aircraft is an integral part of the armed forces in an organic sense.[282] Joseph Kroell rightly pointed out that the definition used in the Paris Convention is insufficient in the context of air warfare, as it does not include all the necessary elements required for a military aircraft. He pointed out the possibility of a practical paradox – an aircraft fully capable of performing military service, but not manned by military personnel, cannot be considered a military aircraft, while an aircraft adapted, for example, for evacuating the wounded, could be treated as a military aircraft.[283] Moreover, reducing the requirement of being a member of the armed forces solely to the commander could have serious consequences in terms of recognizing a person as a prisoner of war (therefore Article 12 of the Hague Rules of Air Warfare required that the crew consist only of crew members who were members of armed forces). The above circumstance reveals the lack of compatibility between the definition of a military aircraft used in international air law and the law of air warfare.

278 A.K. Kuhn, *International Aerial Navigation and the Peace Conference*, "American Journal of International Law" 1920, vol. 14, p. 371.

279 "The objection was taken, and upheld by the Committee, that this was a matter which came within the purview of laws of aerial warfare and did not properly fit into a Convention governing the rules of aerial navigation in peace time" – *36 International Law Association Report Conference*, 1930, p. 253.

280 Convention on the Regulation of Aerial Navigation, signed in Paris on October 13, 1919 (Journal of Laws 1929, No. 6, item 54).

281 *Draft Convention on Rights and Duties on Neutral States in Naval and Aerial War*, "The American Journal of International Law" 1939, vol. 33, p. 176.

282 J. Kroell, *Traité*…, p. 54; see: League of Nations, Lication of Article 198 of the Treaty of Versailles, C.518.1926.IX.

283 J. Kroell, *Traité*…, p. 57.

11.2. 1944 Chicago Convention (Convention on International Civil Aviation)

In 1944, the issue of air warfare was once again not regulated within the framework of international aviation law.[284] Article 3(a) of the 1944 Convention on International Civil Aviation (commonly known as the Chicago Convention) stated that it does not apply to state-owned aircraft, which, according to Article 3(b), included military aircraft. The Chicago Convention did not provide a broader definition of the concept of a military aircraft, only highlighting the relevance of its purpose. From the provisions referring to air warfare, it is worth pointing out the content of Article 89 of the Chicago Convention, which stated that it was not a restriction on the freedom of action of the States Parties to the Treaty in the event of war. Additionally, according to the Chicago Convention, it is the responsibility of the registering state to determine the nature of the aircraft (Articles 17–21). As noted by M. Bourbonniere and L. Haeck, in the case of an armed conflict, the responsibility for identifying the military nature of a civilian aircraft (in the context of the convention) is pursuant to Article 52 para. 3 of AP I assigned to the party executing the attack.[285] In turn, M. Gestri emphasizes the importance of provisions relating to the obligation to place registration markings on the surface of a civilian aircraft and to carry documents that may verify its status. According to the author, these provisions directly stem from similar principles found in the Hague Rules of Air Warfare of 1923 and reflect the obligation to distinguish combatants from civilians in the event of an armed conflict.[286]

11.3. Civilian aircraft in an armed conflict zone

As mentioned earlier in this work, military aircraft shall not conduct combat operations within the airspace of neutral states.[287] This means that in the areas where the principle of freedom of air navigation applies (i.e., over the high seas), as well as within the airspace of belligerent states, situations may arise in which military aircraft of one of the warring parties encounter civilian aircraft transporting civilian

284 D. Johnson, *Rights*…, pp. 58–59. Convention on International Civil Aviation, signed in Chicago on December 7, 1944 – the Chicago Convention (Journal of Laws 1959, No. 35, item 212, as amended).

285 M. Bourbonniere, L. Haeck, *Military Aircraft and International Law: Chicago Opus 3*, "Journal of Air Law and Commerce" 2001, vol. 66, p. 970.

286 M. Gestri, *The Chicago Convention and Civilian Aircraft in Times of War*, [in:] N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006, pp. 141–142.

287 J.C. Martin, *Theatre of Operations*, [in:] M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford 2015, p. 760.

passengers and goods. This potentially exposes international passenger air traffic to the risk of a civilian aircraft being mistaken for a hostile one and consequently being shot down. The presumption of an aircraft's "hostile presence" within a zone of armed conflict was indicated in the provisions of the 1923 Rules (see Chapter V).

The establishment of so-called restricted or no-fly zones is a mechanism for preventing the presence of non-enemy aircraft in areas of ongoing military operations. On April 23, 1982, during the Falklands War, the British government declared that, in order to protect the Royal Navy's intervention fleet, a 200-nautical-mile zone had been established, within which all warships and military aircraft could expect to encounter armed resistance. The statement also included a warning regarding "Argentine civilian aircraft engaged in reconnaissance". On April 28, 1982, the restricted zone was expanded to include "all aircraft, both military and civilian," located in the restricted zone without prior authorization.[288]

The so-called restricted zones should be distinguished from no-fly zones, which, unlike the concept described above, can only be established over the territory of a belligerent party and in the context of a non-international armed conflict.[289] In recent history, the UN Security Council, acting under Chapter VII of the UN Charter, established a number of no-fly zones. The first such initiative was the establishment of a no-fly zone over the territory of Bosnia and Herzegovina in 1992, under UN Security Council Resolution 786/1992, the enforcement of which was executed by NATO. The most recent example of international community actions in this regard was UN Security Council Resolution 1973/2011, which imposed a no-fly zone over the territory of Libya.[290]

From the perspective of the law of air warfare, it is important to note that international humanitarian law treaties do not regulate the rights and obligations of the party establishing a restricted zone or a no-fly zone in any way. For this reason, the above issue is purely technical in nature, essentially serving as a form of warning directed at third states, indicating the potential for a threat arising from ongoing military operations.[291] Therefore, it is unacceptable to attack any aircraft (including military ones) solely based on the presence of the aircraft within the boundaries of the zone.[292] This is also prohibited *per se* under the provisions

288 S. Sivakumaran, *Exclusion Zones in the Law of Armed Conflict At Sea: Evolution in Law and Practice*, "International Law Studies" 2016, vol. 92, pp. 178–179.

289 M.N. Schmitt, *Air Law and Military…*, p. 314.

290 M. Piątkowski, *Strefy zakazu lotów w świetle międzynarodowego prawa konfliktów zbrojnych oraz międzynarodowego prawa lotniczego* [*No-fly zone in the light of international humanitarian law and international aviation law*], [in:] K. Załęski, N. Saletra, K. Kowalska (eds.), *Wybrane aspekty bezpieczeństwa w transporcie* [*Selected issues in transport security*], Dęblin 2015.

291 Y. Dinstein, *The Conduct of Hostilities…*, p. 110.

292 G. Venturini, *Air Exclusion Zones*, [in:] N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006, p. 126.

of Article 57 of AP I, which establishes the obligation to identify a target before launching an attack.[293] The 2009 HPCR Manual, in Rules 105(a) and 105(b), explicitly emphasized that the establishment of exclusive restricted zones or no-fly zones did not nullify or suspend the obligations of states under international humanitarian law. In particular, it strictly prohibited the conduct of unrestricted air warfare.[294] The above conclusion is confirmed by the provisions of the so-called *San Remo Manual*, which states that belligerents cannot be relieved of their obligations under international humanitarian law by establishing zones that may restrict the use of certain maritime areas.[295] In particular, this applied to any aircraft that did not constitute a military target. It is worth noting that the manual also establishes a detailed regime (under Part J) concerning civilian passenger aircraft, arguing that such aircraft should be presumed to not make a significant military contribution. Rules 61–63 highlight the necessity to take multiple precautionary measures, including the requirement to first employ non-combat actions, such as forcing a given aircraft to land.[296]

It should be noted with concern that the number of downed passenger aircraft has been increasing in recent years, starting from 2014 (the downing of MH17 over eastern Ukraine), 2020 (the downing of flight PS752 by Iranian air defense), and the severe damage inflicted by Russian air defense on the aircraft making flight J28243 in December 2024. Some of these incidents occurred in the context of ongoing armed conflicts or due to misjudgment regarding the state of an armed conflict (as in the case of the downing of flight PS752 in 2020). It should be emphasized that the primary responsibility for the safety of civilian aviation in the context of armed conflict lies with the parties involved (both the attacking and defending sides) and, under international aviation law, with the state(s) on whose territory the armed conflict is taking place. NOTAM (Notice to Airmen) messages play a crucial practical role in this regard, serving as a form of communication between airspace management authorities (both military and civilian) and the crews of civilian aircraft. The International Civil Aviation Organization (ICAO) emphasizes the responsibility of states in restricting or closing access to airspace in areas of armed conflicts, also highlighting the threat posed by non-state actors.

293 M.N. Schmitt, *Wings over Libya: The No-Fly Zone in Legal Perspective*, "The Yale Journal of International Law Online" 2011, vol. 36, pp. 53–54; M.R. Aaron, D.R.D. Nauta, *Operational Challenges of the Law on Air Warfare. The Example of Operation Unified Protector*, "Military Law and Law of War Review" 2013, vol. 52, p. 369.

294 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 289.

295 *San Remo Manual on International Law Applicable to Armed Conflict at Sea*, 12 June 1994, p. 181, https://www.legal-tools.org/doc/118957/pdf/ (accessed: 5.06.2025).

296 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 183.

International humanitarian law, as well as the specific norms of the law of air warfare, do not impose an obligation to close airspace in the event of an armed conflict. However, the UN Special Rapporteur on extrajudicial and arbitrary executions associated the issue of airspace closure with a violation of the precautionary measures indicated in Article 57 of AP I.[297] However, good practice observed since 2020 consists in states (Ukraine, Israel, Iran) taking a proactive approach, which involves issuing NOTAM messages, often foreshadowing the inevitability of taking military action in their airspace. Nevertheless, considering the recognition of Article 57 of AP I as an example of the "due diligence" obligation and the strong contextual nature of the provision, in certain situations (such as a drone swarm attacking the adversary's far flank), issuing a NOTAM may not be possible. In such cases, both the defending and attacking parties should do anything possible to inform commercial aviation of the threats through alternative means. Aircrews are obliged to comply with NOTAM regulations, which significantly reduces the risk of a civilian aircraft entering areas of military operations. However, non-compliance with NOTAM *per se* does not make an aircraft, especially a passenger aircraft, a legitimate military target.

297 "While international humanitarian law does not impose an obligation to close the airspace to civilian airlines, a failure to do so followed by an unintentional strike against a civilian airliner would amount to a violation of international humanitarian law, and an intentional one a likely war crime" – Mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings, Statement Commercial Airlines and conflict zones: Recommendations to strengthen air safety and prevent of unlawful deaths.

CHAPTER VIII

NEUTRALITY IN AIR WARFARE

1. Neutrality in air warfare

Both the Hague Rules of Air Warfare (Articles 39–48) and the Manual on Air and Missile Warfare of 2009 (rules 165–175) devote attention to the issue of neutrality in air operations. Moreover, one cannot overlook the fact that the attitude of neutral states during World War I, which decided to intern or attack military aircraft belonging to the parties of the conflict, impacted the principle of exclusive state sovereignty in the airspace. The general outline of the issue of neutrality in air warfare is a derivative of the codification of neutrality in naval and land warfare that took place at the Second Peace Conference in The Hague in 1907.[1] As a result, at the time of the birth of military aviation, neutrality was already a developed institution in the law of war.

According to the so-called classical neutrality (understood as the effect of the codification produced by the V and XIII Hague Conventions of 1907, especially in relation to maritime warfare), a state not party to an armed conflict should comply with the obligations of impartiality and abstention towards the belligerents.[2] A neutral state should intern military equipment and personnel if they are found on the territory of said neutral state, while the parties to a conflict should not violate or use the territory of a neutral state to conduct military operations.[3] When applying the neutrality of states, they should exercise due diligence and respond to its violations.[4]

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1 Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907. Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War. The Hague, 18 October 1907.

2 J. Upcher, *Neutrality in Contemporary International Law*, Oxford 2020, pp. 124–125.

3 K. Wani, *Neutrality in International Law: From the Sixteenth Century to 1945*, Oxon 2017, pp. 101–102.

4 Alabama claims of the United States of America against Great Britain Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871.

The standards of naval warfare also laid down detailed rules for the use of warships from ports of neutral states, as well as their arming and equipping.

In this spirit, the Hague Rules of Air Warfare established obligations towards the parties to the conflict and neutral states. Under Article 42 an obligation was imposed to intercept and force to land, as well as intern any military aircraft belonging to the belligerent states and their crews after landing (Article 43).[5] The 1923 document also provided for a prohibition on the supply of aviation equipment to the parties to the conflict, including ammunition and spare parts. The broad regulation referred to the issue of obligation to prevent any attempts to violate neutrality, e.g., departures of aircraft that could perform acts of hostility or carry personnel of the armed forces of a party to the conflict on board. Article 47 also prohibited the use of a neutral state's airspace by combatants for reconnaissance purposes.

It is significant that the Hague Rules of Air Warfare of 1923 were adopted at the time of an already extensive discussion on the role of neutrality in connection with the new international order created by the Versailles system. The Covenant of the League of Nations assumed that acts of illegal use of force should be met with the collective response of other members of the League of Nations, which contradicted the idea of classical neutrality.[6] One of the main creators of the post-war order, President Woodrow Wilson stated that "neutrality is no longer feasible or desirable where the peace of the world is involved and the freedom of its peoples […]".[7] The inter-war period was the moment when, under the influence of changes in *ius ad bellum*, three views on the issue of neutrality were formed. According to the first one, neutrality lost its normative importance after creation of a system of collective response to threats to peace and adoption of the Briand-Kellog Pact in 1928.[8] The second position allowed taking steps that discriminated against the state being in breach of international law but indicated that neutrality "survived" the banning of war as a tool for settling international disputes.[9] The third view argued that classical neutrality applies in an unchanged manner, pointing to the lack

5 "Neutrals also must act to prevent belligerents from moving forces, munitions or supplies through neutral territory and airspace; and seize and intern belligerent forces, vehicles, aircraft and equipment present in their territory, airspace or waters unlawfully" – J.K. Davis, *"You Mean They Can Bomb Us?" Addressing the Impact of Neutrality Law on Defense Cooperation*, 2020, https://www.lawfaremedia.org/article/you-mean-they-can-bomb-us-addressing-impact-neutrality-law-defense-cooperation (accessed: 15.06.2025).

6 M. Piątkowski, *Dostawy wojskowego sprzętu lotniczego Ukrainie w świetle neutralności w prawie międzynarodowym* [*Supply of military aviation equipment to Ukraine in the light of neutrality in international law*], "Palestra" 2024, vol. 2, pp. 30–32

7 Joint Address to Congress Leading to a Declaration of War Against Germany (1917).

8 J.L. Kunz, *The Covenant of the League of Nations and Neutrality*, "Proceedings of the American Society of International Law at Its Annual Meeting" 1935, vol. 29, pp. 36–45.

9 M.O. Hudson, *The Budapest Resolutions of 1934 on the Briand-Kellog Pact of Paris*, "The American Journal of International Law" 1935, vol. 29, p. 93.

of an unambiguous international mechanism for determining the aggressor state.[10] Moreover, soon after the outbreak of World War II, the concept of the so-called non-participating but not neutral states (so-called non-beligeranza) emerged. As part of this model (used by Italy in relation to the Third Reich until 1940, the United States in relation to the Allies until 1941 and by Sweden in relation to Finland during the Winter War), while remaining out of the conflict, these states decided to support those, whose defense remained also in their interest, through the supply of military equipment (or by making it feasible).[11]

2. Neutrality in the context of air operations during World War II: the internment of flight crews and equipment

As a result of the aggression of the Third Reich and the USSR against Poland, on September 17, 1939, the Polish military authorities decided to evacuate aviation equipment and flight crews to neutral states. Polish airmen were initially interned by Romania and Hungary, but as a result of the favorable policy of the Hungarian and Romanian governments, the number of internees drastically decreased by the end of 1939. Polish aviation personnel were also interned in the Baltic States and Sweden.[12] The vast majority of the pre-war Polish Air Force personnel reached Allied France and Great Britain and continued to fight alongside the Allies.[13]

As a result of Polish defeat in 1939 254 military aircraft were evacuated to Romania after the September 1939 campaign.[14] There were 43 PZL P.11 fighter aircraft on the territory of this state, which were taken over in 1940 for the equipment of Romanian aviation and took part in the battles with the Soviet Union until 1942. A similar fate was shared by the PZL P.23 "Karaś" machines, of which

10 J.B. Whitton, *The Changed Attitude of the Powers Towards Neutrality Laws*, "Current History (1916–1940)" 1929, vol. 30, pp. 458–459.

11 M. Piątkowski, *Dostawy*…, pp. 34–37.

12 J. Pawlak, *Polskie eskadry w Wojnie Obronnej 1939* [*Polish squadrons in September 1939*], Warszawa 1982, p. 271.

13 "By May 1940, 7,119 airmen had been evacuated from Romania, 903 from Hungary, and 1,278 from other states. In total, according to the report of the Polish Air Force department in charge of evacuation, 8,300 airmen had been evacuated to France" – O. Cumft, H. Kujawa, *Księga lotników polskich: poległych zmarłych i zaginionych* [*Book of fallen, missing and dead Polish aviators*], Warszawa 1989, p. 37.

14 A. Glass, T.J. Kopański, *Polskie konstrukcje lotnicze: Tom IV, Wrzesień 1939 r. część 2* [*Polish Aerial Machines, Volume IV, September 1939*], Sandomierz 2011, p. 220.

approx. 30 were taken over by the Romanian side.[15] In the case of PZL 37 "Łoś" bombers (approx. 30 aircraft), the Romanian authorities treated them as the fulfilment of the contract for the supply of these aircraft concluded in July 1939 and incorporated them into the Romanian Air Force.[16] In the spring of 1940, the Polish authorities negotiated with Romania the return of PZL 37 "Łoś" machines, arguing that they were Polish property and should be returned after the end of the war, and "Romanians are not allowed to use them; and a protest was filed on this matter". Interestingly, a proposal was made to the Romanian government to carry out a tying transaction (sale of all Polish military equipment located on the territory of Romania in exchange for returning 10 units of PZL P.37 "Łoś" machines). The operation would be carried out by Romanian crews, who would make a flight to Turkey, where the machines would be handed over to the Polish side.[17] It should be emphasized that the practice of a neutral state taking over the ownership of military aviation equipment was not in accordance with the provisions relating to neutrality, because internment does not lead to a change in the ownership of military aircraft, but aims to prevent the equipment of a party to the conflict from being fielded until the end of the armed conflict.[18] In 1945, Romania proposed returning the machines to Poland, but this did not raise the interest of Poland's government.

During World War II, only a few neutral European states decided to maintain a policy of neutrality towards states fighting in the conflict, although observing the full spectrum of obligations resulting from neutrality was rare. Switzerland was the subject of exceptionally frequent cases of internment, especially of Allied crews. The airspace of this state was notoriously violated, and the Swiss Air Force were frequently involved into serious air combat defending its territorial integrity.[19] Later in the war, the crews of Allied bombers often decided to make a forced landing in Switzerland, which led to the internment of approx. 140 aircraft and 1,700 airmen.[20] Switzerland took the most rigorous approach to the issue of neutrality and is even accused of exceeding the powers of the interning state.[21]

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15 A. Glass, *Polskie konstrukcje lotnicze 1893–1939* [*Polish Aerial Machines 1893–1939*], Warszawa 1976, p. 250; T. Kopański, K. Sikora, *P. 23 Karaś*, Gdynia 1995, pp. 40–41.

16 A. Glass, *Polskie konstrukcje lotnicze*…, p. 266. J. Cynk informs that even during the war, the Polish military authorities attempted to send Łoś-type aircraft to France to be deployed by the resurgent Polish Air Force – J. Cynk, *Siły Lotnicze Polski i Niemiec: Wrzesień 1939* [*Air Forces of Poland and Germany: September 1939*], Warszawa 1989, p. 184.

17 J. Cynk, *Samolot bombowy PZL P-37 Łoś* [*Bomber PZL P-37 Łoś*], Warszawa 1990, pp. 199–200.

18 The British Hawker Hurricanes that landed in Ireland were sold to that state by the government in London. *'Small but fierce': Ireland's Air Corps during World War Two*, n.d., https://www.key.aero/article/small-fierce-irelands-air-corps-during-ww2 (accessed: 15.06.2025).

19 The Swiss Air Force operated the Messerschmitt Bf-109 as its primary fighter aircraft, which led to some mistakes.

20 In retaliation for escapes from internment camps, crew members were punitively transferred to the infamous Wauwilermoos camp, where inhumane conditions of confinement prevailed.

21 C.J. Prince, *Shot From The Sky: American POWs in Switzerland*, Annapolis 2003, pp. 32–33.

In turn, Allied crews bombing northern areas of Germany were forced to cross Sweden's border.[22] Only on June 20, 1944, approximately 21 machines were forced to land at Swedish airports. In 1944, the State Department of State proposed the sale of P-47 aircraft and the transfer of 4 B-17 bombers interned by Sweden in exchange for the release of American air personnel.[23] During the German occupation of Denmark, some of the Danish aviation personnel fled to Sweden to reach the United Kingdom and continue to fight alongside the Allies. Some of the airmen remained in Sweden forming the so-called Danish brigade, which was to be a form of preparation for the liberation of Denmark in the event of the Third Reich's collapse. It is worth mentioning that in order to transport important people and materials (mainly bearings) between Sweden and the United Kingdom, the so-called Stockholm Express was created in 1942. For the purpose of the operation, the BOAC (British Overseas Aircraft Corporation) pilots received Mosquito machines from the Royal Air Force, which were repainted in civilian colors and received a standard registration number. These aircraft, as civil aircraft, were permitted to land on Sweden's territory without it being bound to intern them. One of the most famous personages who was transported this way was the famous physicist Niels Bohr.[24]

Allied airmen were interned in Portugal, Spain, Ireland and Turkey. In February 1943, Spain gave its consent to the release of American airmen. General Franco's government maintained a policy of equality, releasing both Allied and German airmen.[25] Due to airstrikes on Romanian oil fields in Ploiesti, some of the American aircraft landed in Turkey. The US ambassador at the time pointed out that due to the Turkish position, these machines should not be expected to be returned during the war.[26] In June 1942, Secretary of State Cordell Hull

22 In Sweden, approximately 100 American aircraft and 1,200 airmen were interned, along with 63 British aircraft and 267 crew members. H. Bodson, *Downed Allied Airmen and Evasion of Capture: The Role of Local Resistance Networks in World War II*, Jefferson 2005, p. 145.

23 The Secretary of State to the Minister in Sweden (Johnson), Washington 13 September 1944, Foreign Relations of the United States: Diplomatic Papers, 1944, Europe, Volume IV. The negotiations were linked to the mutual release of interned German soldiers in connection with Finland's withdrawal from the war on Germany's side.

24 de Havilland Mosquito FB.Mk.VI, n.d., https://www.ultracast.ca/v/vspfiles/Instructions%20-%20Fundekals/32-Scale/Fundekals_32-004_Instructions.pdf (accessed: 15.06.2025).

25 W. Wolf, *Special Operations Consolidated B-24 Liberators: the Unknown Secret and Specialized Duties Aircraft*, Barnsley 2023.

26 "Under these circumstances and as it is most unlikely that the Turks would dare in view of international law return these planes to us during the continuance of the war particularly as they are and will be under the constant surveillance of Axis agents, I am of the opinion that their prompt gift to the Turkish Government for use as transport planes would create a profoundly favorable impression" – *The Ambassador in Turkey (Steinhardt) to the Secretary of State*, 811.248/576: Telegram Foreign Relations of the United States: Diplomatic Papers, 1942, The Near East and Africa, Volume IV.

proposed a donation of American military aircraft in exchange for the release of Allied airmen. In March 1943, American diplomacy negotiated with Turkey the release of Allied airmen from internment in exchange for the simultaneous release of German airmen.[27] In the context of Portugal, in early 1943, the US government requested the release of American aircraft interned in Lisbon (trying to pressure Portugal's government that it had set a precedent because of previous detentions of German aircraft equipment and flight personnel, or that military aircraft should benefit from the same principles as warships).[28] Interestingly, the US government tried to offer the sale or exchange of American machines located in these states, but that was opposed to by the Portuguese side.[29] Allied and German airmen were interned by Ireland, which in 1943, due to shifting balance of the war in favor of the Allies, released interned British and American airmen.[30]

The above examples indicate that European states that remained neutral for most or all of the war (Lithuania, Hungary, Romania, Portugal, Spain, Ireland, Switzerland and Sweden) decided to intern the airmen and the machines belonging to the belligerents. However, as the conflict dragged on and the advantage shifted in favor of the Allies, the pilots of the winning side were gradually released much more often than German airmen. Except for the situation related to the Polish aviation interned in Romania in 1939, states did not assume ownership over the interned military aircraft (unless accompanied by a sales or exchange agreement).

According to the 1923 document, neutral states should prevent outbound flights from areas under their jurisdiction by any aircraft belonging to the belligerents and capable of carrying out acts of hostility. One of the aircraft interned in September 1939 by Romania was a prototype of the PZL.46 Sum bomber aircraft, which on September 26, 1939, under the pretext of flying to the factory airport of the IAR company in Brasov with a crew of three, made a flight to besieged Warsaw, landing in Lithuania on the way back.[31] The aircraft was

27 *The Ambassador in Turkey (Steinhardt) to the Secretary of State, 24 March 1943*, Foreign Relations of the United States: Diplomatic Papers, 1943, The Near East and Africa, Volume IV.

28 *The Secretary of State to the Minister in Portugal (Fish), 16 January 1943*, Foreign Relations of the United States: Diplomatic Papers, 1943, Europe, Volume II.

29 "Portuguese have refused to consider such proposals stating that any release of interned planes whether by exchange or sale would involve a violation of neutrality" – *The Minister in Portugal (Fish) to the Secretary of State, 28 April 1943*, Foreign Relations of the United States: Diplomatic Papers, 1943, Europe, Volume II.

30 *Belligerent Internees Allied and German Golfers at the Curragh Camp 1940–1945 by Colonel William H. Gibson (retd.)*, n.d., https://www.militaryheritage.ie/wp-content/uploads/2018/12/Belligerent-Internees-1940-1944_2018-03-19.pdf (accessed: 15.06.2025).

31 It is worth mentioning the account of Second Lieutenant Reserve Pilot Engineer Stanisław Reiss regarding the circumstances of the flights he carried out: "During my stay in Bucha-

interned, but its crew made it to the United Kingdom. This is one of the few examples in which an interning state displayed negligence in preventing the departure of interned aircraft.

3. Deliveries of aviation equipment and practice of neutral/non-participating states

In 1932–1934, during the Chaco War, despite the embargo imposed by the League of Nations on Bolivia and Paraguay, Chile supplied Bolivia with aircraft of American origin (Curtiss). The United States prevented the delivery of the Curtiss Condor bomber, France Potez 50, and the Netherlands Fokker CV.[32]

During the Sino-Japanese war, Italy supplied China with CR.32 machines, intending to build an assembly plant, and in 1935 the Kuomintang government negotiated the delivery of He-111 bombers from the Third Reich.[33] Starting from the mid-1930s on the territory of this state, the CAMCO (Central Aircraft Manufacturing Company) assembly plant, operating formally as a private enterprise, was in fact subsidized by the United States, which allowed the Chinese aviation to access the new construction by Curtiss.[34]

In the summer of 1939, Poland ordered a batch of Hawker Hurricane fighters from Great Britain, the first of which reached Gdynia before the outbreak of the war but, due to the international situation, was never unloaded. Before the Western Allies joined the war, the loading of aviation equipment for shipment

rest, I learned from Colonel Stachoń that a volunteer was being sought for a flight to Warsaw." Since the situation on the ground was such that the only aircraft capable of performing the task was a PZL Sum, which I had flown, I immediately declared my readiness to carry out the flight or to familiarize any other pilot with the operation of the aircraft. The next day, I received orders to carry out the flight and transport two officers from the General Staff to Warsaw, whose names were disclosed to me in confidence. The plan involved contacting the director of the Romanian factory in Brasov through a SEPEWE trade representative, requesting the storage of the prototype Sum aircraft as the property of the PZL aircraft manufacturer for the duration of the war. The director was to liaise with the Minister of Aviation to assign a Romanian officer as an observer, and I was supposed to fly to Brasov. Meanwhile, the crew, posing as PZL mechanics, prepared the aircraft for flight. However, I did not receive permission to fly to Brasov. Consequently, on the third day, I decided to take off regardless of the situation.

32 J.A. Olsen, *Global Air Power*, Washington 2011; A. de Quesada, P. Jowett, *The Chaco War 1932–1935: South America's Greatest Modern Conflict*, Oxford 2011, p. 40.

33 P. Jowett, *China's Wars: Rousing the Dragon 1894–1949*, Oxford 2013, pp. 234–235.

34 B. Yenne, *When Tigers Ruled The Sky*, New York 2016, pp. 40–41.

by sea through Romania intended for deliveries to Poland took place on September 1–3, 1939.[35]

Extensive (albeit in many cases belated) equipment support of Finland, invaded by the USSR in November 1939, went down in history. Sweden equipped an air squadron (No. 19) with Gloster Gladiator, Hawker Hurt and Ju-86 machines.[36] The Western Allies handed over Gloster Gladiators, Bristol Blenheim bombers, as well as Morane-Saulnier M.S. 406 and Hawker Hurricane fighters.[37] Italians also donated aircraft (G.50), and shortly before the end of the war, Brewster Buffalo B-239 aircraft obtained from the USA received operational readiness.

4. Neutrality after the adoption of the Charter of the United Nations

The adoption of the UN Charter in 1945 reassessed the views on the issue of neutrality once again. It is generally accepted that in the case of peace-enforcement actions authorized under Chapter VII of the UN Charter by the UNSC, the organization's Member States may not invoke reasons of neutrality (Article 25 UN Charter in conjunction with Article 103 UN Charter).[38] Due to the lack of unanimity among the permanent members of the UNSC, such collective actions are rare. In these situations, the response to acts of aggression and other armed acts between states belongs to the international community (the competence of the UNSC to recognize the state of aggression is paramount, but not exclusive).[39] In this respect, the Uniting for Peace mechanism, which was used, among others, against the Russian aggression on Ukraine in 2022, may prove helpful. However,

35 W. Szewczyk, *Samoloty, na których walczyli Polacy* [*Planes flown by Polish pilots*], Warszawa 1988, p. 107. The same author provides information about the shipment of one Supermarine Spitfire fighter and a Fairey Battle bomber to Poland in the summer of 1939. A. Kurowski states that Poland purchased a total of 100 Fairey Battle bombers, 11 Hawker Hurricane fighters, 1 Supermarine Spitfire, and 160 M.S.406 fighters from the Western Allies (A. Kurowski, *Lotnictwo polskie w 1939 roku* [*Polish aviation in 1939*], Warszawa 1962, p. 59).

36 M. Sprague, *Swedish Volunteers in the Russo-Finnish Winter War, 1939–1940*, Jefferson 2000, pp. 125–129.

37 Finland also received a few French Caudron CR.714 aircraft (the remaining ones in France were assigned to Polish air squadrons fighting in France) as well as Hawker Hurricane fighters. W. Szewczyk, *Samoloty*…, p. 86.

38 J. Upcher, *Neutrality*…, p. 23; A. Clapham, *War*, Oxford 2021, p. 68.

39 "The responsibility conferred is "primary", not exclusive" – ICJ, *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962*, I.C.J. Reports 1962, p. 16.

the reaction of a particular state (in the absence of action taken under Chapter VII of the UN Charter) is strongly individualized and may take a number of different approaches: maintaining the rules of neutrality, the position of "friendly neutrality" or "qualified neutrality" (benevolent neutrality) or outright the attitude of a neutral but also non-participating state. Nowadays, it is difficult to consider neutrality as an absolutely binding concept under the conditions of an act of aggression and reaction to this violation of *ius ad bellum*, and on the other hand, it cannot be determined that it is something expired in all conditions and depending on the decision of the state, it can exercise the right to be neutral.[40]

In the practice of states, the cases of internment of aircraft and flight personnel by neutral (or rather non-participating) states after 1945 significantly decreased. This was a result of several factors. The conflicts that broke out after World War II were mostly internal in nature (to which neutrality, as a legal concept, does not apply). In turn, conflicts of an international nature were often woven into the East-West rivalry or were a response to acts of violation of *ius ad bellum*, which downgraded the use of strict neutrality in favor of the "neither belligerent nor neutral" principle in state policy Improvements to the navigation instruments of aircraft alone, as well as upgrades to the general aviation infrastructure, have made instances of violation of third-party states' airspace by military aircraft something of a rarity.

As it was mentioned, in the context of many conflicts occurring after 1945, states made choices related to maintaining neutrality or applying indirect solutions (such as the institution of non-participating but also non-neutral states). A good example of the diversity in the approaches of various states was the transport of aviation equipment for Israel. In 1948, as part of Operation "Balak", Avia S-199 and Supermarine Spitfire fighters were transported to this state from Czechoslovakia for the purpose of forming the 101st Fighter Squadron, the first air unit of the Israeli Air Force.[41] This procedure was organized in a more or less transparent way, with the consent of the states through which the aviation equipment was transported (France), except in the case of the internment of the first batch of machines by the government of Greece.[42] Here, some states decided to

40 Zob. G. Bartolini, *The Ukrainian-Russian Armed Conflict and the Law of Neutrality*, "Netherlands International Law Review" 2024, vol. 71, p. 296; P. Clancy, *Neutral Arms Transfers and the Russian Invasion of Ukraine*, "International and Comparative Law Quarterly" 2023, vol. 72, p. 543; M.N Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co-belligerency, and the Use of Force*, 2022, https://lieber.westpoint.edu/ukraine-neutrality-co-belligerency-use-of-force/ (accessed: 15.06.2025); H. Nasu, *The Future Law of Neutrality*, 2022, https://lieber.westpoint.edu/future-law-of-neutrality/ (accessed: 15.06.2025); K.J. Heller, L. Traubucco, *The Legality of Weapons Transfer to Ukraine under International Law*, "Journal of International Humanitarian Legal Studies" 2022, vol. 13, p. 256.

41 R. Gandt, *The Czech Fighter That Helped Israel Win Its War of Independence*, 2019, https://www.smithsonianmag.com/air-space-magazine/czech-knife-180972958/ (accessed: 15.06.2025).

42 J. Herf, *Israel's Moment: International Support for and Opposition to Establishing the Jewish State, 1945–1949*, Cambridge 2022, p. 416.

straightforwardly provide aviation equipment to this side of the conflict, while others tolerated the usage of airspace as a means of military equipment transit, and one of the states (Greece) decided to intern aircraft.

It seems that states are focused more on not crossing the "red line" of such a level of support (threshold of belligerency) for a party to an armed conflict, so as not to be recognized as a co-participant, than on maintaining the veneers of neutrality. In November 1950, the Soviets decided to use Soviet air personnel to fight in MiG-15 aircraft marked with of Chinese and North Korean military air force symbols. The reason was the lack of appropriate flying personnel in North Korea, experienced in both air combat and piloting jet machines. The material and technical base was the 64th Fighter Aviation Corps, stationed in Mukden, China (a state party to the conflict).[43] The Soviets made efforts to camouflage the presence of their airmen in the war, including but not limited to using Chinese air suits or prohibiting them from undertaking maneuvers or flights that could expose them to capture by the opposite side. At one point in the conflict, the fact that MiG-15 fighters were being flown by Russian pilots was common knowledge among United Nations personnel (among others, due to the overt use of the Russian language in communication), but in fear of an escalation of the conflict, the United States and its allies decided to ignore the above reports. The actions of the Soviets were extremely effective. The MiG-15, owing to its parameters, proved to be a tough opponent for the F-80 Shooting Star or F-84 Thunderjet aircraft, scattering a B-29 bomber formation and forcing the USAF to cease daily airstrikes for several months in April 1951. The area near the Yalu River was called the "MiG-Alley".[44]

During the Vietnam War, many states adopted the slogan "neither belligerent nor neutral" as a principle of their policy and supported North Vietnam or the Republic of Vietnam to a greater or lesser extent. States like Japan or Thailand made their territory available for strikes executed by B-52 bombers (stationed respectively in Okinawa and bases in Thailand, e.g., Korat).[45] In turn, China trained North Vietnamese pilots and delivered MiG-17s to North Vietnam. Similarly, in the USSR, Vietnamese aviation personnel were trained to fly newer MiG-21s (simultaneously delivering these aircraft).[46]

In 1965, during Pakistan's war with India, Iran and Turkey were asked to provide aviation equipment and spare parts for the Pakistani air force. This request was rejected due to the opposition of the American side, but Iran provided other aviation materials (it also permitted Pakistani fighters to land on its territory).[47] In

43 L. Krylov, Y. Tepsukaev, *Soviet MiG-15 Aces of the Korean War*, New York 2008.

44 Z. Xiaoming, *China, the Soviet Union, and the Korean War: From an Abortive Air War Plan to a Wartime Relationship*, "Journal of Conflict Studies" 2002, vol. 22(1), pp. 73–88.

45 M. Michel, *Operation Linebacker II 1972: The B-52s are sent to Hanoi*, New York 2018, p. 33.

46 I. Topeczer, *MiG-21 Aces of the Vietnam War*, Oxford 2017, pp. 10–11.

47 P. Hoodbhoy, *The Bomb: Iran, Saudi Arabia, and Pakistan*, 2012, https://tribune.com.pk/story/325571/the-bomb-iran-saudi-arabia-and-pakistan (accessed: 15.06.2025).

1973, during the Yom Kippur War, both the United States and the USSR provided aid to their allies on a mass scale. In the course of the Operation "Nickel Grass", the United States transferred to Israel approx. 100 F-4 *Phantoms* (for some, there was not enough time to paint over the characteristic camouflage pattern used by the USAF during the Vietnam War). The transit of American aircraft with supplies was not approved by Spain, Turkey and Italy, but the key base for American aircraft stopover landing in the Azores was placed at the disposal of American aircraft by Portugal.[48] Simultaneously, Soviet MiG-21s were delivered to Syria during the conflict by the USSR along with technicians and ground personnel. It was Hungary, Bulgaria, Yugoslavia and Turkey that allowed those Soviet transports with military equipment to proceed.[49] The states that did not participate in the Iraq-Iran war in the period of 1980–1988 were far from maintaining strict neutrality. France provided extensive support for Iraq, selling approx. 60 *Mirage* F-1 machines and renting 5 *Super Etendard* machines with Exocet anti-ship missiles, and the USSR provided aviation equipment (MiG-23).[50] China, in turn, provided Iran with approx. 100 J-6 aircraft and the United States openly supported Iraq, and covertly Iran, for which the CIA provided services consisting in the sale of spare parts for Iranian F-4 and F-14 (which became, among others, part of the *Iran-Contra* affair).[51]

During the Falklands War, the United States supported the United Kingdom with aerial equipment, but refused to support it with an AWACS aircraft (arguing for the possibility of qualifying this action as participation in an armed conflict on the British side).[52] For the same reason, the USSR, despite its patrols operating near the British naval group rushing to recapture the Falklands, did not provide

48 "However, the Governments of Greece, Turkey, Spain and Italy publicly forbade their territory to American aircraft. Other Governments, including that of Britain, made their positions clear privately. Portugal was under pressure from the United States, the sources asserted, and agreed to use of the Azores base' – L.H. Gelb, *U.S. Jets for Israel Took Route Around Some Allies*, "New York Times", October 25, 1973, https://www.nytimes.com/1973/10/25/archives/us-jets-for-israel-took-route-around-some-allies-jets-for-israel.html (accessed: 15.06.2025); W. Heintschel von Heinegg, *The Law of Naval Warfare and International Straits*, "International Law Studies" 1998, vol. 71, p. 277.

49 B.D. Porter, *The USSR in Third World Conflict: Soviet Arms and Diplomacy in Local Wars 1945–1980*, Cambridge 1984, pp. 132–134.

50 J. Ghazvinian, *America and Iran: A History 1720 to The Present*, Toronto 2021, p. 363; M. Cremasco, *"Do-it-Yourself": The National Approach o the Out-of-Area Question*, [w:] J.I. Coffey (ed.), *The Atlantic Alliance and the Middle East*, Hampshire 1989, p. 159.

51 J. Martie, S. Naghshpour, *Revolutionary Iran and the United States: Low-Intensity Conflict in the Persian Gulf*, New York 2016, p. 2018.

52 "A request for AWACS was refused because it would have involved American airmen in the hostilities. Whether the United States acted in accordance with the rules of neutrality which existed prior to World War II is, at the very least, questionable" – *The Falklands Crisis and the Laws of War*, n.d., https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1490&context=ils (accessed: 15.06.2025).

Argentina with detailed information about the movements of those units. In 1999, during the Operation "Allied Force", Hungary, as a new NATO member, initially opposed the deployment of military aircraft of the Alliance on its territory, fearing that it would make Hungary a state participating in the armed conflict against the Federal Republic of Yugoslavia.[53] During the Second Gulf War, Germany, France, Belgium, Ireland and Italy agreed to the use of airspace by combat machines of the Coalition (the United States, United Kingdom, Australia and Poland).[54] Ireland's actions were treated as incompatible with the neutrality of that state, which was raised before the Irish High Court in *Horgan v. An Taoiseach & Ors*. The court stated that in the context of US military aircraft overflights and landings, there still exists a rule resulting from classical neutrality that requires preventing the transit of military equipment belonging to the parties of the conflict through a neutral state.[55]

An interesting situation took place in 1990–1991 as a result of Iraq's aggression against Kuwait. A small contingent of Kuwaiti military aircraft (approx. 35 A-4 *Skyhawk* and *Mirage* F-1 aircraft) were evacuated to Saudi Arabia, where, together with the Coalition troops, they fought for the liberation of their state. The aircraft and personnel not only were not interned but the personnel and equipment of the victim of aggression were even provided with technical support due to the age of the machines. On the other hand, in 1991, the aggressor's craft crossed the border with Iran *en masse* and were interned (almost 121 machines of various types).[56] Significantly, this is essentially the last example of military aircraft internment by a neutral state. The fate of those machines varied – most were incorporated into Iran's air force as reparations for the Iraqi-Iranian war.[57] In 2014, due to the conflict with the so-called Islamic State (ISIS) and the difficult situation of the Iraqi army, Iran decided to return the Su-25 attack aircraft to Iraq.[58] The same year, the former Iraqi Su-22s were handed over by Iran to Syria.[59] Approx. 30 MiG-21 and MiG-23 fighters of the Iraqi air force were transferred to Yugoslavia for modernization and

53 Ultimately, Hungary granted such permission, which allowed for more frequent airstrikes against northern Serbia. F.N. Schubert, *Hungarian Borderlands: From The Habsburg Empire to the Axis Alliance, the Warsaw Pact and the European Union*, New York 2011, p. 120.

54 C. Antonopoulos, *Non-Participation in Armed Conflict: Continuity and Modern Challenges to the Law of Neutrality*, Cambridge 2022, pp. 81–82.

55 Horgan v. An Taoiseach & Ors, High Court of Ireland, April 20, 2023, https://www.casemine.com/judgement/uk/5da04db54653d07dedfd4fb7 (accessed: 15.06.2025).

56 Interestingly, while Iran's position regarding the internment of Iraqi aircraft was undisputed, it was expected that the state would adopt a different stance toward Coalition aircraft and crews, repatriating both due to obligations arising from the UN Charter and commitments under UN Security Council Resolution 678/1990. (C. Antonopoulos, *Non-Participation*…, p. 71).

57 *Iraq air force wants Iran to give back its planes*, 2007, https://www.reuters.com/article/us-iraq-airforce-idUSCOL54415720070805/ (accessed: 15.06.2025).

58 P. Iddon, *Iraq's Air Force Is At A Crossroads*, 2021, https://www.forbes.com/sites/pauliddon/2021/05/11/iraqs-air-force-is-at-a-crossroads/ (accessed: 15.06.2025).

59 *The Iraq-Iran-Syria Su-22 Fitter connection*, 2015, https://www.uskowioniran.com/2015/03/the-iraq-iran-syria-su-22-fitter.html (accessed: 15.06.2025).

repairs before the war in 1990–1991, but due to Iraq's aggression and sanctions against that state, they were never returned. In 2009, the Iraqi government discovered that some of these aircraft were still in Serbia but were not airworthy.[60]

During the Cenepa War in 1995 between Ecuador and Peru, Ecuadorian C-130s landed in Chile to collect ammunition for Ecuadorian troops, making several shuttle flights. In 2005, Peru filed a protest against Chile's actions during the conflict, emphasizing that Chile was "under obligation to observe absolute neutrality" under international law.[61]

On February 24, 2022, after the start of the Russian aggression against Ukraine, a Su-27 of the Ukrainian air force crossed the Romanian-Ukrainian border, was intercepted by the Romanian air force and was forced to land at a Romanian air base. The reason for the landing has not yet been explained. On March 1, 2022, Romania allowed the return of the aircraft (along with the crew) to Ukraine, but without armament.[62] In an interview on November 10, 2024, the then-head of the General Command of the Armed Forces of the Republic of Poland indicated that on February 25, 2022, Poland granted permission for the landing of Ukrainian Ił-76 transport aircraft, which sought shelter in the face of a possible Russian attack. Such an action would be permissible even under conditions of strict neutrality because a neutral state may allow military aircraft to arrive if they intend to land in a neutral state for internment (rule 172(a)(iii). States supporting Ukraine in repelling Russian aggression donated spare parts for post-Soviet MiG-29 type machines (the US side handed over elements of ex-Moldovan MiG-29s purchased from this state after the collapse of the USSR), Su-27, Su-25 or Su-24. 4 Su-25 type machines were handed over by North Macedonia, which in March 2023 were modernized by the Ukrainian side and included in the inventory of the Ukrainian tactical aviation.[63] It is estimated that 14 Polish MiG-29s joined the Ukrainian air force.[64] 13 Slovak

60 *Iraq seeks return of 19 MiG fighters from Serbia*, 2009, https://www.reuters.com/article/idUSLV278292/ (accessed: 15.06.2025).

61 El Gobierno de Chile debió haber mantenido la más absoluta neutralidad, si se considera que el Protocolo de Río además de ser un tratado de límites es un tratado de paz. *Perú confirma que Chile entregó armas a Ecuador en pleno conflicto del Cenepa*, 2005, https://web.archive.org/web/20110927160752/http://www.rree.gob.pe/portal/boletinInf.nsf/0/d279e8a9d33601e605256ff3000a4f62?OpenDocument (accessed: 15.06.2025).

62 B. Tingley, T. Rogoway, *Su-27 Returning From Romania Will Likely Be The Last Fighter Ukraine Gets For Some Time*, 2022, https://www.twz.com/44514/su-27-returning-from-romania-will-likely-be-last-fighter-ukraine-will-get-for-some-time (accessed: 15.06.2025).

63 I. Bozinovski, *Ukraine restores ex-North Macedonian Su-25 to help fight Russia*, 2023, https://www.key.aero/article/ukraine-restores-ex-north-macedonian-su-25-help-fight-russia (accessed: 15.06.2025).

64 *How Many MiG-29 Are Left in Poland and What Stands in the Way of Transferring These Aircraft to Ukraine*, 2024, https://en.defence-ua.com/analysis/how_many_mig_29_are_left_in_poland_and_what_stands_in_the_way_of_transferring_these_aircraft_to_ukraine-12463.html (accessed: 15.06.2025).

MiG-29s (partly by air, with removal of Slovak symbols) were also handed over by March 2023. Since July 2024, Ukraine has successively received a batch of F-16s transferred as part of a coalition of 11 states (Denmark, Belgium, Canada, the Netherlands, Luxembourg, Norway, Poland, Portugal, Romania, Sweden, Greece and the United States).[65]

5. Neutrality and being a party to an armed conflict

In air warfare, the outline of neutrality has a similar dimension to the rules governing naval and land warfare. In this spirit, the 2009 Manual on Air and Missile Warfare refers to the principles already expressed in the 1923 Hague Rules of Air Warfare. Emphasis is placed on the prohibition of belligerent states' military aircraft from using the airspace of a neutral state (violations of which may carry the risk of destruction), the obligation of a neutral state to respond to violations of its airspace by military aircraft from parties to the conflict, the obligation to intern military aircraft and flight crews, and to prevent the departure of aircraft capable of engaging in harmful activities against a party to the conflict (rules 170–173). The rules strictly exclude the possibility of using neutral airports for servicing, refueling or treating neutral bases as a sanctuary, also mandating the confiscation of any contraband shipped to a belligerent.[66]

Nevertheless, whether these rules will be applied in an armed conflict remains an open question, given the highly diverse practice of states, the altered nature of neutrality following the adoption of the UN Charter, as well as the increasing discretion of states in choosing their stance toward an external armed conflict: from maintaining strict neutrality to qualified neutrality or non-belligerent attitude. After 1945, states were far more attentive to actions that, regardless of neutrality considerations, could cross the threshold of participation in an armed conflict. This threshold is defined by two parameters: the direct connection of a given action to ongoing military operations and coordination with a party involved in the conflict. In the aviation context, particular attention should be given to assessing the use of the airspace of a non-participating state by parties to the conflict, as well as its aviation infrastructure. Overflights within the airspace of a belligerent

65 K. Zhevlakova, *Can Ukraine sustain its F-16 fleet if Trump halts US aid?*, 2024, https://kyivindependent.com/can-ukraine-sustain-its-f-16-fleet-if-trump-halts-us-aid/ (accessed: 15.06.2025).

66 P. Hosteller, *Reflection on the Law of Neutrality in Current Air and Missile Warfare*, "IYHR" 2014, vol. 44, pp. 158–159.

state alone do not necessarily cause the state making its airspace accessible to become a party to the armed conflict.[67] Poland's decision of February 25, 2022, to allow Ukrainian transport aircraft to land did not imply that Poland had become a co-belligerent in the armed conflict on Ukraine's side against Russia. Similarly, the provision of airspace by European states in 2003 to the Coalition forces against Iraq for transport or repair flights should be assessed in the same manner.[68]

While under the principles of targeting applicable in air warfare, any military aircraft – regardless of its role (combat, reconnaissance, or transport) or whether it is armed or not – constitutes a legitimate military target, in the context of determining co-participation in hostilities, states differentiate between the status of transport and combat aircraft. This distinction reflects the varying degrees of impact resulting from their operation.[69] At the same time, it should be noted that one of the key factors in this regard may be geographical proximity. For example, Romania (a state bordering a party to the conflict) decided on March 1, 2022, to approve the departure of a Ukrainian Su-27 (which was a violation of the classic rules of neutrality). However, at the same time, the authorities of this state decided to allow the departure of an unarmed aircraft to avoid turning Romania into a belligerent state in the conflict with Russia. The above position suggests that any potential use of airspace, especially military bases, for carrying out combat missions (and returning to bases located on that territory for rearmament, repairs, or refueling) constitutes an action that is sufficiently detrimental and direct towards the adversary. As such, a state allowing its territory to be used for conducting aerial combat missions (e.g., bombing or interception flights) should be considered as a co-belligerent in the armed conflict.[70] In this regard, it is worth considering the case of Belarus as a state from which the Russian air force carried out air strikes against targets located in Ukraine.[71]

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67 "Despite carrying consequences under the law on state responsibility, violations of the law of neutrality (even significant or systematic violations), such as providing a party with continuous financial support or access to the neutral state's airspace have not hitherto been considered to lead to a loss of neutral status and the acquisition of co-party status by the violating state" – A. Wentker, M. Jackson, L. Hill-Cawthorne, *Identifying Co-Parties to Armed Conflict in International Law How States, International Organizations and Armed Groups Become Parties to War*, "Research Paper International Law Programme", March 2024, p. 14.

68 A. Wentker, *Party Status To Armed Conflict in International Law*, Oxford 2024, p. 201.

69 For example, on March 19, 2003, under the policy of non-belligerency, Italy upheld the right for all aircraft to fly through its airspace, but the use of airbases was granted only to transport aircraft and aerial refueling planes. N. Ronzitti, *Italy's Non-Belligerency During the Iraqi War*, [in:] M. Ragazzi, *International Responsibility Today*, Leiden 2005, p. 201.

70 "[…] making available its air bases to allow planes to take off to bomb troops on that territory, or implementing a no-fly zone, for example" – J. Grignon, *Co-Belligerency» or When Does a State Become a Party to an Armed Conflict?*, IRSEM Strategic Brief 39.

71 A. Wentker, *At War? Party Status and the War in Ukraine*, "Leiden Journal of International Law" 2023, vol. 36, p. 665.

Another unique dimension of the issue was revealed during the mutual airstrikes performed between Iran and Israel in 2024 and 2025 (with notable escalation in June 2025). Both states used the airspace of third states (Iraq, Syria and Jordania) in order to reach their respective targets in Israel and Iran. The affected states did not respond to the overflight of drones, conventional aviation and missiles belonging to belligerents, with the exception of the activity of the Jordanian Air Force, destroying the approaching Iranian drones and missile. While Jordan could be classified as a co-belligerent on the Israelian side in international armed conflict between Iran and Israel, the position of Syria and Iraq seems to tolerate (or abstain from interference), on impartial basis, the use of the airspace by both of the belligerents. Despite the official protest of Iraq against Israelian intrusion, both Syria and Iraq decided to manifest its willingness to abstain from participation in confrontation between Iran and Israel due to its highly volatile geopolitical location.[72]

72 *Iraq: Complaint to Security Council against Zionist entity's violations of airspace*, 2025, https://ina.iq/en/politics/40451-iraq-complaint-to-security-council-against-zionist-entitys-violations-of-airspace.html (accessed: 20.06.2025).

CHAPTER IX

AIR WARFARE AND INTERNATIONAL JURISPRUDENCE

1. Preliminary comments

This part of the dissertation is a summary of judgements or other types of court decisions issued by international or national bodies, which refer, directly or indirectly, to issues concerning air warfare legislation. The presented rulings highlight the difficulties of applying the law of air warfare in the judicial process, from factual investigation to the interpretation of norms and proper subsumption. In addition to the judgements, individual facts, which, for various reasons, were not a direct subject of examination by judicial authorities but possess practical value for recreating the normative process of the law of air warfare, will also be presented.

2. The case of Lieutenants Walker and Smith – the use of incendiary ammunition in air warfare

On August 25, 1916, two British pilots of the Royal Flying Corps were forced to land on the German side of the front. During the search for the aircraft, ammunition belts containing incendiary ammunition were discovered in two Lewis machine guns.[1] At the same time, a similar type of ammunition was thought to have caused increased losses among German airships. Ultimately, despite initial warnings about the possibility of executing pilots, the German side did not put the

1 R. Neer points out that in the initial period of using incendiary munitions, RAF pilots were given special instructions that prohibited the firing of incendiary shells at aircraft other than airships. See: R.M. Neer, *Napalm: An American Biography*, London 2013, e-book.

British pilots on trial, which, according to J.M. Spaight, was clear evidence of all parties' consent to the use of incendiary ammunition, *prima facie* prohibited by the provisions of the Saint Petersburg Declaration of 1868.[2]

3. Judgement of the Greco-German Mixed Arbitral Tribunal in the *Coenca Brothers v. Germany* case and the judgement of the Romanian-German Mixed Arbitral Tribunal in *Kiriadolou v. Germany*

The *Coenca Brothers v. Germany* case concerned the aerial bombardment of Thessaloniki in 1916, carried out by German Zeppelin-type airships. Military operations in this area were related to the so-called Macedonian front and the intervention of the Entente states in Greece – the state remained formally neutral, but the port was under Allied occupation. Given its relevance to the existence of the law of aerial warfare in the interwar period, it is vital to quote the entire passage of the judgement in full:

> Germany's right to defend itself against the occupation of Thessaloniki did not exonerate her from the obligation to observe the rules established by international law […]. The evidence shows that the bombardment of Salonika […] took place without prior warning by the German authorities, that the attack took place at night, and that the Zeppelin which dropped the bombs was at an altitude of about 3,000 meters […]. It is one of the principles generally recognized by international law that belligerents must, so far as possible, respect the civil population and civilian property […] The Hague Convention IV of 1907, drawing its inspiration from this principle, has, in Article 26 of the Regulations concerning the laws and customs of warfare on land, clearly laid down that "the officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his powers to warn the authorities […]. It is evident that the authors of the Convention intended in this way to accord to the authorities of the threatened town an opportunity either to evade bombardment by offering its capitulation, or to evacuate the civilian population […]. Article 26 only envisage warfare on land; [but] this Article ought to be regarded as expressing the *opinion communis* on this matter, and there is no reason why the rules adopted for bombardment in land warfare should not apply equally to aerial attacks. [Germany] had contended the aerial attack ought to be effected with surprise, and so cannot

2 J.M. Spaight, *Air Power and War Rights*, London 1924, p. 180; D. Preston, *A Higher Form of Killing: Six Weeks in World War I That Forever Changed the Nature of Warfare*, London 2015, p. 245.

> be announced in advance. Even if this allegation […] were true from the military point of view, it would not follow that aerial bombardments without warning are lawful, but on the contrary, it would lead to the conclusion that such bombardment are, in general, inadmissible. The darkness of the night, the altitude of 3,000 meters and the fact that, during the occupation, Salonika was not illuminated, made it impossible to aim the bombs with the accuracy required to spare private dwelling houses and commercial establishments. […] bombardment in issue must be considered as contrary to international law.[3]

It should be emphasized that an even more bizarre view was revealed in the *Kiriadolou v. Germany* case with similar factual situation concerning the bombing of Bucharest in 1916. The tribunal pointed out that:

> […] the distinction between bombing with the aim of "occupying" an area and "destroying" it has no legal basis and cannot absolve the air force of its obligations to issue prior notification regarding the intention of aerial bombing. This obligation is activated in particular when a city is the object of attack, and the bombing takes place at night from a considerable altitude. The combatants should, in such a situation, do everything in their power to destroy field fortifications and munitions factories without harming the civilian population.[4]

This ruling, along with the decision reached in the *Coenca* case, essentially maintained the view that the provisions of the 1907 Hague Regulations should apply to aerial warfare, which was completely contrary to the postulates of international law doctrine prevailing at the time.[5] It was a critical mistake to assume that artillery bombardment regulations could have an analogous application directly to aerial warfare. There were attempts to rectify this flawed concept, in a way, in the Kiriadolou ruling, but it was decided, for unknown reasons, to distinguish the elementary and logical difference existing between bombardment in naval warfare (so-called destructive bombing) and bombardment on land (occupational bombardment). William H. Parks further alleges that the adjudication completely disregarded the possibility that the German air force had attacked legitimate targets, which would contribute to dismissing the victims' claim.[6] Likewise, the requirement for a prior warning also raised reasonable doubts in this regard.[7]

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3 Rec des Décisions des Tribunaux Arbitraux Mixtes, 683/1927. Judgment cited in: L.C. Green, *Essays on the Modern Law of War*, New York 1985, p. 136.

4 Kiriadolou c. Etat allemand, Rec des Décisions des Tribunaux Arbitraux Mixtes, vol. IX, p. 103.

5 R. O'Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge 2006, p. 27.

6 "But for the failure to warn, the German attack would have been lawful, and the collateral damage to plaintiff's goods would have been a consequence of war for which the plaintiff could not have recovered damages. The case is of little value in determination of the issue before us" – W.H. Parks, *Air War and the Law of War*, "The Air Force Law Review" 1990, vol. 32, p. 37.

7 "Although its decisions appear to lay down an inflexible requirement of warning before all air raids, at least one of the raids considered in the two cases before it seems to have taken place

A positive aspect of the ruling, on the other hand, was the fact that it recognized the right of combatants to attack military objectives (identified as fortifications and armament factories) and highlighted the need to respect private property belonging to non-combatants in aerial operations.[8] Anthony P.V. Rogers drew attention to the fact that the tribunal's "obsession" with the necessity to issue warnings during bombing missions on the part of air forces completely obscured the real legal problem that had arisen in this case.[9]

The tribunal in the *Kiriadolou* case went further in the context of deriving the legal basis for the application of the warning than in the case of the ruling on Greek citizens, indicating that in addition to Article 26 of the Hague Regulations of 1907, the basis for the attacker's obligation can be found in the content of Article 6 of the Ninth Hague Convention of 1907, by indicating that "a possible failure to satisfy the obligation to issue a warning would lead to the fact that balloons and airplanes could poison the civilian population of the hostile city by dropping bombs filled with chemical gases at night, which would result in illness or even death among the city's inhabitants". Gregor Schwarzenberger rightly argued that the reference to the norms applicable in naval warfare only weakened the rationality of the ruling, and the reference to the issue of the deployment of chemical weapons had no justification in the realities of the case.[10] One should fully agree with D. Johnson that the above-mentioned judgements significantly hindered the possibility of formulating an effective code of aerial warfare law.[11] These consequences were more far-reaching than arresting the process of *ius in bello* development – in fact, they brought about a state of complete non-transparence of the *de lege lata* norms.[12]

The author of this book pointed out in other research that:

> […] through its decisions in *Coenca* Brothers and *Kiriadolou*, the Greco-German Mixed Arbitral Tribunal had thrown its authority as an international judicial body behind the analogous applicability of the rules binding in land warfare in air operations.

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at night" – B. Carnahan, *The Law of Air Bombardment in Its Historical Context*, "The Air Force Law Review" 1975, vol. 17, pp. 46–48.

8 H. Post, *War Crimes in Air Warfare*, [in:] N. Ronzitti, G. Venturini (eds.), *The Law of Air Warfare: Contemporary Issues (Essential Air and Space Law)*, Utrecht 2006, p. 160.

9 A.P.V. Rogers, *Law on the Battlefield*, Manchester 2006, p. 91.

10 "The reference to Article 6 of Hague Convention IX can only weaken the Tribunal's reasoning. The reservation of «military situation permitting» reduces this Article to one of the admonitory rules of Type Four of the rules of warfare. Similarly, the reference to chemical and bacteriological warfare is somewhat pointless. The use of these weapons is either legal or illegal, but does not depend on either notice or the manner of their delivery" – G. Schwarzenberger, *The Law of Air Warfare and the Trend Towards Total War*, "University of Malaya Law Review" 1959, vol. 1, p. 125.

11 D.H.N. Johnson, *Rights in Air Space*, Manchester 1965, p. 32.

12 A broader analysis of the judgment in the work by M. Piątkowski, *The Mixed Arbitral Tribunals and the Law of Air Warfare: The Tragic Impact of the Awards in Coenca Brothers and Kiriadolou*, [in:] H.R Fabri, M. Erpelding (eds.), *The Mixed Arbitrary Tribunals, 1919–1939*, Baden-Baden 2023,

However, in applying this analogy, it had overlooked core practical issues and dilemmas which had already been addressed by a fair amount of state practice and opinions by international law experts. The Tribunal had focused on a secondary problem, ie. the laws of war regarding prior warning, and had dealt it with it, as observed by David Johnson, in a way that was 'surely unrealistic'. Moreover, it had rejected the logical reference to the international regime on naval bombardment in the context of strategic air operations. In both the *Coenca* Brothers and *Kiriadolou* cases, it had lost a great opportunity to correct, or at least to attempt a reasonable interpretation of, the existing legal framework with regard to this new phenomenon.[13]

4. The *Lotus* case and its impact on international humanitarian law

Although the factual situation of the *Lotus* case related to the maritime collision of the ship "Lotus" (sailing under the French flag) with a Turkish vessel on August 2, 1926 did not in any way concern issues related to the material scope of the law of war, the theses presented as part of the court's decision significantly formed the view of states on the limitations of obligations under international law. The case regarding the assessment of which state exercises jurisdiction over incidents on the high seas led the Permanent Court of International Justice to conclude that international law is "created either by the will of sovereign states or by customs reflecting the acceptance of the practice of states as grounded in the legal foundations of its source". The *Lotus* case ruling emphasizes in the first place that the consequence of the foregoing conclusion is that no implied restrictions imposed on states may arise (*permissum videtur in omne quod non prohibetur*).[14] Consequently, states are free to create their legal situation outside the boundaries of established international prohibitions as a result of their sovereignty.[15]

The so-called Lotus principle as applied in the context of international humanitarian law essentially amounted to the statement that "what is not expressly

13 *Ibidem*, p. 521.

14 PCIJ, *S.S 'Lotus' (France v. Turkey)*, Judgement, PCIJ Series A No. 10, ICGJ 248 (PCIJ 1927).

15 "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable" – PCIJ, *S.S 'Lotus' (France v. Turkey)*, Judgement; J.F. Escudero Espinoza, *Self-Determination and Humanitarian Secession in International Law of a Globalized World*, Cham 2017, p. 39.

prohibited by international law is allowed and depends entirely on the will of States".[16] The extreme positivist view of the Lotus principle had fundamental consequences particularly in the context of assessing the legality of armaments, leading to the assumption that the absence of a dedicated treaty provision or customary norm is an expression of the legalization of the means of combat in question.[17] In the context of the law of aerial warfare, it is worth noting the gradual approval (at the beginning of the 20th century) of aircraft as a tool of war, and aerial bombardment as a method of conducting military operations. In its extreme form, the Lotus Principle justified carpet bombing during the Second World War, as argued by Arthur Harris: "In the matter of the use of aircraft in air warfare there is, it so happens, no international law at all".[18] This acceptance was directly expressed through the decision of the international community to reject the restrictions of the 1899 Hague Declaration. Nevertheless, after 1945, the doctrine of international law maintains that the provisions of the *ius in bello* are based on a paradigm derived from the Martens Clause, regarding it as a source of restrictions on the discretion of states in the selection of means of combat.[19] The peculiar rivalry between the two concepts – the Lotus principle and the Martens Clause – is an inherent element of the analysis of means and methods of warfare, the use of which has not been sufficiently defined by the international community (this aspect was described more extensively in the 1996 ICJ *Advisory Opinion on the Legality of the Use of Nuclear Weapons*).[20] On the same basis, the theory concerning the unconstrained activity of the State in the event of a non-international armed conflict is rejected (in this context, a view that is flawed insofar as it does not take into account customary humanitarian law).[21] On the other hand, as J.F. Murphy states, "*the Lotus* principle has never been repudiated by the ICJ. Moreover, its positivist

16 H. Lauterpacht, *The Function of Law in the International Community*, New Jersey 2000, p. 94.

17 R. Kolb, *The Main Epochs of Modern International Humanitarian Law Since 1864 and Their Related Dominant Legal Construction*, [in:] K. Larsen, C. Cooper, G. Nystuen (eds.), *Searching for a 'Principle of Humanity' in International Humanitarian Law*, Cambridge 2013, pp. 23–24. Interestingly, it is argued that the Lotus doctrine influenced the establishment of criminal tribunals after World War II; see: W. Simons, *The Jurisdictional Bases of the International Military Tribunal at Nuremberg*, [in:] G. Ginsburgs, V. Kudriavtsev (eds.), *The Nuremberg Trial and International Law*, Leiden 1990, pp. 45–46.

18 "International law can always be argued pro and con, but in this matter of the use of aircraft in war there is, it so happens, no international law at all" – quotation: A.C. Grayling, *Among the Dead Cities: Is the Targeting of Civilians in War Ever Justified*, London 2006, p. 211.

19 J. Doria, *Whether Crimes against Humanity are Backdoor War Crimes*, [in:] J. Doria, H.-P. Gasser, M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko*, Leiden 2009, p. 658.

20 D. Fleck, *The Protection of the Environment in Armed Conflict: Legal Obligations in the Absence of Specific Rules*, Leiden 2014, pp. 55–56.

21 K. Heller, *The Use and Abuse of Analogy in IHL*, [in:] J. Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge 2016, p. 238.

approach may be particularly well-suited to issues of the law of armed conflict, which by their very nature, implicate the vital interest of States".[22]

5. Aerial bombardment during the Spanish Civil War

The League of Nations' investigation conducted by an expert commission composed of French and British air force officers at the request of the Spanish Republican government between 1938 and 1939 is a little-known episode. The commission was tasked with investigating the conduct of air operations undertaken by the Nationalist faction during the Spanish Civil War. It is essential to emphasize the commission's cautious approach to the conclusions submitted. After a detailed visual inspection, the commission members assessed air operations elements such as the distance between military infrastructure and civilian facilities, the impact of factors impeding the bombing process such as air defense firepower, unfavorable weather conditions, and the presence of enemy fighter aviation. In most cases, the commission refrained from forming categorical conclusions due to the lack of evidence of the nationalist faction's intentions, or the lack of full documentation from the nationalist air force – clearly signaling the need to analyze air operations *ante factum*. A certain mystery surrounds the legal standard that was applied by the members of the commission: on several occasions the commission emphasized that a particular settlement "had been undefended from the air attack" implicitly referring to Article 25 of the 1907 Hague Regulations. The methodology of the work itself, however, indicates the use of the term "military objectives" such as military concentration areas, train stations, military depots or military schools.[23]

6. *Kommandobefehl*

On October 18, 1942, due to increased activity by Allied sabotage groups, and as a direct repercussion of the landing at Dieppe and alleged violations of the 1929 Geneva Convention by special troops, Adolf Hitler issued an order known

22 J.F. Murphy, *Some Legal (and a Few Ethical) Dimensions of the Collateral Damage Resulting from NATO's Kosovo Campaign*, "Israel Yearbook on Human Rights" 2001, vol. 31, p. 235.

23 M. Piątkowski, *War in the Air from Spain to Yemen: The Challenges in Examining the Conduct of Air Bombardment*, "Journal of Conflict & Security Law" 2021, vol. 26, pp. 502–504.

as *Kommandobefehl*. Under this instruction, the German side argued that the actions of the Allied commandos were regarded as acts contrary to the laws of war, and that the soldiers of the SAS (Special Air Service) or SOE (Special Operation Executive) formations themselves would not be treated as prisoners of war and "shall be ruthlessly destroyed by the German troops" regardless of their uniforms and the fact that they openly carried weapons. From an operational perspective, the order contained an important instruction in point 5, excluding its application to "those enemy soldiers who, after air battle, seek to save their lives by parachute".[24] In von Falkenhorst's trial, the order was found to violate the 1907 Hague Regulations (Article 23(c)), insofar as it permitted the killing of soldiers of the Allied forces' special units who had surrendered.[25]

7. The Essen Lynching case

The intensification of the Allied air campaign over the Third Reich while the Luftwaffe was losing its air superiority prompted the senior military-political leadership to take retaliatory measures against Allied bomber aircrews. With the objection of the *Auswärtiges Amt* (German Foreign Ministry), a special order was prepared to exclude certain categories of airmen involved in "acts of terror" from the protection provided by the provisions of the 1929 Geneva Convention as "criminals".[26] Whether this order was actually issued is disputed; nevertheless, the repercussions of the action taken were OKW (*Oberkommando der Wehrmacht*) directives ordering police and army units to refrain from intervening if there were attempts to lynch Allied crews.[27]

On December 13, 1944, three British airmen were detained by German police after landing in the western Essen area and then transferred to a local military unit. Under the rules enforced by the Third Reich, prisoners of war who were also Allied air force personnel were subject to mandatory interrogation by the

24 A. Cassese, *The Oxford Companion to International Criminal Justice*, Oxford 2009, p. 936.

25 "It will be remembered that in the text of the Commando Order of 1942, Allied commando troops were to be denied quarter in battle or in flight and this seems to be a clear and serious contravention of international law" – Case No. 61, *Trial of Generalobers Nickolaus von Falkenhorst*, British Military Court Brunswick, 29th July – 2nd August, 1946, *Law Reports of Trials of War Criminals*, United Nations War Commission, Volume XI, London 1949, p. 29.

26 V. Vourkoutiotis, *Prisoners of War and the German High Command: The British and American Experience*, New York 2003, p. 189.

27 A. Kochavi, *Confronting Captivity: Britain and the United States and Their POWs in Nazi Germany*, London 2005, p. 174.

Luftwaffe. During the transfer along the city's main street, local residents began harassing the detained British airmen. Due to a lack of intervention by the German guards escorting the prisoners (who, moreover, began to incite the civilians), the crowd began to beat and stone the detainees, eventually battering the British to the point of death. Two German soldiers – an officer and a private – stood trial at the British Military Tribunal for the trial from December 18–22, 1945, in Essen. The German officer was charged with inciting the murder of the prisoners of war and neglecting to undertake measures to protect them from the aggressive behavior of the crowd (the second charge involved the other defendants). The officers were sentenced to death and the penalty of long-term imprisonment was imposed on the other accomplices.[28] In this case, a remark was made regarding the behavior of the German guards as an example of failing to perform an action required by the provisions of Article 2 para. 2 of the 1929 Geneva Convention which states that the detaining party "They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity."

8. Enemy Airmen's Act

On April 18, 1942, a group of B-25 Mitchell bombers attacked Japanese islands, having taken off from the USS Hornet, which were located 600 km from Tokyo.[29] The raid, carried out in retaliation for the attack on Pearl Harbor and targeting military facilities, took the Japanese air defense and political leadership completely by surprise. Due to a lack of fuel and mechanical failures in some aircraft, only a portion of the crews reached areas of China controlled by guerilla fighters or the Soviet Union, while the rest were taken captive. Prime Minister Tōjō, shocked by the so-called Doolittle Raid (named after the operation's commander), decided to issue special penal provisions under the so-called Enemy Airmen's Act, being retroactive in nature, providing for the punishment of air attacks: 1) against the civilian population, 2) against private property without military value, 3) against targets without a military character and being in breach of the law of armed conflicts.[30] In the main judgment of the Tokyo Tribunal, it was stated in the grounds for the judgement that one of the reasons the Japanese side had chosen not to

28 *The Essen Lynching Case*, *Trial of Erich Heyer and Six Others*, British Military Court for the Trial of War Criminals, Essen, 18th – 19th and 21st – 22nd December 1945; *Law Reports of Trials of War Criminals,* United Nations War Crimes Commission, Volume 1, London 1947, pp. 89–91.

29 G. Wallace, *Life and Death in Captivity*, London 2015, p. 31.

30 S.H. Ross, *Strategic Bombing by the United States in World War II: The Myths and the Facts*, Jefferson 2003, p. 59.

ratify the 1929 Geneva Convention on the Treatment of Prisoners of War was the concern over the possibility of aerial warfare reaching the territory of the Japanese islands. The International Military Tribunal for the Far East commented on the above-mentioned law by referencing Japanese aerial practices in China. It also pointed out that "the prosecution of the persons accused of war crimes did not require special regulations; it was permissible under any conditions as long as a fair trial was conducted and punishment was imposed within the limits allowed by international law," without, however, addressing the potential substantive legal basis for the accusation. American crew members, subjected to cruel treatment and deprived of any procedural guarantees, were sentenced to death in October 1942 based on the Enemy Airmen's Act.[31]

On October 12, 1944, the Japanese authorities of Formosa (present-day Taiwan) adopted an amendment to the military penal code, prescribing penalties for enemy airmen carrying out acts of "illegal bombing contravening international law". The provision described applied within the territory controlled by the 10th Army and concerned all enemy airmen who perpetrated 1) bombing and strafing with the intent to kill or injure civilians; 2) bombing and strafing with the intent to destroy or burn private property not military in character; 3) bombing or strafing non-military objects, except in unavoidable circumstances. The punishment for committing these crimes was death, or, by way of exceptional mitigation, a sentence of 10 years of imprisonment could be imposed.[32] The competent court was to be a special military court of the 10th Army. From October 1944 to February 1945, a total of 14 American bomber crew members were captured – higher-ranking officers were transported to Tokyo for interrogation. The persons accused after the war were members of the Japanese judicial-investigative team that interrogated and then passed judgements regarding the airmen on May 21, 1945. During the trial, the accused were proved to have committed several violations, including depriving the victims of the right to defense and a translator, no access to case files, and no possibility to submit evidence requests. The Japanese

31 International Military Tribunal for the Far East, *Judgment of 4th November 1948*, [in:] R.J. Pritchard, S.M. Zaide (eds.), *The Tokyo War Crimes Trial*, vol. 22, New York 1981, pp. 622–630.

32 "The Law in question provided that its terms would apply to all enemy airmen within the jurisdiction of the 10th Area Army and that punishment would be meted out to all enemy airmen who carried out any of the following: bombing and strafing, with intent to kill, wound or intimidate civilians; bombing and strafing with intent to destroy or burn private objectives of non-military nature; bombing and strafing non-military objectives apart from unavoidable circumstances; disregarding human rights and carrying out inhuman acts; or entering into the jurisdiction with intentions of carrying out any of the foregoing. Death was provided as the punishment, but this, according to circumstances, could be changed to imprisonment for life or for not less than 10 years" – Case No. 32, *Trail of Lieutenant General Harukeu Isayama and Seven Others*, United States Military Commission, Shanghai, 1st – 25th July 1945; *Law Reports of Trials of War Criminals*, United Nations War Crimes Commission, Volume V, London 1948, pp. 60–66.

military criminal procedure in such cases was based solely on documents, such as interrogation protocols of the suspects and reports of damage sent by public security units. As a result of instructions from the central government in Tokyo, on June 19, 1945, a death sentence by firing squad was carried out against the American pilots. The Shanghai Commission concluded that the Japanese forensic team, including, among others, Harukei Isayama, the chairman of the judicial panel and simultaneously the chief of staff of the 10th Army, were found guilty of committing a war crime by conducting an illegal trial and, as a result, unlawfully executing prisoners of war.[33]

Similar regulations were adopted in various parts of the Japanese Empire between 1942 and 1944. As part of the trial of Lieutenant General Shigeru Sawada, the commander of the 13th Expeditionary Army in China, the indictment charged him with committing a war crime by "knowingly, unlawfully and willfully try, prosecute and adjudge" the eight members of the United States forces "to be put to death in violation of the laws and customs of war".[34] Some war criminals accused of a similar type of war crimes were tried at a special court in Hong Kong between 1946 and 1948.[35]

9. The sinking of the ship "Laconia"

On September 12, 1942, during a routine patrol near Ascension Island and Liberia in the central Atlantic, the German submarine U-156 torpedoed a British transport ship "Laconia", which was carrying approx. 1,800 prisoners of war and 300 crew members (including over a hundred Polish soldiers serving as escorting guards).[36] After the attack, U-156 surfaced and made the decision to send a distress message to *Befehlshaber der U-Boote* (U-boat fleet commander Karl Doenitz),

33 "It was charged that the accused, Lieutenant-General Harukei Isayama, Colonel Seiichi Furukawa, Lieutenant-Colonel Naritaka Sugiura, Captain Yoshio Nakano, Captain Tadao Ito, Captain Masaharu Matsui, First Lieutenant Jitsuo Date and First Lieutenant Ken Fujikawa did each at Taihoku, Formosa, wilfully, unlawfully and wrongfully, commit cruel, inhuman and brutal atrocities and other offences against certain American Prisoners of War, by permitting and participating in an illegal and false trial and unlawful killing of said prisoners of war, in violation of the laws and customs of war" – *ibidem*.

34 *Trial of Lieutenant-General Shigeru Sawada and Three Others*, United States Military Commission, Shanghai, February 27 – April 15, 1946.

35 S. Linton, *Rediscovering the War Crimes Trials in Hong Kong, 1946–48*, "Melbourne Journal of International Law" 2012, vol. 13, p. 342.

36 See more: G.H. Bennett, *The 1942 Laconia Order: The Murder of Shipwrecked Survivors and Allied Pursuit of Justice 1945–1946*, "Law, Crime and History" 2011, vol. 1.

informing him of the need for assistance for the shipwrecked sailors. An open message was also sent to the Allied forces, informing them that if rescue ships arrived, they would not be attacked. Two days after the rescue operation began, an American B-24 bomber appeared over the disaster site and noticed the German submarine marked with Red Cross symbols and transmitting an open message about the ongoing evacuation. Despite this, the American field commander decided to attack the U-boat, considering the actions of the German submarine as an act of perfidy, due to the illegal use of the Red Cross flag by a military vessel.[37] As a result of the air attack, U-156 was sunk. The remaining crew of the sunken ships was rescued by other German U-boats and French Vichy ships (including approx. 70 Polish soldiers). This incident later served as the basis for the issuance of the so-called Laconia Order by Doenitz, which prohibited German U-boats from rescuing shipwrecked survivors.[38] The German admiral argued that the issuance of the order was justified by the need to protect U-boats from the actions of Allied aviation. During the Nuremberg trial, this order was one of the main grounds for the personal indictment against Admiral Karl Doenitz, who was accused, among others, of violating the provisions of the so-called London Protocol, in so far as it prohibited providing assistance to the crews of merchant ships.[39] The incident, along with the list of the practices of the Allied states, served as the basis for the acquittal of the German admiral on the charge of conducting unrestricted submarine warfare.[40] The International Military Tribunal pointed out that, in fact, the provisions of the 1936 London Protocol had been repealed due to the oppos-

37 Article 1 of the X Hague Convention on the Adaptation of the Principles of the Geneva Convention of 1907 to Maritime Warfare stated that hospital ships are ships whose sole function is to assist the wounded, sick and shipwrecked.

38 „Jegliche Rettungsversuche von Angehörigen versenkter Schiffe, also auch das Auffischen Schwimmender und Anbordgabe auf Rettungsboote, Aufrichten gekenterter Rettungsboote, Abgabe von Nahrungsmitteln und Wasser haben zu unterbleiben. Rettung widerspricht den primitivsten Forderungen der Kriegsführung nach Vernichtung feindlicher Schiffe und deren Besatzungen". Interestingly, the order referred in point 4 to the practice of Allied bombing raids justifying the issuance of the order. R.W. Tucker, *The Law of War and Neutrality at Sea*, Washington 1957, p. 73; K. Doenitz, *10 lat i 20 dni. Wspomnienia 1939–1945* [*10 years and 20 days. Memories 1939–1945*], Gdańsk 2004, pp. 292–294.

39 Protocol concerning the regulations on submarine warfare, established in Part IV of the London Treaty of April 22, 1930, London, November 6, 1936 (Journal of Laws of 1937, No. 55, item 425).

40 "The orders, then, prove Doenitz is guilty of a violation of the Protocol. In view of all the facts proved and in particular of an order of the British Admiralty announced on the 8th May, 1940, according to which all vessels should be sunk at sight in the Skagerrak, 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 Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare" – *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, November 14, 1945 – October 1, 1946*, vol. 1, Nuremberg 1947, p. 313.

ing and consistent practices of all parties involved in naval warfare during World War II (although with the exception regarding enemy merchant ships).[41]

No proceedings were held against the commander of the American air force on Ascension Island. In the opinion of S.V. and W.T. Mallison, evaluating the actions of the American air force years later, they classified it as a *prima facie* war crime, arguing that an enemy submarine involved in a rescue operation cannot be the object of a legal military attack by military aviation.[42] Pursuant to Article 16 of the Tenth Hague Convention of 1907, there was an obligation to rescue wounded and sick shipwreck survivors, as long as military considerations permitted.[43] Article 18 of the Second Geneva Convention of 1949 confirmed the aforementioned principle, stating that the obligation applies to all possible means.[44] In his 1960 commentary on the Second Geneva Convention of 1949, J.S. Pictet emphasized that there was no absolute rule obligating a naval commander to undertake a rescue operation if it exposed them to the possibility of an attack.[45] Wolff Heintschel von Heinegg argued that the above situation, among others, might require the submarine commander to refrain from carrying out a rescue operation if it could expose the vessel to the risk of destruction.[46] Furthermore, Rule 179 of the *San Remo Manual* indicates that military aircraft of the opposing side involved in rescue missions act at their own risk during such operations.[47] In view of the above,

41 See the position of W. Heintschel von Heinegg, *The Law of Armed Conflict at Sea*, [in:] D. Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford 1993, p. 466; L.F.E. Goldie, *Maritime War Zones and Exclusion Zones*, "International Law Studies" 1991, vol. 64, p. 170. In addition to the actions of the American side (with Admiral Nimitz as a witness in the Nuremberg trials) and the British side, it is also worth noting one of the greatest maritime tragedies in history – the unannounced sinking of the German passenger ship "Wilhelm Gustloff" (carrying fleeing civilians and German soldiers from East Prussia) by a Soviet submarine in January 1945.

42 S.V. Mallison, W.T. Mallison, *Naval Targeting: Lawful Objects of Attack*, "International Law Studies" 1991, vol. 64, p. 255.

43 Convention on the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1907 (X Hague Convention), The Hague, October 18, 1907.

44 Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Geneva, August 12, 1949 (Journal of Laws of 1956, No. 38, item 171).

45 "Generally speaking, one cannot lay down an absolute rule that the commander of a warship must engage in rescue operations if, by so doing, he would expose his vessel to attack" – J.S. Pictet, *The Geneva Conventions of 12 August 1949. Commentary: II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Geneva 1960, p. 131.

46 W. Heintschel von Heinegg, *The Development*…, p. 82.

47 "Other aircraft, military or civilian, belligerent or neutral, that are employed in the search for, rescue or transport of the wounded, sick and shipwrecked, operate at their own risk, unless pursuant to prior agreement between the parties to the conflict" – *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, June 12, 1994, https://www.legal-tools.org/doc/118957/pdf/ (accessed: 5.06.2025).

it should be noted that there is no explicit norm in international law (both during World War II and currently) prohibiting an attack against military vessels participating in rescue operations. For this reason, it should be noted that the obligation to rescue shipwrecked persons is not absolute, but depends on the circumstances – just as, for example, the commander of HMS "Dorsetshire" decided to abandon the rescue operation for the survivors of the sunken Bismarck due to information about an approaching group of German submarines.[48]

10. The International Military Tribunal at Nuremberg

10.1. Luftwaffe commanders before the International Military Tribunal (IMT)

It is desirable that all military actions are based on the provisions of international law. However, there are situations essential from the perspective of the success of a military operation that must be carried out regardless of existing international law.[49]

A report regarding the work of the United Nations War Crimes Commission, established by the decision of the Allies in 1943, dealing with, among other things, the preparation of the future international criminal trial of war criminals in both material and procedural contexts, reveals an interesting piece of information according to which during the last two months before the closure of its work, the Polish delegation officially filed charges against German commanders who conducted attacks on undefended Polish cities in the early days of World War II. Despite the

48 E. Grove, *German Capitol Ships and Raiders in World War II. Volume 1: From Graf Spee to Bismarck 1939–1941*, Oxon 2002, p. 25.

49 The words of Admiral Erich Raeder before the ITM in Nuremberg. "That memorandum contains near the beginning that sentence which has been quoted by the Prosecution concerning our position with respect to international law, where reference is made to highest ethics of warfare, adherence to international law, and the desire to base all military measures on existing laws wherever possible. But if this is not possible or when by deviation it is possible to achieve decisive military results, and we could take the responsibility for this deviation, then in case of necessity we must depart from existing international law. That means that also a new international law may have to be developed" – *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, November 14, 1945 – October 1, 1946*, Nuremberg 1947, p. 130.

reminder that in 1919 the Commission on the Responsibility for the War indicated, following L. Oppenheim, that one of the characteristics of a war crime is "deliberate bombardment of undefended localities", the issue was deemed too complex, and, in the end, it was decided to leave it unresolved.[50] The commission pointed out that the prohibition specified under Article 25 of the Hague Regulations of 1907 did not cover the possibility of bombing military objectives.[51] The above stance of the commission clearly signaled that the issue of airstrikes during World War II would not be subject to legal analysis in the course of the future criminal trial.

After May 8, 1945, several high-ranking Luftwaffe officers who held important command positions during the war were captured by the Allies. In addition to the most important figure, Hermann Goering, the commander-in-chief of the Luftwaffe, several other high-ranking officers were captured: Hugo Sperrle – commander of the Third Air Fleet stationed in occupied France since June 1940, conducting offensive operations against Great Britain; Albert Kesselring – commander of the First Air Fleet responsible for attacks on Warsaw in September 1939, and the Second Air Fleet, which attacked the London area during the Battle of Britain and participated in Operation "Barbarossa"; Erhard Milch – commander of the Fifth Air Fleet stationed in Norway, later the general inspector of Luftwaffe's technical division; Alexander Löhr and Wolfram von Richthofen – commanders of the Fourth Air Fleet and the Seventh Air Corps, respectively, responsible for the destruction of the town of Wieluń on September 1, 1939, and Belgrade on April 6 and 7, 1941.[52] Alexander Löhr was handed over to the Yugoslav authorities and, after a trial, was executed by a firing squad on February 26, 1947,[53] in contrast, Wolfram von Richthofen died of natural causes before he could be transferred to the tribunals in Nuremberg. The remaining commanders – Goering, Sperrle, Kesselring, and Milch – were detained in connection with the so-called Main War Criminals Trial No. 1 (Goering) before the IMT, in Trial No. 2 (Milch), and in Trial No. 12, the so-called Generals' Trial (Sperrle).[54] Kesselring appeared as a witness

50 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London 1948, pp. 492–493.

51 M.S. McDougal, F.P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order*, New Haven 1994, p. 643.

52 E. Spertzler, *Luftkrieg und Menschlichkeit*, Göttingen 1956, p. 274.

53 Alexander Löhr commanded the Army Group E from 1943 to 1945, in charge of the Balkan theater, committing crimes against civilians and deporting Jews. Unfortunately, there is no information in the literature on the course of the trial, the content of the indictment, and the death sentence verdict. However, there are some reports suggesting that one of the charges was the execution of a terror bombing raid on Belgrade on April 6, 1941. The author's research intention is to investigate the course of the trial in the former Yugoslavia against the German commander.

54 Essentially, only the first trial of the main architects of the war took place before the IMT. Shortly after the verdict was announced in October 1946, the first disagreements arose among the Allies regarding the conduct of further trials in an international setting. As

in the Nuremberg Trials. In turn, he stood trial before the British Military Court in Venice in 1947 as a defendant.

Article 6(b) of the IMT Charter classified as war crimes, among others, the wanton destruction of cities, towns, and villages not justified by military necessity. It should be emphasized in this regard that it has never been clearly explained what the authors of the above regulation meant by "wanton destruction".[55] The indictment (charge No. 3, point g) limited the above charge only to the violation of the occupying party's obligations in connection with Articles 46 and 50 of the 1907 Hague Regulations and concerned the destruction of towns under German control in Norway, the Netherlands, the USSR, Greece and the Balkans.[56] The above circumstances lead to several important conclusions. First and foremost, it should be noted that Article 6 of the IMT Charter does not explicitly describe a war crime of deliberately bombing undefended cities and villages. Secondly, the charge of wanton destruction of inhabited settlements did not include any acts related to aerial bombings during World War II committed by the accused German commanders.[57] None of the defendants in the Nuremberg Trials were charged with offenses directly related to Luftwaffe units under their command. Hermann Goering was responsible in connection with acts committed as part of managerial and political functions in the Third Reich (theoretically, he was also charged with acts specified under charge No. 3, which included deliberate destruction of cities and villages).[58] Hugo Sperrle was accused, among other charges, of employ-

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a result, the next trials in Nuremberg are referred to as the "subsequent Nuremberg trials" or Nuremberg Military Tribunals (which were, in fact, conducted before the United States Military Court).

55 E. Rosenblad, *Area Bombing and International Law*, "Military Law and Law of War Review" 1976, vol. 15, p. 77.

56 "The defendants want only destroyed cities, towns, and villages and committed other acts of devastation without military justification or necessity. These acts violated Articles 46 and 50 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the states in which such crimes were committed, and Article 6(b) of the Charter" – *Trial of the Major War Criminals*…, p. 61.

57 "Although Section G of Count Three dealing with War Crimes was headed Wanton Destruction of Cities, Towns and Villages and Devastation not Justified by Military Necessity, the provisions of the Hague Regulations specifically referred to were Articles 46 and 50,32 both of which formed part of Section III of the regulations concerning «Military Authority over the Territory of the Hostile State». Further, the examples given in the Indictment were those of destruction by land forces (burning or dynamiting, flooding of large parts of Holland etc.)" – D.W. Graig, *The Underlying Principles of International Humanitarian Law*, "Australian Yearbook of International Law" 1980, vol. 46, p. 58.

58 "He promoted the accession to power of the Nazi conspirators and the consolidation of their control over Germany set forth in Count One of the Indictment; he promoted the military and economic preparation for war set forth in Count One of the Indictment; he participated in the planning and preparation of the Nazi conspirators for Wars of Aggression and Wars in

ing Russian prisoners of war for field labor in France.[59] Erhard Milch was held accountable for conducting illegal medical experiments and using prisoners of war slave labor.[60] Albert Kesselring, in turn, was brought before the British Military Court for an act related to the execution of 335 Italian citizens as part of retaliatory anti-partisan operations.[61] In conclusion, it must be concluded that the prosecutors representing the Allied states undoubtedly sought to exclude issues related to aerial bombings from the deliberations of the IMT in Nuremberg.[62]

The U.S. prosecutor, Robert Jackson, during Hermann Göring's trial, attempted to partially interrogate the summoned witnesses (Karl Bodenschatz, Göring's adjutant, and Albert Kesselring) regarding the illegality of certain aerial attacks carried out by the air force of the Third Reich. A significant issue in this context was the matter of bombing Warsaw in September 1939. Bodenschatz, called as a witness, pointed out that the capital of Poland was "a fiercely defended fortress with a significant military garrison".[63] Albert Kesselring stated that "all the requirements of the Hague Regulations of 1907 applicable to land warfare were met in the context of the air strikes against Warsaw, which was a defended city." The German commander outlined three phases of the attacks on the Polish capital: 1) focused solely on the military aviation; 2) aimed at disrupting military movement due to the strategic importance of the railway stations and bridges

Violation of International Treaties, Agreements, and Assurances set forth in Counts One and Two of the Indictment; and he authorized, directed, and participated in the War Crimes set forth in Count Three of the Indictment" – *Trial of the Major War Criminals*…, p. 69.

59 "Aside from his alleged participation in crimes against peace, heretofore disposed of in this opinion, he is charged with (1) enforcing the «Sauckel action» while serving as deputy in Rundstedt's absence; and (2) using Russian prisoners of war in air force construction battalions in France" – US Military Tribunal Nuremberg, *The High Command Case*, judgment of 27 October 1948, in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10: Nuernberg October 1946 – April 1949*, Volume XI, Washington 1950 p. 564.

60 Case No. 39, Trial of Erhard Milch, United States Military Tribunal, Nuremberg, http://www.worldcourts.com/imt/eng/decisions/1947.04.17_United_States_v_Milch.pdf (accessed: 3.01.2021).

61 Case No. 44, Trial of Albert Kesselring, British Military Court at Venice, Italy, 17th February – 6th May 1947, *Law Reports of Trials of War Criminals*, The United Nations War Crimes Commission, Volume VIII, London 1949.

62 J. Rabkin, *Proportionality in Perspective: Historical Light on the Law of Armed Conflict*, "San Diego Journal of International Law" 2015, vol. 16, p. 308.

63 "I only know that Warsaw was a fortress which was held by the Polish Army in very great strength, provided with excellent pieces of artillery, that the forts were manned, and that two or three times Adolf Hitler announced that civilians should be evacuated from the city. That was rejected. Only the foreign embassies were evacuated, while an officer with a flag of truce entered. The Polish Army was in the city defending its stubbornly in a very dense circle of forts. The outer forts were very strongly manned, and from the inner town heavy artillery was firing towards the outskirts. The fortress of Warsaw was therefore attacked, and also by the Luftwaffe, but only after Hitler's ultimatum had been rejected" – *Trial of the Major War Criminals*…, Volume IX, p. 34.

across the Vistula River, "Stukas" and ground "strafer" aircraft, because the precision of these machines afforded the guarantee that mainly the military targets would be hit."; 3) the phase of supporting the assault on the city, during which "[…] everything that was humanly possible was done to hit military targets only and to spare civilian targets".[64] When questioned about the attacks on Rotterdam, Kesselring stated that the bombing of the city was the result of a series of "unforeseeable coincidences", adding that at the time of the attack, the bombing of the city was conducted "tactical requirements and technical possibilities", and that the excessive destruction was caused by an accidental hit at fuel storage depots.[65] The witness also pointed out that the negotiations ultimately led to the achievement of the military objective, which was the surrender of the city.[66] Göring's adjutant justified the destruction of Coventry with the fact that the city housed industry producing aviation components and the Luftwaffe had received orders to bomb only industrial sites.[67] When questioned about this matter, Kesselring confirmed the above concerns, acknowledging that the widespread devastation was a result of bomb dispersal accompanying every bomb drop directed at legitimate military objectives.[68] In his closing statement, the German commander emphasized that "The Hague Convention on land warfare did not provide for the requirements of air warfare. In order to avoid an arbitrary selection of targets, the Supreme Command had to go into the question and issue general directives based on the preamble to the Hague Convention, the literature published in the meantime, and finally, the special conditions governing the Luftwaffe itself", stressing that only targets in compliance with international law were assigned to the air fleets[69]. When

64 *Ibidem*, p. 175.

65 *Ibidem*, p. 178.

66 "The immediate consequence of the attack was the Surrender of the Rotterdam troops. General Wenninger, who was air attach6 at the time and who later was attached to my air fleet, told me that in consequence of this attack the whole of the Dutch Army capitulated" – *ibidem*, p. 177.

67 "Coventry was no fortress. Coventry, however, was a city which housed the key industry of the enemy air force, in which the aircraft engines were built, a city in which, as far as I know, many factories were situated and many parts of these aircraft engines were manufactured. In any case, the Luftwaffe had at that time received orders to bomb only the industrial targets. If the city also suffered, it is understandable, considering the means of navigation at that time" – *ibidem*.

68 "But bombs follow the same law as other projectiles; in other words, in land and air warfare dispersion covers a wide range. With an air force this is the further peculiarity that if strong formations are employed not the individual target but only the target area as a whole can be aimed at, which naturally causes a deviation from the target itself" – *ibidem*, p. 178.

69 "The Hague Convention on land warfare did not provide for the requirements of air warfare. In order to avoid an arbitrary selection of targets, the Supreme Command had to go into the question and issue general directives based on the preamble to the Hague Convention, the literature published in the meantime, and finally, the special conditions governing the Luftwaffe itself. Only those targets which we considered admissible according to international law were assigned to the air fleet or formation" – *ibidem*.

asked about the bombing of several Polish cities at 5:00 AM on September 1, 1939, Kesselring stated that the target of the attack "was not the cities, but the military objectives located in them […] designated based on information provided by intelligence".[70] The British prosecutor, D. Maxwell Fyfe, challenged the standpoint of the German commander by pointing out the impossibility of conducting effective reconnaissance of those localities on that day.[71]

Hermann Göring, in turn, referred to the circumstances surrounding the attack on Poland, stating that on September 1, 1939, 80% of the combat missions had been directed against cities where airbases and communication hubs were located. He added that Warsaw itself had been bombed solely in connection with its central railway station and the airbase at Okęcie, and that the bombing during the siege of the city had been preceded by numerous warnings. In a similar manner, he justified the attacks on Rotterdam (a particular coincidence) and Coventry (the armaments industry scattered throughout the entire urban area).[72] In the later stages of the proceedings, the issue related to the Luftwaffe's aerial bombings did not arise either in the examination of prosecution witnesses, in the closing statements, or in the final judgment. From the perspective of a researcher of air warfare law, it should be emphasized that the maintained line of defense seemed reasonable. Regardless of its legitimacy concerning the facts presented (which is contradicted, for example, by the bombing of the Royal Castle in Warsaw on September 25, 1939), in the context of substantive law, all arguments were based on the provisions of the international law applicable at the time, assuming that only Article 25 of the Hague Regulations of 1907 could be considered the relevant norm applicable in air warfare. Most likely with this same understanding, the prosecutors of the IMT decided to cease further attempts to proceed with this matter.

10.2. The Einsatzgruppen Trial

The most significant remark made during the Nuremberg Trials regarding air warfare and the practice of aerial bombings occurred during Trial No. 4 (Einsatzgruppen), when a certain group of defendants raised a *tu quoque* allegation, attempting to undermine the legitimacy of the Nuremberg Tribunals by referring to the Allied air attacks against German cities.[73] Defendant Otto Ohlendorf

70 "The attack started in the morning, but not, as you put it, on the towns but on military objectives; airfields, staff headquarters, and traffic centers were attacked. As I have already explained, very detailed instructions were published by the OKW, that only these military objectives should be bombed" – *ibidem*, p. 218.

71 *Ibidem*, pp. 215–218.

72 *Ibidem*, pp. 337–341.

73 A. Cassese, *The Oxford Companion*…, p. 701; P. Gaeta, *Serious Violations of the Law on the Conduct of Hostilites: A Neglected Class of War Crimes?*, [in:] F. Pocar, M. Pedrazzi, M. Frulli

argued that, in his view, aerial bombings were morally equivalent to the crimes committed by the Einsatzgruppen units.[74] The defense attorney for Gen. Wilhelm Liszt, in turn, argued that "reasons of fairness and justice demand that Field Marshal List be treated in this respect exactly as were those Allied commanders who gave the orders to attack Dresden and Hiroshima".[75] In his speech, the prosecutor pointed out that the German defense line was based on the belief that, within the framework of the so-called total war, every military action could be justified. According to the prosecutor, the use of nuclear weapons was in no way restricted by any norms of international law, and the manner in which air forces would be used in future armed conflicts should be the main subject of consideration. He pointed out that attacks aimed at centers of armaments production were "an unfortunate but legal and acceptable practice of modern warfare," acknowledging that the aerial bombings took place long after the Third Reich had systematically denied all and any values of international law.[76] Ultimately, the judges deemed the *tu quoque* argumentation inadmissible, first noting that the German aerial bombings of Warsaw, Rotterdam, Coventry, and London occurred chronologically before the Allied air strikes on German cities. Secondly, it was stated that there is "no parallelism between an act of legitimate warfare, namely the bombing of a city, with a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory". In the further part of the argument, it was maintained that "a city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military". Civilian casualties "an unavoidable corollary of battle action." According to the judges, there is a fundamental difference between executing civilians and

(eds.), *War Crimes and the Conduct of Hostilites: Challenges to Adjudication and Investigation*, Northampton 2013, p. 21.

74 "Do you attempt to draw a moral comparison between the bomber who drops bombs hoping that it will not kill children and yourself who shot children deliberately? Is that a fair moral comparison? A. I cannot imagine that those planes which systematically covered a city that was a fortified city, square meter for square meter, with incendiaries and explosive bombs and again with phosphorus bombs, and this done from block to block, and then as I have seen it in Dresden likewise the squares where the civilian population had fled to that these men could possibly hope not to kill any civilian population, and no children. And when you then read the announcements of the Allied leaders on this and we are quite willing to submit them as document you will read that these killings were accepted quite knowingly because one believed that only through this terror, as it was described, the people could be demoralized and under such blows the military power of the Germans would then also break down" – *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. IV, "The Einsatzgruppen Case", "The RuSHA Case"*, Nuernberg October 1946 – April 1949, Washington 1950, p. 357.

75 "Reasons of fairness and justice demand that Field Marshal List be treated in this respect exactly as were those Allied commanders who gave the orders to attack Dresden and Hiroshima" – *ibidem*, p. 380.

76 *Ibidem*, p. 381.

using aerial weaponry, including nuclear weapons, which is merely a means of breaking the military resistance of the adversary's state[77]. It was also pointed out that the opposing side may declare a given city an open one, which would prevent that location from being the object of a military attack.[78]

The reflections of the tribunal in the *Einsatzgruppen* case reveal a view that reflects a general attitude of acceptance for strategic bombing against industrialized urban centers. The tribunal did not in any way delegalize the above practice, nor did it specify the rules for how air operations should be conducted, going so far as to state that an air strike against urbanized localities legal and that civilian casualties are merely accidental.[79] A significant part of the above argumentation, however, is the reference to the moral and axiological dimension, as well as the context of reprisals related to the earlier nature of air operations carried out by the German Luftwaffe. Aside from the validity of the general view on the *tu quoque* defense by members of one of the most atrocious military formations of the Third Reich, the tribunal's conclusion appears to be an effective attempt to avoid conducting a comprehensive legal analysis of the course of air warfare during World War II. Some authors argue that, in this context, a more important and problematic aspect was the danger of undermining the legitimacy of the Nuremberg Tribunals in prosecuting perpetrators of violating international law.[80] This assessment could certainly not have been accepted due to the overall political and historical climate of that period – especially if it had been expanded to include considerations derived not only from the 1907 Hague Regulations but also from many other documents from the period immediately preceding the outbreak of World War II. Anthony C. Grayling argues that the IMT and subsequent Nuremberg tribunals were not instituted to create law *ex post*, but to enforce already existing norms.[81] However, from the perspective of the following 30 years, the consequences of this judgement seem to be significant to such a degree that, for the development of international law at the time, it might have been more appropriate for the judges of this trial to entirely refrain from making any statements on the legality of air bombardments during World War II. The effects of the procedural decision are evident in the course of the discussions held by representatives of the post-WWII international law doctrine (see Chapter V, point 27).

77 "Thus, as grave a military action as is an air bombardment, whether with the usual bombs or by atomic bomb, the one and only purpose of the bombing is to effect the surrender of the bombed nation. The people of that nation, thro" – *ibidem*, p. 467.

78 *Ibidem*, pp. 466–476.

79 H. Reinhold, *Target Lists: A 1923 Idea With Application for the Future*, "Tulsa Journal Comparative and International Law" 2002, vol. 10, p. 18.

80 G.D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge 2010, p. 123; M. Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition*, Leiden 2013, pp. 467–468.

81 A.C. Grayling, *Among the Dead Cities*…, p. 199.

10.3. The Erhard Milch Trial

The factual situation of the Luftwaffe general's trial involved the deliberate deployment of Soviet prisoners of war around German anti-aircraft artillery positions, which was classified as a violation of Article 9 of the 1929 Geneva Convention, which prohibits the use of prisoners of war to shield certain areas from the possibility of bombing. As a fact stating the existence of *mens rea* (awareness of the illegality of the alleged act) in the case of the defendant, attention was drawn to the common knowledge of the so-called memorandum of the Abwehr Chief, Wilhelm Canaris, who, on September 15, 1941, informed the Wehrmacht High Command about the necessity of applying "at least minimal standards of protection for prisoners of war" in the event of war.[82]

11. The International Military Tribunal for the Far East

The legacy of the International Military Tribunal for the Far East (IMTFE) is much less established and widespread in international law literature compared to the Nuremberg trials. This is partly due to the simple fact that, as an institution active at a later time, the IMTFE largely relied on the normative and jurisprudential achievements of the tribunal that administered justice to persons holding leadership positions in the political and military apparatus of the Third Reich. Nonetheless, the distinct nature of the military operations in the Far Eastern theater of war, the scale of violations committed by representatives of the Japanese Empire, as well as the highly controversial (from the perspective of integrating Japanese society with Western values of law, democracy, and economics) fact of dropping an atomic bomb on Hiroshima, meant that the work of the IMTFE required considerable caution as part of the peace process outlined in the plan of Gen. MacArthur.

The material basis for the charges against Japanese war criminals was the so-called Tokyo Charter of 1946, which in Article 5(b) established responsibility for the violations in the form of the so-called conventional war crimes – which

82 Case No. 39, Trial of Erhard Milch, United States Military Tribunal, Nuremberg, http://www.worldcourts.com/imt/eng/decisions/1947.04.17_United_States_v_Milch.pdf (accessed: 3.01.2021). The so-called Canaris Memorandum was issued in connection with the infamous order regarding the execution of Soviet political commissars. The direct author of the document was an international law expert Helmuth James Graf von Moltke (owner of the estate in Krzyżowa, present-day Poland), who was the leader of the anti-Nazi resistance movement and was executed following his arrest after the assassination attempt on Hitler on July 20, 1944.

was a significant distinction from the content of the document establishing the Nuremberg Tribunal.[83] The linguistic interpretation of this formulation led to ambiguities regarding the possibility of recognizing violations of customary international law as war crimes. The provision further stated that conventional war crimes are violations of the laws and customs of war. The reasons for making the above distinction in the titles of provisions are not explained. In this context, it can be hypothesized that one of the main reasons for the linguistic change could have been issues related to potential undermining of the legitimacy of the tribunal, based on the *tu quoque* argument resulting from aerial bombings. The likely reference to customary law of a conventional nature was related to the unclear status of the 1929 Geneva Convention, which the Japanese side had signed but had not ratified.[84] Japanese war criminals were categorized into three classes. Class A comprised the highest-ranking political and military leaders of the Japanese Empire (with the emperor excluded based on the provisions of the peace treaty). They were prosecuted for all acts falling under Article 5 of the IMTFE Charter, whilst classes B and C included military personnel accused of committing conventional war crimes against prisoners of war and civilians. They were tried by military commissions from China, the Philippines, the United States, Great Britain, France, Australia, and the Netherlands. Just as with the International Military Tribunal in Nuremberg, the indictment before the Tokyo Tribunal did not include any charges related to the operations of the air force, except in the specific case of the operation against Pearl Harbor on December 7, 1941. This resulted from the construction of Article 5 of the Tokyo Charter, which assumed that every war criminal must also be accused of committing crimes against peace; as a result, approx. 60% of the charges were crimes against peace.[85]

Under charge No. 39, the Japanese military leadership was accused of committing the crime of an unannounced attack by striking the U.S. Navy base at Pearl Harbor on December 7, 1941, in the context of an undeclared and illegal war. They were also charged with the murder of Admiral Kidd and the deaths of 4,000 Allied sailors killed that day as a result of the Japanese attack. The only field commander charged with participating in the crime of killing American sailors

83 Tokyo Charter (Charter of International Military Tribunal for Far East), Special Proclamation by the Supreme Commander for the Allied Powers, as amended 26th April 1946, T.I.A.S. No. 1589; cited in: C. van den Wyngaert, *International Criminal Law: A Collection of International and European Instruments: Third Revised Edition*, Leiden 2005, pp. 43–47; K.D. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, The Hague 1997, p. 179.

84 However, on January 29, 1942, the Japanese Minister of Foreign Affairs stated that Japan would apply the provisions of the 1929 Geneva Convention on a reciprocal basis. C. Kinvig, *Allied POWs and the Burma- Thailand Railway*, [in:] P. Towle, M. Kosuge, Y. Kibata (eds.), *Japanese Prisoners of War*, New York 2000, p. 42.

85 M. Furmata, *War Crimes Tribunal and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*, Oxon 2008, e-book.

in an undeclared war was Admiral Osami Nagano, commanding the strike group attacking the Pacific Fleet base in December 1941.[86]

An extremely interesting aspect of the trial was the attitude of the main defense attorney, professor of international law Kiyose Ichiro, who in his defense speech referred in detail to the accusations presented to the main war criminals. Apart from the arguments presented by the Japanese lawyer regarding the doctrine of self-defense as a justification for the Japanese Empire joining the war, it is worth highlighting the considerations related to the allegation of murdering Allied sailors and soldiers in connection with the crime of an unannounced attack on Pearl Harbor, among other targets, on December 7, 1941. It was pointed out in this regard that "the defense contends that the loss of lives due to the act of war does not constitute murder". The state of war – according to the Japanese professor – occurs at the moment of the first shot, so the charges are related to the state of war that has already occurred.[87] Further conclusions emphasized that international law distinguishes between war as an expression of state sovereignty and the actions of individuals. The defense argued that individuals acting on behalf of the state, in light of the international law in force at the time, cannot be held responsible for the state's actions. It also pointed out that the attack on the U.S. Pacific Fleet base could not be considered a violation of the provisions of the 1907 Hague Convention. The Japanese defense statement is worth quoting because, during the trial, a substantial amount of material had been collected; however, the request to have this evidence attached to the criminal proceedings file was rejected by the judges of the IMTFE. The submission of an extremely extensive separate and dissenting judgment (nearly 1,200 pages) by the Indian judge Pal, also caused considerable controversy. This judgment was permitted for publication only after the signing of the peace treaty between Japan and the United States in San Francisco in 1952.[88]

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86 "The same Defendants as in Count 38, under the circumstances alleged in Counts 37 and 38, by ordering, causing and permitting the armed forces of Japan to attack the territory, ships and airplanes of the United States of America, with which nation Japan was then at peace, at Pearl Harbour, Territory of Hawaii, on the 7th December, 1941, at about 0755 hours (Pearl Harbour time), unlawfully killed and murdered Admiral Kidd and about 4,000 other members of the naval and military forces of the United States of America and certain civilians whose names and number are at present unknown" – N. Boster, R. Cryer, *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments*, Oxford 2008, p. 28.

87 "The Indictment from Count 37 on provides for a group of crimes under the title, «murder», and charges crimes of murder against the defendants for the loss of lives due to the act of war. The defense contends that the loss of lives due to the act of war does not constitute murder. This, we believe, is an accepted theory of international law and is too obvious to call for any authority. The state of war in this instance came into existence when the first shot was fired. Therefore, we will produce evidence to show that the loss of lives referred to in Counts 37 to Count 44 in the Indictment occurred after the state of war existed" – quotation after: K. Keiichiro, *The Tokyo Trials: The Unheard Defense*, Tokyo 1995, p. 46.

88 R. Pal, *International Military Tribunal For The Far East, Dissentient Judgment of Justice Pal*, Tokyo 1999.

In the judgment of the IMTFE, charge No. 39 regarding the attack on Pearl Harbor was ultimately withdraw due the lack of elements constituting an act of "murder in the context of an aggressive war". This charge was later attempted to be redefined as an act "involving participation in an illegal war conspiracy, which also entailed a conspiracy to commit murder". The judges of the Tokyo Tribunal considered the above structure unknown in light of Article 5 of the Tokyo Charter.[89]

A significant portion of Judge Pala's statements was devoted to considerations regarding the legitimacy of the Japanese authorities' establishment of criminal provisions in 1942 for Allied pilots who carried out attacks against non-military objectives. The judge, denying the right to judge prisoners of war for war crimes during World War II, pointed out that the regulations established during the conflict were a reflection of the 1923 Hague Rules of Air Warfare. He emphasized that despite the lack of the formal validity of the rules, they constitute a convincing attempt to regulate the rules governing the use of aviation during an armed conflict.[90] He referred to the practice of American airstrikes, which, in the case of conventional attacks, did not comply with the standards set by the 1923 commission of jurists. In his opinion, in this state of the law of air warfare, it is difficult to consider the conduct of the Japanese authorities as criminal.[91] The judge's views can be considered inconsistent in a sense – by depriving the Allied side of the right to prosecute war criminals, while at the same time granting this right to the Japanese side, claiming that the provisions established by it cannot be considered as

89 "The Prosecution did not challenge this view but submitted that the counts were sustainable under Article 5(a) of the Charter. It was argued that the waging of aggressive war was unlawful and involved unlawful killing which is murder. From this it was submitted further that a conspiracy to wage war unlawfully was a conspiracy also to commit murder. The crimes triable by this Tribunal are those set out in the Charter. Article 5(a) states that a conspiracy to commit the crimes therein specified is itself a crime. The crimes, other than conspiracy, specified in Article 5(a) are «planning, preparation, initiating or waging» of a war of aggression. There is no specification of the crime of conspiracy to commit murder by the waging of aggressive war or otherwise. We hold therefore that we have no jurisdiction to deal with charges of conspiracy to commit murder as contained in counts 37 and 38 and decline to entertain these charges" – J. Pritchard, S.M. Zaide (eds.), *International Military Tribunal for the Far East, judgment of 12 November 1948*, "Tokyo War Crimes Trial" 1981, vol. 22, p. 450.

90 "In 1923 the Commission produced the proposed code of rules. This, however, was not ratified by any of the Powers. The code is of importance only as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war; it will doubtless prove a convenient starting point for any future steps in this direction. But, in any case, this has not as yet been done, and it seems none of the belligerents including the Allied powers paid any heed to these rules" – R. Pal, *International Military Tribunal*…, p. 679.

91 "In this state of the aerial warfare, it is difficult to consider the conduct of the Japanese authorities in making the regulation for the purpose of trial of the air pilots criminal on the ground that the regulation gave ex post facto law. In my opinion, they did not commit any crime in making these regulations" – *ibidem*, p. 681.

legislation contravening international law.[92] On the other hand, during the trial of another Japanese commander, Okada Tasuku, who approved the death sentences for the crew of an American B-29 shot down during a bombing sortie near the city of Nagoya in 1944, an American lawyer Joseph Featherstone argued that the evidence collected showed American pilots actually carried out acts consisting in indiscriminate attacks on civilians, which not only justified the procedural and substantive jurisdiction of Japanese military courts, but also affirmed the basis for the death sentence of Americans.[93] The above conclusion should be compared with the grounds for the US Supreme Court's judgement in the trial of Gen. Yamashita:

> One of the key elements of military operations is the adoption of mechanisms designed to discipline enemy combatants who, in an effort to disrupt the operations of the United States armed forces, committed acts contravening the law of war. Punishing enemy combatants who have violated the laws and customs of war is not only necessary as a preventive measure but also as an exercise of authority to conduct warfare sanctioned by Congress […], which extends beyond victories on the battlefield to include actions that prevent the recurrence of conflict and contribute to a fair settlement of the evil of military operations.[94]

The matter which differentiated the American and Japanese processes is the issue of a fair trial. However, it should be noted that none of the courts adjudicating in the trials of American pilots addressed the merits.

12. Rendulic rule

In many national legal systems, error of fact (*error in facti*), derived from the Roman legal tradition, is a recognized basis for excluding the criminal responsibility of the perpetrator, provided the error was honest[95]. In fact, the practice of warfare

92 "As regards the trial according to these regulations, I do not think anything has been established which would fix any guilt on any of the accused. Even if we judge by the standard given by the rules suggested by the Commission, there were bombardments in complete disregard of them. At any rate, if the court-martial found that to be the fact and accordingly convicted the airmen of war crimes, I would not say that either the commander-in-chief or the members of the Cabinet or of the General Staff committed any crime in not opposing that conviction" – *ibidem*, p. 682.

93 Y. Tanaka, *The Atomic Bombing, the Tokyo Tribunal and the Shimoda Case: Lessons for Anti-Nuclear Legal Movements*, Leiden 2011, p. 295.

94 *In re Yamashita*, 327 U.S. 1 (1946).

95 See: M. Małecki, *Usprawiedliwiający błąd do okoliczności stanowiącej znamię czynu zabronionego w świetle nowelizacji art. 28 § 1 k.k* [*Error in facti in the light of Article 28 para. 1 of the*

indicates that such circumstances are not uncommon, especially in the conditions of a dynamic battlefield, where the parties do not have a full picture of the reality. Difficulties in this regard may also be caused by specific behavior of an adversary of a legal (e.g., the use of camouflage) or illegal nature (the use of objects or civilians as shields to protect military infrastructure).

A similar legal problem occurred on the basis of the jurisprudence of the United States Military Tribunal in the case regarding the commander of the German forces in Norway, Gen. Lothar Rendulic. At the turn of 1944 and 1945, German intelligence services informed about the possibility of the Soviets launching an offensive in the north of Norway. Finland's withdrawal from the war and the general difficulty of the situation prompted the German commander to order the use of scorched earth tactics, which involved deliberate destruction of critical infrastructure points in Finnmark by the retreating troops.[96] However, the attack by the Soviet troops did not take place, and after the war, Gen. Rendulic was accused of violating the provisions of Article 23(g) of the 1907 Hague Regulations prohibiting the destruction of private property unless justified by military necessity.

The United States Military Tribunal first noticed the uniqueness of the location of the German armed forces in Norway and also pointed out that many factors were in favor of the high probability of a broad Soviet offensive commencing along the entire frontline. The presence of unfavorable weather conditions and extreme cold was also emphasized, which contributed to preventing the use of air reconnaissance. Importantly, the Tribunal pointed out that the retrospective analysis of the circumstances of the case may lead to the conclusion that there were no premises justifying the invocation of military necessity. However, as the judges stated: "[…] obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it".[97] This ruling thus approved the doctrine of error of fact within the framework of international criminal law (Article 32 of the Rome Statute of the ICC), as well as indirectly international humanitarian law (which was reflected in the content of interpretative reservations to Section IV of AP I).[98] The Rendulic rule resulting from the above judgment

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Polish Penal Code], "Czasopismo Prawa Karnego i Nauk Penalnych" 2015, vol. 3, pp. 1–29; O. Lee, T.A. Robertson, *"Moral Order" and The Criminal Law: Reform Efforts in the United States and West Germany*, The Hague 1973, pp. 95–96.

96 It is worth mentioning that the scorched earth tactic affected Finnish Lapland and the city of Rovaniemi. However, but due to the fact that Finland found itself among the Axis powers after 1941, none of the charges on this incident were raised.

97 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals, Case No. 47 'Trial of Wilhelm List', Vol VIII*, London 1949, p. 68–69.

98 "IHL does not prohibit the making of reasonable factual mistakes on the battlefield. International criminal law expressly acknowledges the likelihood of reasonable mistakes in the

constructed the standard of a reasonable commander who, acting in good faith and on the basis of "all practically available information", makes a decision based on "the circumstances existing at the time of making the decision".[99]

This directive has important implications for the assessment of circumstances related to conducting air operations *per se*. As a consequence, justified errors in the targeting process are not war crimes.[100] One example of the application of the argument derived from the Rendulic principle was the bombing of a bunker in Baghdad on February 13, 1991, during the First Gulf War. The incident, known as the "Al-Firdos bunker", gained notoriety due to the deaths of nearly 200 civilians who had sought refuge in the facility, believing it to be sheltered from coalition airstrikes. It was the most serious incident of the war, given the number of dead and wounded. Non-governmental organizations indicated that the coalition air force carried out the attack on insufficient information, neglecting all precautions. The U.S. Air Force (USAF) stated that the attack was conducted based on multiple sources of data indicating a clear military purpose of the bunker, referring, among other things, to information from a Scandinavian construction company, camouflage of the facility, violating Article 66 para. 2 of AP I, as well as satellite, photographic, and radio intelligence, which indicated that the facility was a command center. As a consequence, despite very high losses among the civilian population, the decision to attack was made *prima facie* in accordance with the criteria indicated in the *Rendulic* case.[101]

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fog of war. The Rome Statute, for instance, provides for a mistake-of-fact defense when the mistake negates a mental element of the crime. In particular, the offense of willfully killing civilians requires that the perpetrator have been aware of the factual circumstances that established the protected status" – M.N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities*, "Harvard National Security Journal" 2010, vol. 1, p. 39; F. Martin, S. Schnably, R. Wilson, J. Simon, M. Tushnet, *International Human Rights and Humanitarian Law*, Cambridge 2006, p. 536.

99 M. Piątkowski, *The Rendulic Rule and the Law of Aerial Warfare*, "Polish Review of International and European Law" 2013, vol. 2, pp. 41–69; A. Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice*, Oxon 2015, pp. 137–138.

100 D. Lewis, *The Protection of Civilian Educational Institutions*, [in:] J. Grimhedem, R. Ring (eds.), *Human Rights Law: From Dissemination to Application: Essays In Honour of Goran Melander*, Leiden 2006, pp. 101–102.

101 "The Secretary of the Air Force report stated that the presence of large numbers of civilians was not known by US sources. Their presence is somewhat curious bearing in mind the location of several other shelters nearby (without camouflage and barbed wire), though there is speculation that the «shelter» inhabitants were relatives of high level officials and officers at the facility, which the US government will not confirm or deny. If, as is probable, the planners did not know of the presence of civilians, a reasonable mistake of fact is a defense to charges of violation of the laws of armed conflict" – C.B. Shotwell, *Economy and Humanity in the Use of Force: a Look at the Aerial Rules of Engagement in the 1991 Gulf War*, "United States Air Force Academy Journal of Legal Studies" 1993, vol. 15, p. 33.

William H. Parks, one of the leading specialists in international humanitarian law, dedicated the opening pages of his study on the legal aspects of air warfare to referencing a fragment of the Nuremberg trials ruling, emphasizing that the Rendulic judgment is an important clue that historians who formulated critical opinions on bombing during World War II tend to overlook.[102]

13. Ryuichi Shimoda et al. v. The State

In the 1950s, the relatives of the victims of the atomic bombings of Hiroshima and Nagasaki in Japan initiated efforts to obtain financial compensation from the United States for violating the laws and customs of air warfare in August 1945 by conducting an air attack using nuclear weapons. These actions were closely linked to widespread public anger and disapproval over the IMTFE judges' refusal to examine the legality of the American conduct during the final months of the war. The victims' actions were directly influenced by the active involvement of former defense team members from the Tokyo Criminal Tribunal, particularly lawyer Okamoto Shoichi. In his study, *Issues related to the civil law aspects of claims resulting from the use of nuclear weapons*, he argued that the bombing of Japanese cities constituted a violation of the Fourth Hague Convention of 1907 and that the perpetrators of such unlawful actions should be held accountable under the Nuremberg Principles, which establish that the actions of state officials do not exempt them from responsibility for violations of international law.[103]

The Japanese lawyer postulated that future plaintiffs should pursue legal action within the American legal system. However, his proposal was not well received by the communities of legal practitioners in both Japan and the United States.[104] Ultimately, the families of the victims – including Ryuichi Shimoda, who lost most of his immediate family in the nuclear attack – filed a lawsuit with the Tokyo District Court, which issued its ruling on December 7, 1963, the 20th anniversary of the

102 "The Rendulic decision is an important guideline, and one not always followed by historians, some of whom, with hindsight and lacking the pressures of command, may have leaped to conclusions unduly critical of bombing during World War II prompting responses by some participants" –W.H. Parks, *Air War*…, p. 3.

103 Y. Tanaka, *The Atomic Bombing*…, p. 296.

104 Y. Tanaka, R. Falk, *The Atomic Bombing, the Tokyo War Crimes Tribunal and the Shimoda Case: Lessons for Anti-Nuclear Legal Movements*, "The Asia – Pacific Law Journal" 2009, vol. 7(44), pp. 3–5.

Japanese attack on Pearl Harbor.[105] The lawsuit was directed against the Japanese state, which, due to its renunciation in Article 19 of the 1953 San Francisco Treaty its citizens' claims against the Allies, is responsible for redressing damages to individuals for violations of international law. The defendant filed for dismissal of the lawsuit, recognizing that there was no explicit norm prohibiting the use of nuclear weapons in the conditions of World War II and raising the military justification related to the proportionality of the use of nuclear weapons in relation to the expected losses resulting from the invasion of the Japanese islands by the Allied forces.

Judgment in the case of *Shimoda v. The State* is extremely valuable from the perspective of a researcher of the law of air warfare. At the moment, this is the only court judgment known to the author of this work, which directly addresses the issue of the legality of air bombing during World War II. The Tokyo District Court pointed out that the use of nuclear weapons is not explicitly prohibited by any norms of positive international law, but the legality of its use may depend on the question of whether the use of a new type of weapon is in conflict with other norms of international law, including those of a customary nature. According to the court, the prohibition of the use of nuclear weapons does not have to be conditional on the existence of an express provision of international law. The mere state of novelty does not determine the legality of a weapon, which must be assessed in light of the existing positive law. It seems that the logical consequence of the mechanism used is that it cannot be stated *per se* that in the light of the *Shimoda v. The State* judgement nuclear weapons are illegal in all circumstances. The Japanese court rightly decided to assess the use of the above measure as an act of aerial bombing limited solely to attacks on Japanese cities. Thanks to this construction, the Tokyo District Court began examining whether atomic bombing was in accordance with the general principles governing air bombing. The comments made are extremely important and interesting in this regard:

1) a distinction was made between the situation of defended cities under the naval and land warfare regime;
2) the court assumed that it is permissible to attack defended areas without distinction;
3) it is unacceptable to attack objects other than military objectives in undefended areas (cities or zones).

A landmark finding of the court was the reference to the 1923 Hague Rules of Air Warfare and the statement that "although the Draft Rules of Air Warfare cannot be described as part of positive law as they have not yet come into effect as a treaty, students of international law regard them as authoritative on the law of air warfare. Some States adopt the substance of the Rules as a code for the activities of their armed forces, and their essential provisions were formulated in line with

105 *Shimoda v. Japan (Tokyo District Court, 7 December 1963*), 1963, https://ihl-databases.icrc.org/en/national-practice/shimoda-case-compensation-claim-against-japan-brought-residents-hiroshmina (accessed: 15.06.2025).

the rules of international law and practice then in force".[106] The court indicated that, due to the above, it is permissible to articulate the prohibition of bombing non-defended cities indiscriminately and also to confirm the validity of the theory of military purpose in air warfare as part of customary international law, which is consistent with the provisions applicable in naval and land warfare.

In turn, the court's considerations made in the context of the distinction between the status of a defended and non-defended locality deserve criticism.[107] It was determined that a city fortified with defensive installations and with military forces stationed cannot be considered defended solely because it is located far beyond the front line and cannot be subject to occupation by the enemy.[108] This statement is contrary to the general belief of the doctrine of international law about the impracticality of applying the test in force on the basis of Article 25 of the Hague Regulations of 1907 as not being adapted to the conditions of air warfare. The correction of the above conclusion was, however, the correct view that in such a situation military objectives may be the object of attack.[109] The court argued (also correctly) that it is permissible to bombard defended areas without distinction, but it must be sanctioned by factual circumstances. In the context of undefended areas, it cannot be of such a nature and must be limited only to military purposes – considering it a principle of international law applicable in air warfare. The court pointed out that attacks on military objectives may also lead to losses among non-combatants, as long as they are incidental and inevitable, but there is no justification for so-called blind bombing, which aims to destroy both civilian and military objectives. For this reason, it was decided that the method of air bombing consisting in the use of an atomic bomb against unprotected cities was a violation of international law, as it blurred the border between military objectives and civilian objects. In conclusion, the court ruled that the bombing of Hiroshima and Nagasaki was contrary to the then-applicable law of air warfare prohibiting attacks without distinction against cities with non-defended nature. Due to the practice of states in World War II, the possibility of claiming that the applicable principle of distinction loses its binding force in the conditions of total war was also rejected. Interestingly, the court made a distinction between:

1) indiscriminate bombing – as an illegal act;
2) area bombing – directed against a given area, in which there is a significant concentration of military objectives strongly defended by anti-aircraft defense means; such an attack was legal even if it violated the principle of distinction, because the military advantage obtained would obviously be greater than the losses among non-combatants.[110]

106 *Shimoda v. Japan*, p. 631.
107 A. Cassese, *The Human Dimension*…, p. 179.
108 *Shimoda v. Japan*, p. 632.
109 Y. Matsui, *The Historical Significance of the Shimoda Case Judgment, in View of the Evolution of International Humanitarian Law*, Tokyo 2013, p. 2.
110 *Shimoda v. Japan*, p. 633.

Considerations regarding the legality of the nuclear weapon itself were derived by the court from the analysis of the premise underlying the prohibition of unnecessary damage, starting from the St. Petersburg Declaration of 1868, Article 23(e) of the 1907 Hague Regulations and the 1925 Geneva Protocol, comparing its effects to those of chemical weapons as potentially exceeding the permissible level of harm to the enemy, while avoiding a categorical stance on the matter. Ultimately, the litigation of Shimoda and others was dismissed on the grounds of the principle granting the state jurisdictional immunity. The Tokyo District Court stated that, apart from the cases of creating mixed arbitration tribunals on the basis of, for example, the 1919 Treaty of Versailles and due to the specific form of discretionary diplomatic steps taken by states against another state, natural persons are not able to pursue claims before Japanese courts on their own behalf. The possibility of pursuing claims for violation of international law applicable in an armed conflict by natural persons depends on the existence of treaty-derived powers (self-executing) in this regard.[111]

Apart from the critical error of recognizing Nagasaki and Hiroshima as undefended cities, it is difficult to accuse the 1963 judgement of a lack of logical interpretation with regard to the provisions of the law of air warfare in force during World War II.[112] It was particularly accurate to emphasize the importance of the military objective theory, which, pursuant to the 1923 Hague Rules of Air Warfare, was the main determinant of the legality of an air attack. The Tokyo District Court's reasonable considerations regarding the possibility of collateral damage, as well as an indication of the possibility of legalizing the practice of area bombardment (apart from clear and acceptable conditions), deserve approval. The acceptance of the 1923 rules as an element of international humanitarian law in force at the time of the atomic attacks on Hiroshima and Nagasaki was entirely groundbreaking.[113] The above statement was met with strong opposition from R.A. Falk, who argued that the lack of formal acceptance by states of the above document and the contrary practice of states during World War II did not allow for the adoption of such a view, recognizing that there was "consistent pattern of non-adherence to the standards prescribed by then Draft Rules as governing aerial bombardment fails to shake the

111 American law, on the other hand, excluded the possibility for citizens of third-party states to pursue claims under the Federal Torts Claims Act. Another circumstance was the decision made by the President of the United States within the scope of the authority related to the function of the head of state, whose discretion is not subject to judicial review.

112 A completely different assessment of the cities located behind the front line was presented by G. Simpson, who pointed out that cities situated far behind the front line cannot be occupied and are thus *per se* are considered protected. G. Simpson, *The Nature of International Law*, Aldershot 2001, p. 122.

113 R. Kramer, D. Kauzlarich, *Nuclear Weapons, International Law and the Normalization of State Crime*, [in:] D. Rothe, C. Mullins (eds.), *State Crime: Current Perspectives*, London 2011, pp. 76–77.

confidence of the court in the validity of these standards".[114] Similarly, J.J. Paust, who believed that the conviction of the Tokyo District Court that the 1923 document was valid as an element forming part of international law at that time was simplified and had no major justification.[115]

14. Advisory opinion of the ICJ of 1996

Another adjucation of significant value for the purposes of this work is the advisory opinion of the ICJ issued on the *Legality of the Threat or Use of Nuclear Weapons*, issued on the basis of the request of the UN General Assembly, in accordance with the resolution of December 15, 1994 (resolution 49/75K).[116] As part of the above procedure, the ICJ was to answer the question whether the threat or use of nuclear weapons is in all circumstances permissible under international law. The most important from the point of view of the considerations made in this case are the findings of the ICJ regarding the consequences of the use of nuclear weapons in the light of international humanitarian law. Already from the perspective of the *Shimoda v. State* case, it must be stated that issues related to the use of nuclear ammunition are closely linked to the law of aerial warfare, one of the components of which is the permissibility of equipping military aircraft with a given type of weaponry.

The ICJ made several important general comments regarding the regime of international humanitarian law determining the basis for the legality of the use of a given type of weapon, referring to the provisions of the St. Petersburg Declaration of 1868, the Hague Regulations of 1907, the First Additional Protocol to the Geneva Conventions of 1977 or the CCW Convention of 1980. The ICJ argued that the established nature of the principle expressed under Articles 22 and 23 of the 1907 Hague Regulations provide for the limitation of accepting the scope of damage to the enemy, the prohibition of the deployment of weapons aimed at causing unnecessary suffering, as well as the use of means which can

114 R.A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, "The American Journal of International Law" 1965, vol. 59, p. 770; P.K. Menon, *Legal Limits on the Use of Nuclear Weapons in Armed Conflicts*, "Military Law and Law of War Review" 1979, vol. 18, p. 31.

115 'It is true that certain Draft Rules of Air Warfare proposed in 1923 would have changed the legal result, but these were never adopted as a part of international law and it seems that it was rather improper and simplistic for the Tokyo Court to have relied on the draft rules for its conclusions" – J.J. Paust, *The Nuclear Decision in World War II-Truman's Ending and Avoidance of War*, "International Lawyer" 1974, vol. 160, p. 163.

116 ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996.

strike indiscriminately. The tribunal considered this premise to be the cardinal principle protecting against the effects of the use of weapons causing unnecessary suffering and derived from the above the principle that "States do not have unlimited freedom of choice of means in the weapons they use".[117] The ICJ also pointed to the useful role of the so-called Martens Clause in the legal assessment of new technological solutions ("it has proved to be an effective means of addressing the rapid evolution of military technology"), on the basis of which international humanitarian law introduced a ban on the use of combat measures that could indiscriminately strike combatants and civilians, as well as unnecessary damage to the enemy in a manner disproportionate to the need to achieve the legal objective of military operations.[118] The International Court of Justice emphasized that there is no doubt that international humanitarian law applies in the cases of using nuclear weapons.[119] Despite the fact that according to the ICJ, *prima facie* nuclear weapons will have serious difficulties becoming weapons capable of fulfilling the requirements of the so-called weapons law, the judges were not able to unequivocally determine the illegality of using this weapon in all circumstances.[120] It seems that the analysis of the view represented by states with nuclear weapons, indicating the possibility of using such weapons, e.g., in a limited form (tactical nuclear weapons), significantly contributed to the above conclusion.[121]

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117 *Ibidem*, para. 78.

118 "In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives" – *ibidem*, para. 78.

119 "However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future" – *ibidem*, para. 86.

120 "In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance" – *ibidem*, para. 95.

121 "The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the «clean» use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons" – *ibidem*, para. 94.

In the analysis of the ICJ ruling, the final evasion of two important issues is of significant importance. Firstly, it is the lack of assessment of the content of Article 35 AP I as a *per se* source determining the illegality of a given type of armament. Secondly, there is no reference to the legal consequences of the non-existence (at the time of drawing up the opinion) of an unambiguous treaty rule prohibiting the use of nuclear weapons.[122] The above actions lead some specialists and experts to recognize that, in fact, the ICJ recognized the existence of a *non liquet*[123] standard. An important circumstance resulting from the analysis of the content of the advisory opinion of the ICJ is also the fact that the second premise may be the basis for the assessment of the legality of weapons pursuant to Article 36 of AP I, which is the prohibition of equipping the armed forces with armaments that are unable to distinguish between the civilian population and combatants.[124] As Judge Higgins pointed out in her separate opinion, the basis of this prohibition is the established and cardinal norm of international humanitarian law, stipulating that the civilian population should not be targeted by a military attack.[125] This determination should, however, be of a *per-casu* nature and not lead to generalizations, especially if the use of weapons of a given type may create different legal repercussions depending on the specific factual situation.[126]

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122 See: T. McCormack, *A Non Liquet on Nuclear Weapons – The ICJ Avoid the Application of General Principles of International Humanitarian Law*, "International Review of the Red Cross" 1997, vol. 316.

123 K. Kulovesi, *Legality or Ohterwise? Nuclear Weapons and the Strategy of Non Liquet*, "Finnish Yearbook of International Law" 1999, vol. 10, p. 60. See also: J. Kammerhoffer, *Gaps, The Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice*, "British Yearbook of International Law" 2009, vol. 80.

124 A. Cannone, *The Use of Prohibited Weapons and War Crimes*, [in:] F. Pocar, M. Pedrazzi, M. Frulli (eds.), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation*, Northampton 2013, p. 174. "With regard to means of warfare, those that can in no circumstances be directed at a specific military objective, or that produce effects which cannot be limited by IHL, may be considered under customary IHL as weapons that are indiscriminate by nature, the use of which would inevitably constitute an indiscriminate attack" – L. Maresca, E. Mitchell, *The Human Costs and Legal Consequences of Nuclear Weapons under International Humanitarian Law*, "International Review of the Red Cross" 2015, vol. 97, p. 630.

125 "The requirement that a weapon be capable of differentiating between military and civilian targets is not a general principle of humanitarian law specified in the 1899, 1907 or 1949 law, but flows from the basic rule that civilians may not be the target of attack" – ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, *Dissenting Opinion of Judge Higgins*, para. 24, p. 588.

126 "The use of nuclear weapons is, for the reasons examined above, exceptionally difficult to reconcile with the rules of international law applicable in armed conflict, particularly the principles and rules of international humanitarian law. But that is by no means to Say that the use of nuclear weapons, in any and al1 circumstances, would necessarily and invariably conflict with those rules of international law. On the contrary, as the dispositifin effect acknowledges, while they might «generally» do so, in specific cases they might not. It all depends upon the facts of the case" – ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, *Dissenting Opinion of Vice-President Schebel*, p. 322.

The assessment of the normative value of the Martens Clause in the form proposed by the ICJ raises doubts. Some authors believe with undisguised enthusiasm that by placing the idea of the Russian diplomat of 1899 at the center of considerations regarding the legality of the use of nuclear weapons, the ICJ has created a new standard within international humanitarian law that puts the interest of the international community above the framework of customary and positive law.[127] The some scheme was reflected in the jurisprudence of the ICTY, where in the *Kupreškić* case, when the Yugoslav tribunal ruled that the Martens Clause may be the source of the development of norms of customary international humanitarian law, disregarding the practice of states.[128] Setting aside the fact that, *prima facie*, such a view contradicts the provision of Article 38(1)(c) of the ICJ Statute, which explicitly refers to the requirement of *usus* necessary for the formation of customary norms, the ICTY, in another part of the same judgment, ruled that the principles of humanity and the dictates of public conscience are not sources of international humanitarian law *per se*. However, they serve as a point of reference in situations where the rules of international humanitarian law lack sufficient precision.[129]

It is also worth noting the United Kingdom's comments to the ICJ, which indicated that while the lack of a dedicated treaty ban on the use of nuclear weapons does not determine, in the light of the Martens clause, the legality of using a given type of weapon, the preamble itself cannot determine their illegality.[130] The USA,

127 G. Oberleitner, *Human Rights in Armed Conflict*, Cambridge 2015, p. 52. See also the dissenting opinion of Judge Shahaubudeen ("Thus, the Martens Clause provided its own self-sufficient and conclusive authority for the proposition that there were already in existence principles of international law under which considerations of humanity could themselves exert legal force to govern military conduct in cases in which no relevant rule was provided by conventional law. Accordingly, it was not necessary to locate elsewhere the independent existence of such principles of international law; the source of the principles lay in the Clause itself") – ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, *Dissenting Opinion of Jugde Shahabuddeen*, p. 409.

128 "This is however an area where opinio iuris sive necessitatis may play a much greater role than usus, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent" – ICTY, *Prosecutor v. Zoran Kupreškić et all*, Trial Chamber Judgment, 14 January 2000, IT-95-16-T, para. 527.

129 *Ibidem*, para. 525.

130 "While the Martens Clause makes clear that the absence of a specific treaty provision on the use of nuclear weapons is not, in itself, sufficient to establish that such weapons are capable of lawful use, the Clause does not, on its own establish their illegality. The terms of the Martens Clause themselves make it necessary to point to a rule of customary international law which might outlaw the use of nuclear weapons. Since it is the existence of such a rule which is in question reference to the Martens Clause adds little" – Letter dat-

in turn, emphasized that the legality of using nuclear weapons is strictly dependent on the circumstances in which they are to be used.[131] It was also pointed out that the premise of not causing superfluous injury and unnecessary suffering expressed on the basis of Article 35 of AP I refers only to weapons that are constructed to increase suffering/damage to an extent disproportionate to the achievement of a military goal.[132]

The Martens Clause is also regarded as a counterbalance to the so-called Lotus principle (see the chapter above). In a separate opinion, Judge Weeramantry considered that in the *Corfu* case, the ICJ already referred to the existence of obligations of states resulting from the elementary considerations of humanity even in the absence of a clear norm prohibiting a given behavior in certain circumstances.[133] Judge Shahabuddeen took a parallel position in this regard, recognizing that the lack of authorization from international law for the use of nuclear weapons is decisive.[134]

As E. Crawford rightly points out, there are too many contradictory interpretations of the preamble itself, as well as of the normative value understood as an autonomous source of international humanitarian law.[135] These doubts arise from

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ed 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Comments of the United Kingdom, International Court of Justice Legality of the Threat or Use of Nuclear Weapons (Request for an Advisory Opinion by the United Nations General Assembly), p. 48, https://www.icj-cij.org/public/files/case-related/95/8802.pdf (accessed: 3.01.2021).

131 Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with Written Statement of the Government of the United States of America, p. 21, https://www.icj-cij.org/public/files/case-related/95/8700.pdf (accessed: 3.01.2021).

132 *Ibidem*, p. 28.

133 "This Court's own jurisprudence in the Corfu Channel case sees customary international law as imposing a duty on all States so to conduct their affairs as not to injure others, even though there was no prohibition ipsis verbis of the particular act which constituted a violation of the complaining nation's rights. This Court cannot in 1996 construe «Lotus» so narrowly as to take the law backward in time even beyond the Martens Clause" – ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, *Dissenting Opinion of Judge Weeramantry*, p. 496.

134 "On the other hand, if that view of «Lotus» is incorrect or inadequate in the light of subsequent changes in the international legal structure, then the position is that States have no right to use such weapons unless international law authorizes such use. If international law has nothing to say on the subject of the use of nuclear weapons, this necessarily means that international law does not include a rule authorizing such use. Absent such authorization, States do not have a right to use nuclear weapons" – ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, *Dissenting Opinion of Judge Shahabuddeen*, p. 390.

135 "It is not, however, a tool to be used in a vacuum; that is to say, it cannot be used alone to outlaw certain methods or means of warfare, especially in contested or problematic cases. As tempting as it is to use the Martens Clause as a 'solve-all' for uncertain legal situations, it is better that obvious gaps in the IHL schema are addressed with specific treaties, rather than reliance on the more 'negotiable' Martens Clause" – E. Crawford, *The Modern Relevance of the Martens Clause*, "Legal Studies Research Papers" 2018, no. 11/27, p. 20.

the particular nature of *ius in bello* as a legal framework based on the positivist theory of international law.[136] It also makes little sense at this point to remind states of the particularly sensitive geopolitical sphere of restrictions on the choice of means of combat. The author personally joins the position of Judge T. Meron, who postulated that on the basis of the Martens clause "castles should not be built on sand".[137] At the same time, the view presented by the Russian side, testifying to the expiry of the significance of the clause due to the adoption of the "comprehensive code of war laws" in 1949 and 1977, should be strongly rejected.[138] It should be noted that in the course of the development of international humanitarian law, three mutual subcategories of norms have been distinguished in the form of: 1) the so-called Geneva law, which regulated the situation of victims of armed conflicts in a general way, 2) the so-called Hague law, referring to methods and means of conducting warfare, 3) the so-called St. Petersburg law, referring to prohibitions on the use of a certain type of weaponry.[139] While in the context of the Geneva-Hague law, significant progress has been made in their codification, in relation to which there is currently no serious conviction about the need for their further development, the St. Petersburg law is constantly being modified and is the most flexible tissue of international humanitarian law in the context of technological development and the emergence of new types of armaments. Especially in this context, the value of the Martens clause is revealed as a special identifica-

136 "The dominant philosophy of international law is positivist. Obligations to the international community are therefore regulated through a combination of treaty and customary law. With regard to the laws of armed conflict, this has important implications. By refusing to ratify treaties or to consent to the development of corresponding customary norms, the powerful military States can control the content of the laws of armed conflict" – R. Ticehurst, *The Martens Clause and the Law of Armed Conflict*, "International Review of the Red Cross" 1997, vol. 317.

137 "Nevertheless, the Martens clause does not allow one to build castles of sand. Except in extreme cases, its references to principles of humanity and dictates of public conscience cannot, alone, delegitimize weapons and methods of war, especially in contested cases" – T. Meron, *The Martens Clause, Principles of Humanity and Dictates of Public Conscience*, "American Journal of International Law" 2000, vol. 94, pp. 78–79.

138 Letter dated 19 June 1995 from the Ambassador of the Russian Federation, together with Written Comments of the Government of the Russian Federation, 1995, p. 13, https://www.icj-cij.org/public/files/case-related/95/8796.pdf (accessed: 3.01.2021).

139 M. Cherif Bassiouni, *The Regulation, Control and Prohibition of the Use of Certain Weapons in the Context of War*, [in:] M. Cherif Bassiouni, *International Criminal Law Third Edition: Volume I: Sources, Subjects and Contents*, Leiden 2008, p. 380. "Those governing the conduct of hostile operations and the choice and use of weapons (Hague Law), and those prescribing the treatment to be accorded victims of war, in particular, the wounded, sick and shipwrecked, prisoners-of-war, and civilians who find themselves in the hands of a power to which they do not belong (Geneva Law)" – P.J. Cameron, *The Limitations on Methods and Means of Warfare*, "Australian Yearbook of International Law" 1980, vol. 9, p. 249.

tion mark (a specific instruction, as argued by A. Cassese) indicating the direction of the development of international humanitarian law, both in the treaty context and in shaping the *opinio iuris* of the international community.[140] In the context of the law of air warfare, such a view was advocated in particular by E. Spetzler.[141] However, it seems that there are no convincing arguments for recognizing the stronger normative value of the above clause, and in particular indicating "that Martens' preamble fills in gaps in positive law".[142]

15. International Criminal Tribunal for the Former Yugoslavia

15.1. Stanislav Galić – attacking the civilian population, judicial application of the rule of proportionality, customary status of the 1923 Hague Rules of Air Warfare

Stanislav Galić was the commander during the siege of Sarajevo by the Bosnian Serb army in 1992–1994. The ICTY prosecutor charged the defendant with committing a war crime in the form of attacks on the civilian population in violation of Article 51 of AP I and Article 13 of AP II, prosecuted under Article 3 of the ICTY Statue.[143] The Trial Chamber first reconstructed the elements of the crime of attacking the civilian population, arguing that such action must bear the signs of a deliberate action with specific and conceivable intent, excluding ordinary negligence.[144] In addition, it was required that the perpetrator be aware that the attacked person belongs to the category of civilian population. In case of doubt, this accusation should prove that a reasonable person could not treat a given target as a legitimate object of attack. The act must brought effects and depended on

140 A. Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, "European Journal of International Law" 2000, vol. 11, pp. 208, 212–213. See also: T. Coughlin, *The Future of Robotic Weaponry and the Law of Armed Conflict: Irreconcilable Differences?*, "UCL Jurisprudence Review" 2011, vol. 17, p. 80; M. Newton, *Back to the Future: Reflections on the Advent of Autonomous Weapons Systems*, "Case Western Reserve Journal of International Law" 2015, vol. 47, p. 14.

141 E. Spetzler, *Luftkrieg*…, pp. 129–130.

142 R.A. Malviya, *International Humanitarian Law Concerning Employment of Means and Methods of Combat: Problems and Prospects*, "Israel Yearbook of Human and Refugee Law" 2005, vol. 5, p. 4.

143 On May 22, 1992, the warring parties decided to reach an agreement on the application of provisions I and AP I.

144 ICTY, *Prosecutor v. Stanislav Galić*, Judgement of 5 December 2003, IT-92-29-T, para. 42.

the circumstances of death or serious injury.[145] This means that the element of the crime is not the exposure of the civilian population to an abstract danger. Judges of the Trial Chamber of the ICTY also pointed out that indiscriminate attacks can also be classified as directly aimed at the civilian population, especially if the perpetrator uses inherently imprecise means as a tool of combat that cannot be controlled and directed against combatants.

The ICTY Trial Chamber emphasized that attacks without distinction are not only prohibited by the treaty norm, but also by customary international law, deriving this prohibition, among others, from Article 24 of the 1923 Hague Rules of Air Warfare, citing the position expressed in 7th edition of the Oppenheim's International Law.[146] In the further argument, reference was made to the 1938 documents of the League of Nations, the position of Neville Chamberlain and UNGA resolutions 2444/1968 and 2675/1970 as evidence of the existence of a customary norm. Reference was made to Article 24 of 1923 Rules once again while determining the basis of the rule of proportionality.[147] In this context, the ICTY used the Rendulic rule, arguing that the assessment of whether the attack was proportionate should take into account the *ante factum* perspective and indicate whether there was a reasonable possibility of predicting excessive civilian losses resulting from the attack. This means accepting, within the jurisprudence of the ICTY, the normative model of a reasonable commander, which was reflected in the interpretative reservations to the AP I.[148]

Reviewing the legitimacy of the attack on the Markale market during the siege of Sarejevo, the Trial Chamber determined the status of the local workshop producing uniforms for the needs of the army and the Bosnian police, recognizing that "persons employed therein may be treated as legitimate military objectives".[149] The conclusion of the ICTY in this respect is interesting in the light of the status of the so-called quasi-combatants, but it seems incomplete. The statement of reasons does not specify whether the protection afforded to these employees ceases at the time of crossing the workplace premises, or whether it ceases much earlier (e.g. during travel for the purpose of performing official duties).

Another incident was the case of the Koševo hospital bombing. Judges of the first instance of the ICTY pointed out that, in fact, Bosnian mortars were firing

145 *Ibidem*, paras. 54–57.

146 "The Trial Chamber observes that, already in 1922, the Air Warfare Rules enunciated the prohibition on indiscriminate attacks" – *ibidem*, footnote 103.

147 "The principle of proportionality, inherent to both the principles of humanity and military necessity upon which the law of conduct of hostilities is based, may be inferred, inter alia, from Articles 15 and 22 of the Lieber Code and from Article 24 of the 1924 Hague Air Warfare Rules" – *ibidem*, footnote 104.

148 *Ibidem*, para. 58.

149 "It is unclear whether manufacturing was still on-going at the time of the incident but in any case it is not reasonable to consider that the employees of such a manufacturing plant would be considered legitimate targets" – *ibidem*, para. 495.

from the hospital building and therefore it is not possible to establish which parts of damage to the hospital were the result of the Serbian returning fire. Nevertheless, it was deemed that at least part of the hits were not related to the hospital losing its function but were partly deliberate shelling.[150] The Appeals Chamber of the ICTY confirmed that hospital facilities may lose their protected character if, in accordance with Article 13 of the AP I they are used to commit acts harmful to the enemy for the duration of military use, provided that a prior warning with a reasonable time limit is issued. The Appeals Chamber emphasized that the Koševo hospital had become a legitimate military target for the time of the Bosnian army's mortar fire, but only to the extent necessary to eliminate military resistance.[151] The conclusion of the second instance court confirmed the possibility of changing the status of civilian or even specially protected facilities, such as hospitals, not only by the provisions of AP I itself, but first of all by the Geneva Conventions of 1949.

In the case of *Galić*, the Trial Chamber encountered for the first time an allegation concerning acts of violence aimed at spreading terror among the civilian population. The ICTY derived from the provisions of Article 51 para. 2 AP I, preparatory works and the historical development of the phrase "crime of terror", that is one of the violations of the laws and customs of war, pointing to its features as an act of violence against the civilian population with the intention of spreading terror among non-combatants.[152] This excluded the possibility of attributing the crime in the event of a possible intention – it was necessary to demonstrate on the basis of objective and subjective circumstances that the perpetrator not only agreed to the occurrence of the effect in the form of a terrorist effect but directly intended to achieve it.[153] It was also important to emphasize that acts of violence

150 "Nevertheless, the evidence does reveal that, on occasions, the Kosevo hospital buildings themselves were directly targeted, resulting in civilian casualties, and that this fire was certainly not aimed at any possible military target" – *ibidem*, para. 509.

151 "Therefore, the Trial Chamber erred in law in determining that fire on the hospital was «not aimed at any possible military target», because fire from the hospital turned it into a target. At the same time, however, military activity does not permanently turn a protected facility into a legitimate military target. It remains a legitimate military target only as long as it is reasonably necessary for the opposing side to respond to the military activity. Additionally, an attack must be aimed at the military objects in or around the facility, so only weaponry reasonably necessary for that purpose can be used. The Appeals Chamber must now review the Trial Chamber's factual findings in light of the correct legal standard" – *ibidem*, para. 346.

152 *Ibidem*, paras. 113–134.

153 "'Primary purpose' signifies the *mens rea* of the crime of terror. It is to be understood as excluding dolus eventualis or recklessness from the intentional state specific to terror. Thus the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended. The crime of terror is a specific-intent crime" – *ibidem*, para. 136.

do not include attacks directed at legitimate military objectives.[154] Interestingly, the defense argued that the crime of terror cannot be "the result of activities carried out in the urban area in accordance with international law".[155] Although the Trial Chamber did not directly address this postulate, the comparison of the elements of the crime of attacking the civilian population and the spread of terror confirms that the mere fact of illegal military operations, e.g. with the use of means that may attack indiscriminately, does not necessarily lead to the automatic classification of a given attack as terrorist in character.

Serious consequences were caused by the shelling of people gathered on June 1, 1993, at an *ad hoc* football tournament taking place in an adapted parking lot in a district of Sarajevo distant from the front line. During the barrage, many people from a crowd of nearly 200 people were injured or killed. During the trial, the defendant's defense attorneys indicated that among the fans there were many Bosnian soldiers, who, according to various estimates, constituted from 30 to 50% of the participants in the competition, but it was assumed that the attack on a 200-strong gathering, in which there were many non-combatants, must have led (from an *ante factum* perspective) to the possibility of losses among the civilian population that were excessive in relation to the specific, direct and expected military advantage.[156] This view is not free from controversy – it is noted in the doctrine that the ICTY may have made a mistake in applying the so-called equation of proportionality, confusing the expected excessive losses with damages of a significant dimension. It is argued that the circumstance of even extensive losses among non-combatants is not evidence of a violation of the rule of proportionality during the attack – the losses must be excessive (it should be recalled at this point that Article 8 para. 2(b)(iv) of the Statute of the ICC adds the adjective "clearly") in relation to the concrete and direct military advantage. It is worth noting that among the crowd there were also people occupying senior positions in the Bosnian Armed Forces. The final results of the attack – according to the Bosnian report – were such that approx. 60 combatants (including the commander of one of the brigades defending Sarajevo) and 40 civilians were killed or injured.[157] The above findings reveal an interesting conflict of perspectives. On the one hand, the Court, assessing the *ante factum* attack,

154 *Ibidem*, para. 135.

155 *Ibidem*, para. 82.

156 "Although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated. In light of its finding regarding the source and direction of fire, and taking account of the evidence that the neighbourhood of Dobrinja, including the area of the parking lot, was frequently shelled from SRK positions, the Majority finds that the first scheduled shelling incident constitutes an example of indiscriminate shelling by the SRK on a civilian area" – *ibidem*, para. 387.

157 *Ibidem*, para. 386.

decided that the shelling of a crowd of 200 people could have caused ("attacks in connection with which it may be expected") excessive losses among the civilian population in relation to the military advantage obtained and this attack should be assessed as illegal. On the other hand, taking into account the effects of the attack itself (*post factum*), adopting a purely quantitative criterion, it should be noted that *prima facie* the bombing of an improvised sports field did not cause excessive losses among the civilian population. However, in the perspective of Article 51 para. 5(b) of AP I, the emphasis is placed on anticipating losses that may be excessive. In this context, the ICTY, in the *Galić* case, held that even the presence of numerous soldiers among 200 people gives rise to the presumption of a potentially disproportionate effect. On the other hand, it is worth referring to the content of Article 85 para. 3(b) of AP I, which states that it is forbidden to launch an indiscriminate attack with the awareness that such an attack will cause excessive losses among the civilians.[158] This means that the element of culpability must already exist in the foreground of the prohibited act. Still, its criminal distinctive trait is not the anticipation but awareness of the occurrence of excessive losses among non-combatants, which seems to be a more stringent requirement under Article 51 para. 5(b) of AP I. A separate issue is a previously indicated distinction between the concepts of excessive and significant losses, revealing in its entirety significant practical difficulties in applying the principle in question, which have been removed only indirectly as part of the Galić judgment.

15.2. Kupreškić and feigned bombing of military objectives

Assessing the fighting between Serbian and Bosnian units in the Lasava Valley, the ICTY noted that the presence of individuals who can be considered directly involved in military operations cannot justify carrying out large-scale attacks without distinction, disproportionate to the military advantage obtained.[159] In another part

158 "This sub-paragraph 3(b), like sub-paragraph 3(c), adds the words «in the knowledge» to the common constitutive elements set out in the opening sentence: therefore there is only a grave breach if the person committing the act knew with certainty that the described results would ensue, and this would not cover recklessness" – Y. Sandoz, C. Swiniarski, B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva 1997, para. 3479.

159 "The point which needs to be emphasised is the sacrosanct character of the duty to protect civilians, which entails, amongst other things, the absolute character of the prohibition of reprisals against civilian populations. Even if it can be proved that the Muslim population of Ahmici was not entirely civilian but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. Indeed, even in a situation of full-scale armed conflict, certain fundamental norms still serve to unambiguously outlaw such conduct, such as rules pertaining to proportionality" – ICTY, *Prosecutor v. Zoran Kupreškić*…, para. 513.

of the judgment, it was indicated that attacks directed against legitimate military objectives may be considered illegal if they are carried out through non-discriminatory methods and means of conducting combat in "such a way as to cause indiscriminate losses among the civilians".[160] In fact, the ICTY pointed to the possibility of revealing during military operations the phenomenon of the so-called covert indiscriminate bombing, i.e., one directed against military objectives while causing certain civilian losses. However, the theoretical recognition of this phenomenon by the judges of the Trial Chamber encounters serious practical doubts. Firstly, it should be noted that there is no obligation in international law to use precise means of combat – the only border line to this extent is the imperative that these means lead to the simultaneous destruction of military objectives and civilian objects. This means that combatants have a wide range of discretion in selecting means of combat, and they can be divided into precise or less precise categories without violating the principles of distinction. Secondly, when certain civilian losses arise, determination of whether they are excessive in relation to the overall military advantage resulting, for example, from attacking several targets within one built-up area is another important issue. Thirdly, an issue related to the mental element arises.

A famous fragment of the Kupreškić judgment is the reflection on the nature of reprisals in a non-international armed conflict. Justifying the existence of a prohibition in customary law, the Trial Chamber pointed out that despite the lack of convincing practice of the states, the *opinio iuris* "has a stronger impact than *usus* due to the nature of the Martens Clause".[161] This decision raises a lot of controversy.[162] On the one hand, the superiority of the paradigm resulting from the preamble to the Fourth Hague Convention of 1907 is recognized, which should determine and confirm the existence of standards important from the point of view of humanitarian requirements, such as the above-mentioned prohibition of repris-

160 "In addition, attacks, even when they are directed against legitimate military objectives, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians" – *ibidem*, para. 524.

161 "Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely usus or diuturnitas has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than usus, as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent" – *ibidem*, para. 527.

162 N. Hayashi, *The Martens Clause and Military Necessity*, [in:] H. Hensel (ed.), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict*, Aldershot 2008, p. 148. E.g., R. Dolzer pointed out that the modern formulation of the Martens Clause in Article 1, para. 2 of AP I only concerns issues not regulated by the provisions of AP I – which leaves obligations contained within the provisions of AP I outside its scope – R. Dolzer, *Commentary: Part V*, "International Law Studies" 2002, vol. 78, p. 358.

als.[163] On the other hand, it is argued that the above-mentioned decision directly violates the two-element definition of custom.[164] Fausto Pocar, commenting on the scope of the customary nature of AP I, pointed out that there is no doubt that custom must be recognized as binding by states, and practice must show compatibility to this extent.[165]

Apart from the Trial Chamber's inference of the possibility of the formation of customary international law without taking into account the *usus* element due to the normative value of the Martens Clause, the reference to the preamble to the Fourth Hague Convention of 1907 was made in the context of the rule of proportionality and the analysis of the so-called combined effects resulting from an attack on a military objective, which lead to incidental losses and damage among the civilians. The ICTY pointed out that in certain circumstances, a series of attacks located in the "gray area between uncontested legality and illegality" may be "jointly" considered as not meeting the requirements of international law, resulting from, among others, "humanitarian reasons".[166] The above view is interesting – considering that, in accordance with the content of the interpretative reservations made under Articles 52 and 57 of AP I, the military advantage resulting from attacks on military objectives should take into account the entirety (implicitly the sum) of all elements being beneficial to military activity, it should also *a contrario* show the entirety of the accompanying losses among the non-combatants.

15.3. Milan Martić – the use of cluster munitions in a populated area

On the May 2 and 3, 1995, the president of the so-called Republic of Serbian Krajina (RSK), Milan Martić, issued an order to bomb Zagreb. For this act, he was charged by the Prosecutor of the ICTY, who accused him of committing a war

163 J. Sarkin, *Colonial Genocide and Repreatrions Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herere against Germany for Genocide in Namibia 1904–1908*, London 2009, p. 92; R. Kolb, R. Hyde, *An Introduction to the International Law of Armed Conflicts*, Oxford 2008, pp. 62–63.

164 A. Clapham, P. Gaeta, M. Sassòli, *The 1949 Geneva Conventions: A Commentary*, Oxford 2016, para. 88.

165 F. Pocar, *To what Extent is Protocol I Customary International Law?*, "International Law Studies" 2003, vol. 78, p. 340.

166 "As an example of the way in which the Martens clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul per se of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law" – ICTY, *Prosecutor v. Zoran Kupreškić*…, para. 526.

crime consisting in attacking civilians, in accordance with the provisions of Article 51 para. 2 of AP I, Article 13 para. 2 of the Additional Protocol II and Article 3 of the ICTY Statue. In addition, it should be noted that the defendant's act was classified as intentionally making the civilians the object of attack, as specified under Article 85 para. 3(a) of AP I.[167] The defendant was not directly accused of violating the provisions of Article 85 para. 3(b) of AP I providing for the prohibition of indiscriminate attacks – this was considered a prior co-criminal act, which is consumed by the provision of Article 85 para. 3(a) of AP I. In the justification of the indictment, it was indicated that attacks carried out indiscriminately against civilian and military objectives may be qualified as attacks directly targeted at civilians, and one of the determinants of the above intention on the defendant's part was the use of indiscriminate weaponry, such as rocket launchers with cluster munitions in the course of a military operation.[168] In this way, reference was made to the standard specified in the *Galić* and *Blaskić* cases, where the deliberate form of the act was determined on the basis of all the subjective circumstances of a given act, analyzing the manner and type of combat means used, the location of military objectives and the presence of civilians.[169] In the course of the proceedings, the defendant's defense attorneys argued that the objects of the attack were the buildings of public administration, national defense, airport and the president's palace. The ICTY Trial Chamber recognized that some of the objects with a military purpose were actually hit as part of the bombing but considered this fact irrelevant in the light of the characteristics of the M-87 Orkan rocket launcher. The specification of the missile system included the possibility of launching a salvo using cluster munitions, which fired from a distance of 50 km and had an error margin of approx. 1 km.[170] Due to the use of a weapon within its limits of its strike range, significant dispersion and a 2-hectare impact area of cluster munitions, the Trial Chamber found the M-87 Orkan unit to be incapable of hitting specific targets. In addition, it was stated that this means was incapable of complying with the principle of distinction ("M-87 Orkan is an indiscriminate weapon"), the use of which in a densely populated area such as Zagreb leads to losses among non-combatants.[171]

167 ICTY, *Prosecutor v. Milan Martić*, Judgement of 12 June 2007, IT-95-11-T.

168 *Ibidem*, para. 39.

169 "In particular, indiscriminate attacks, that is attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians. In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used" – *ibidem*, para. 69.

170 *Ibidem*, paras. 461–462.

171 "Moreover, the Trial Chamber notes the characteristics of the weapon, it being a non-guided high dispersion weapon. The Trial Chamber therefore concludes that the M-87 Orkan, by virtue of its characteristics and the firing range in this specific instance, was incapable of hitting specific targets. For these reasons, the Trial Chamber also finds that the M-87 Orkan is an indiscriminate weapon, the use of which in densely populated civilian areas, such as Zagreb, will result in the infliction of severe casualties" – *ibidem*, para. 463.

As a result, the accused was found guilty of a war crime in the form of a deliberate, direct attack on the civilians carried out with a means of combat that could strike indiscriminately within the meaning of Article 3 of the ICTY Statute.[172]

The position of the ICTY, despite the correctness of the decision, has a flaw in the grounds of the judgement. Undoubtedly, the selection of artillery firing salvoes of warheads carrying cluster munitions as a means of destroying military objectives within a densely populated area – taking into account the weapon's borderline range and its significant dispersion – disqualified its use in the specific circumstances of May 2–3, 1995.[173] However, the classification of the M-87 Orkan rocket launcher as an indiscriminate weapon without emphasizing that this conclusion made only on the basis of the *Martić* case[174] is an unacceptable conclusion on the part of the Trial Chamber. The conclusion of the ICTY may be misleading in this regard as an example of outlawing the M-87 Orkan missile system *per se*.[175] It is clear that in the circumstances of war conducted in urbanized conditions, the Tribunal's ruling should signal that a potential decision of an air operation commander to equip military aircraft with cluster munitions is highly perilous and with a high density of civilians in the area of the planned attack it can undoubtedly be treated as the use of an indiscriminate method of attack with a probability approaching certainty.

The defendant attempted to challenge the Trial Chamber's findings presented above, arguing that the Orkan rocket launcher could hit a specific target from a greater distance.[176] This allegation was dismissed. Partial correction of the view

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172 "Having regard in particular to the nature of the M-87 Orkan and the finding that Milan Martić knew of the effects of this weapon, the Trial Chamber finds that Milan Martić wilfully made the civilian population of Zagreb the object of this attack. Milan Martić therefore incurs individual criminal responsibility under Article 7(1) of the Statute for Count 19, attacks on civilians under Article 3" – *ibidem*, para. 472.

173 S. Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law*, Cambridge 2014, pp. 202–203.

174 C. De Cock, *Legal Implications Surrounding Operation "Inherent Resolve" in Iraq and Syria*, "Israel Yearbook on Human Rights" 2017, vol. 47, p. 128; D. Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, "Journal of Conflict and Security Law" 2006, vol. 11, p. 216.

175 G. Nystuen, *A New Treaty Banning Cluster Munitions: The Interplay between Disarmament Diplomacy and Humanitarian Requirements, Security: A Multidisciplinary Normative Approach*, Leiden 2009, p. 139; S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford 2012, p. 392.

176 "He argues that the M-87 Orkan is precise, even from a long distance, the targets aimed at were large and similar weapons have been used by many armies in the recent past. Martić claims further that the Prosecution's expert witnesses were not experienced in relation to the use of the M-87 Orkan and that they used outdated material and disregarded relevant information" – ICTY, *Prosecutor v. Martić*, Appeals Chamber Judgment, 8 October 2008, IT-95-11-1-A, para. 239.

expressed in the first instance was made by the Appeals Chamber of the ICTY, which indicated that the M-87 Orkan system was an indiscriminate weapon, unable to attack specific targets in the conditions of the *Martić* case.[177]

15.4. Dragomir Milošević – fuel-air bombs, TV station as a military target

During the bombing of the Sarajevo area by the troops of the Republic of Srpska, specially modified air bombs weighing from 100 to 250 kg were used as part of siege operations.[178] Some of the missiles were mounted as a component of missile systems and launched from the ground. One of the types of weapons dropped on the city was the FAB-250 fuel-air bomb, which essentially derives its destructive power from a significant pressure difference. The Trial Chamber pointed out that the use of modified air bombs endangered the civilians of Sarajevo since it was an imprecise weapon causing extensive destruction.[179] In addition, it was indicated that the use of this type of armament by the defendant confirms the act with the specific intent of spreading terror among the civilians of the besieged city (the Appeals Chamber emphasized this position) by attacking it directly or as a result of negligence.[180] In the Appeals Chamber, the ICTY also pointed out that, in its opinion, modified fuel-air bombs were not only imprecise but were even described as uncontrollable.[181]

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177 "For the foregoing reasons, Martić has not demonstrated that the Trial Chamber erred when it found that the M-87 Orkan was an indiscriminate weapon, incapable of hitting specific targets in the circumstances of the case as presented before the Trial Chamber" – *ibidem*, para. 252.

178 "The Trial Chamber finds that air bombs were modified in order to enable their launch from the ground. It is also established that some of these modified air bombs carried fuel-air explosives, rather than only TNT" – ICTY, *Prosecutor v. Dragomir Milošević*, Trial Chamber Judgement, 12 December 2007, IT-98-29/1-T, para. 107.

179 "Moreover, the Accused introduced to the Sarajevo theatre, and made regular use of, a highly inaccurate weapon with great explosive power: the modified air bomb. It is plain from the evidence that the indiscriminate nature of these weapons was known within the SRK. The modified air bombs could only be directed at a general area, making it impossible to predict where they would strike. Each time a modified air bomb was launched, the Accused was playing with the lives of the civilians in Sarajevo. The psychological effect of these bombs was tremendous" – *ibidem*, para. 1001.

180 "The use of the modified air bombs is another clear indication of the Accused's intent to spread terror. The highly destructive force and the psychological effects these bombs had on the civilian population were obvious to anyone. The decision by the Accused to use modified air bombs against civilian targets can, therefore, only be interpreted as demonstrating the intent to spread terror" – *ibidem*, para. 970.

181 "On the basis of this evidence coupled with the established fact that Milošević was directly involved in the use and deployment of air modified bombs and issued orders regarding

Although the use of air bombs by the ground forces was only an episode in the case of *Dragomir Milošević* (affecting the intensification of criminal responsibility), the Trial Chamber again pointed out that these weapons could indiscriminately strike military and civilian targets without the explicit reservation that this applies to the circumstances related to the siege of Sarajevo during the civil war in the former Yugoslavia. As a side note to the *Milošević* case, it is worth noting that on the basis of the *Blaskić* case, the ICTY Trial Chamber acquitted the defendant of crimes against humanity, pointing out that during the attack on settlements inhabited by Bosnians, it was not proved that the *mens rea* of this attack covered the consequence of using weapons against civilians.[182]

As part of the above proceedings, the Trial Chamber also investigated the incident of June 28, 1995, related to the attack of Serbian artillery on the building of the Bosnian television station, which caused injuries to approx. 30 people. During the proceedings, it was established that while there were no Bosnian military personnel in the facility itself, artillery units were deployed in an area directly adjacent to it. The UN mission staff who testified during the proceedings pointed out that, in their opinion, the proximity of the Bosnian mortars posed a significant risk of collateral damage to the nearby buildings.[183] Despite the above, the Trial and Appeals Chambers concluded that the TV station building was deliberately bombed and was of a purely civilian nature.[184] The conclusion of the ICTY

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their use from as early as August 1994,798 the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to conclude beyond reasonable doubt that all the shelling involving modified air bombs and mortars fired by the SRK in Sarajevo during the Indictment period could only occur pursuant to Milošević's orders. Furthermore, considering that modified air bombs were a highly inaccurate weapon, sometimes even described as uncontrollable, yet with extremely high explosive force, the Appeals Chamber finds that it was not unreasonable to establish that Milošević possessed the required mens rea for ordering the crimes of terror and crimes against humanity, either deliberately targeting civilians or attacking them indiscriminately" – ICTY, *Prosecutor v. Dragomir Milosević*, Appeals Chamber, Judgement 12 November 2009, IT-98-29/1-A, para. 273.

182 "However, does not satisfy beyond reasonable doubt the standard of mens rea pronounced by the Appeals Chamber in this Judgement, that the Appellant was aware of a substantial likelihood that «baby bombs» would be used against Muslim civilians or their property during the attack of 18 July 1993" – ICTY, *Prosecutor v. Tihomir Baskić*, Judgement 3 March 2000, IT-95-14-T, para. 465.

183 "However, Lt. Col. Fortin testified that there were ABiH mortars in the vicinity, in a field 500 metres north of and behind the TV Building. He thought that the ABiH mortars could not be seen. During cross-examination, he agreed that the ABiH placed heavy weapons close to UNPROFOR positions. He also agreed with the Defence that there were densely-populated areas around mortar positions and that, by placing mortars there, one would «run into the problem of collateral damage»" – ICTY, *Prosecutor v. Dragomir Milosević*, Trial Chamber Judgement…, para. 583.

184 "There is abundant evidence of the accused planning and ordering the shelling of civilian areas, including, in particular, the TV Building and the shelling of Hrasnica on 7 April 1995" – *ibidem*, para. 964.

seems to be highly controversial for two reasons. Firstly, classifying a TV station as a civilian facility is contrary to the doctrine's position and the historical view that radio and television stations are recognized as inherently military objectives (see the justification of the procedural decision of the ICTY Prosecutor's Office on the analysis of NATO air strikes on Serbia in 1999). Even if the Trial Chamber did not accept the above view, it should still be the subject of evidence proceedings to determine whether the TV station, through its "use", had lost the status of a civilian asset, e.g., by broadcasting a specific type of programs or making its television links available for the needs of the armed forces. Secondly, one should approach with particular caution the view that the TV station was actually the direct target of an artillery attack if there were military objectives deployed nearby.[185]

15.5. Slobodan Praljak and classification of bridges as military objectives

As part of the hostilities taking place around Mostar in 1992, many objects were destroyed or damaged, including the Old Bridge in Mostar, recognized as a world-class monument, located on the Neretva River, which was also the front line. The ICTY prosecutor accused Croatian units under the command of Slobodan Praljak of this destruction. The attorneys of the defendant argued that the bridge had been used by Bosnian units for military purposes, including the transfer of military materials and equipment.[186] On the other hand, the destruction of the object also caused significant consequences for the local civilians, cutting them off from food supplies and medical assistance.[187] However, making unambiguous arrangements was hindered in this respect by the fact that the so-called Old Bridge collapsed as a result of damage many months after the defendant had left the command post (November 9, 1993) and its structure was already strained as a consequence of intense fire from Serbian artillery in the earlier period and the exchange of fire between Croatian and Bosnian units. The incident of November 8, 1993, when a Croatian tank fired approx. 15 shells at foundations of the bridge, which was captured in the video and analyzed. Ultimately, the Trial Chamber determined that the destruction of the bridge

185 "On the basis of the evidence, the Trial Chamber is satisfied that on 28 August 1995, a modified air bomb hit the TV Building and exploded. There was no real challenge by the Defence that it was a modified air bomb that hit the TV Building" – *ibidem*, para. 618.

186 "Although there were other ways of getting from one bank to the other, the Chamber considers that the Old Bridge was essential to the ABiH for the combat activities of its units on the front line, for evacuations and for sending troops, provisions and materiel and that it was used for this purpose" – ICTY, *Prosecutor v. Prlić et all*, Trial Chamber Judgement of 29 May 2013, IT-04-74-T, para. 1290.

187 *Ibidem*, para. 1293.

brought strategic benefits to Croatian units, at the same time causing serious consequences for the civilian population and a decline in morale.[188]

The Chamber pointed out, however, that the analysis carried out by the first instance of the ICTY did not make any findings and was limited to reconstructing the factual state. This happened despite an interesting issue pertaining to the so-called dual-use facilities, defining a bridge as a military objective and deciding whether, at the time of its destruction, Serbian forces obtained a specific military advantage. An additional element was the special value of the object as a monument, which could also introduce an element of considerations related to the extent of protecting objects of this type against the effects of warfare and the loss of its protective character as a result of its structure being used by Bosnian troops. The Trial Chamber partially signaled acknowledging the fact that the destruction of the Old Bridge in Mostar brought a measurable strategic benefit (which suggests that the analysis of the consequences of the attack was not only carried out *per casu* but also included the attack as a whole) in the light of Article 52 para. 2 AP I. In another place of the judgement, the first instance of the ICTY inferred that the bridge was a military objective for Croatian troops.[189] However, it was not indicated on the basis of which of the premises specified under Article 52 para. 2 of AP I, the decision was taken to classify the structure as a military target – whether due to its nature or purpose. As R. Bartels rightly noted, there are fundamental differences between the content of the *Trial Chamber Judgement Summary*, which on page 3 indicates that "despite the recognition of the Old Bridge in Mostar as a legitimate military target, its destruction caused disproportionate effects on the civilian population", which is not to be found in the extremely extensive content (approx. 2,500 pages) of the judgment.[190] In particular, in the judgment of the Trial Chamber, there is no reference to the estimation of the expected, concrete and specific military advantage in relation to the losses among the civilian population.[191] This would be interesting because this

188 *Ibidem*, para. 1357.

189 "The Chamber therefore found that the Old Bridge indeed constituted a military target for the HVO, but that the impact of its destruction on the Muslim civilian population of Mostar was disproportionate to the concrete military advantage to be gained by its destruction" – *ibidem*, para. 175.

190 "On 8 November 1993, as part of the offensive, an HVO tank fired throughout the day at the Old Bridge until it was unusable and on the verge of collapse. The Bridge then collapsed on the morning of 9 November 1993. The Chamber finds, by a majority, with the Presiding Judge dissenting, that although the Bridge was used by the ABiH and thus constituted a legitimate military target for the HVO, its destruction caused disproportionate damage to the Muslim civilian population of Mostar" – ICTY, *Judgement Summary for Jadranko Prlić and others*, The Hague, 29 May 2013.

191 "Furthermore, the Chamber did not balance the anticipated military advantage that the HVO would achieve by destroying the bridge and the expected damage to the bridge itself and/or the civilians. As discussed above, it would not be the first time that a chamber

estimation would not have a dimension regarding the very consequences of an attack in a direct way but would also include the context of indirect consequences for non-combatants.

15.6. Gotovina – unjustified destruction of the village and indiscriminate bombing

In the summer of 1995, the Croatian Armed Forces under the command of Gen. Ante Gotovina launched Operation "Storm" against the Serbian presence in the Krajina region. In the course of hostilities, from 4 to 5 August 1995, Croatian artillery bombarded four towns inhabited by the Serbian population (Knin, Benkovac, Gračac and Obrovac). In the high-profile (due to the requirement of prior extradition of Gotovina and other war criminals as one of the conditions for Croatia's accession to the European Union) and controversial (due to the general's great popularity in Croatian society, as well as the expectations of the Serbian community) trial, the ICTY Prosecutor's Office accused the commanders of Operation "Storm" of wanton destruction cities and towns in a way unjustified by military necessity – i.e. a war crime under Article 3(b) of the ICTY Statue. This effect, in the prosecutor's opinion, was the result of indiscriminate artillery bombardment, which means that the judgment in question contains interesting issues from the perspective of the law of aerial bombardment.

The first issue that was examined by the ICTY Trial Chamber was the determination of the legality of using imprecise artillery systems such as BM-21 Grad launchers. In this context, importantly, it was found that although the use of the Grad missile system offers lower accuracy than conventional howitzers and mortars, its use during the bombardment the town of Knin did not display the features of indiscriminate shelling.[192] The Trial Chamber also investigated whether the use

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makes conclusions as to the disproportionate nature of an attack without actually having applied the proportionality principle to the facts of the case. Yet, this is the most striking thing: the Trial Chamber in Prlić did not conclude that the destruction of the bridge was disproportionate!" – R. Bartels, *Prlić et al.: The Destruction of the Old Bridge of Mostar and Proportionality*, 2013, https://www.ejiltalk.org/prlic-et-al-the-destruction-of-the-old-bridge-of-mostar-and-proportionality/ (accessed: 2.01.2021).

192 "According to Konings and Corn, this method of fire can, depending on the target and the intended effect, be used for a military purpose or to psychologically harass civilians. The evidence does not establish the locations of impacts of the artillery projectiles which the HV fired at defined intervals. Under these circumstances, the Trial Chamber is unable to conclude from the use of this method of fire whether the artillery projectiles fired in this manner were intended to harass civilians or to disrupt the SVK. Further, based primarily on the testimony of expert Corn, the Trial Chamber considers that although MBRLs are generally less accurate than Howitzers or mortars, their use by the HV in respect of Knin on 4 and 5 August 1995 was not inherently indiscriminate" – ICTY, *Prosecutor v. Ante Gotovina et all*, Trial Chamber Judgement of 15 April 2011, IT-06-90-T, para. 1897.

of batteries of multi-barrel rocket launchers met the criteria for causing psychological side effects impacting the civilian population but was unable to establish relevant findings there. The findings of the Trial Chamber in the context of the legality of deploying the BM-21 Grad multi-barrel launcher (based on the opinion of appointed experts in the field of artillery and ballistics) indicates that the judges not only recognized the above-mentioned type of armament as a legal means of combat but also its use as a legal method of conducting fire in the conditions in which the city of Knin was attacked on 4 and 5 August 1995.[193]

The second important element was to determine the actual object of the attack carried out by means of cannons, howitzers and BM-21 Grad batteries. In order to determine whether the above means were in fact directed at military objectives, the ICTY Trial Chamber decided to carry out a geographical and distance analysis in relation to the missiles impact sites (craters or other remains) and the simultaneous location of military objectives pursuant to Article 52 para. 2 AP I. When determining the above parameters, the possible margin of error (permissible dispersion) of the weapon was also taken into account, while recognizing that the missiles impacting within a radius of 200 meters from the location of the military target were launched with the intention of hitting this target.[194] The determination of the so-called 200-meter standard took place contrary to the divergent assessments of experts, who considered the 400-meter limit to be a more reasonable indication. During the analysis of the facts, it was noted that the Croatian artillery fired a total of 900 missiles during the attack on Knin, attacking many military objectives, such as: headquarters, barracks, stationing location of General Martic, the police station, the post office building, road intersection, the area located near the school, which was the location of the Serbian mortar battery. In the context of Article 52 para. 2 AP I and its requirements for the classification of military objectives, apart from the targets that may be the object of attack due to their nature, such as barracks and artillery emplacements, the road intersection was deemed a legitimate target of attack as its destruction was meant to hinder the movement of Serbian reserves.[195] Moreover, the ICTY pointed out that the location where Gen. Martic was staying, due to his leadership role in the executive and

193 *Ibidem*.

194 "Evaluating all of this evidence, the Trial Chamber considers it a reasonable interpretation of the evidence that those artillery projectiles which impacted within a distance of 200 metres of an identified artillery target were deliberately fired at that artillery target" – *ibidem*, para. 1898.

195 "Thus, regardless of the presence of the SVK operational forces in the Northern barracks, disrupting or denying the SVK's ability to make use of this intersection and move through Knin could offer a definite military advantage. Under these circumstances, the Trial Chamber considers that the evidence allows for the reasonable interpretation that the HV may have determined in good faith that firing at the intersection would have offered a definite military advantage" – *ibidem*, para. 1900.

military apparatus, permitted attacks against this location.[196] A similar conclusion was made regarding the factory producing materials and parts for ammunition.[197]

Approximately 50 missiles out of 900 launched dropped at distances greater than 200 meters from the legal targeting points. The Trial Chamber found that these cannot be errors or inaccuracies resulting from technical conditions affecting the dispersion of weapons, and there are no other premises for considering the bombing of these areas (as a result of the lack of military targets) as evidence of deliberately attacking non-military areas and objects by Croatian artillery.[198] The theory of the so-called spontaneous (opportunity) fire, related to the ongoing shelling of mobile military objectives belonging to Serbian units, not related to fixed military objectives, was also rejected. Critical analysis also included the morning shelling of Martic residence on August 4, 1995 – despite the fact that it was a legal military target, it was concluded that the location of the facility within the residential area meant that the shelling of the alleged stopover location of the Serbian commander was excessively risky in relation to the expected military advantage and is evidence of the Croatian side's failure to take basic precautions for the civilian population during the shelling of a military target.[199] As a result, despite the fact that only a few civilian objects were actually hit, the Trial Chamber found that the bombing of the city of Knin displayed the features of the so-called apparent indiscriminate bombing[200] – in fact, apart from attacks directed at legitimate military purposes, there was also a simultaneous attack on "civilian areas".[201] The final conclusion of the Tribunal of first instance was that the Croatian artillery treated the city as one target, as a result of which it considered this attack

196 "Further, given Martić's position within the RSK and SVK, the Trial Chamber is satisfied that firing at his residence could disrupt his ability to move, communicate, and command and so offered a definite military advantage, such that his residence constituted a military target" – *ibidem*, para. 1899.

197 "TVIK factory was a logistics supply facility and ammunition components production facility, then harassing fire at this factory could degrade the SVK's ability to use the resources stored there to re-supply forces engaged in combat" – *ibidem*, para. 1902.

198 *Ibidem*.

199 "Firing twelve shells of 130 millimetres at Martić's apartment […] created a significant risk of a high number of civilian casualties and injuries, as well as of damage to civilian objects. The Trial Chamber considers that this risk was excessive in relation to the anticipated military advantage of firing at the two locations where the HV believed Martić to have been present. This disproportionate attack shows that the HV paid little or no regard to the risk of civilian casualties and injuries and damage to civilian objects when firing artillery at a military target on at least three occasions on 4 August 1995" – *ibidem*, para. 1910.

200 A similar conclusion was made by the ICTY with regard to the town of Gračac "Consequently, based on these reports alone, the Trial Chamber is unable to determine whether the Croatian forces in fact treated Gračac itself as a target, or whether its reporting falsely created the impression that it was doing so as a result of a lack of details, errors, or other inaccuracies in the reporting" – *ibidem*, para. 1927.

201 *Ibidem*.

to be indiscriminate in nature and as an element of a systematic and extensive plan aimed at the Serbian civilian population living in the Krajina region.[202] In the case of shelling of the town of Benkovac, the Trial Chamber also determined that "while the Trial Chamber was not able to establish exactly how many projectiles impacted on these civilian objects or areas, the Trial Chamber considers that even a small number of artillery projectiles can have great effects on nearby civilians".[203] Similar findings were made in the case of other localities, where the bombings were linked by a common denominator in the form of the intention to displace the Serbian civilian population from the Krajina region.

The Gotovina's defense, filing an appeal from the judgement of conviction, raised a number of objections related to not taking into consideration the factual circumstance, which was a finding that 95% of the missiles fired actually hit legitimate military objectives, arbitrary adoption of the so-called 200-meter standard, arbitrary determination of the range for the permissible error in aiming, as well as errors and technical defects which are a natural consequence of warfare.[204] Errors in the interpretation of substantive law were also raised – Article 52 para. 2 of AP I and Article 51 para. 5(b) of AP I, through the defective determination that the city was the object of an indiscriminate attack, the use of the category of objects called "civilian areas", which was unknown in international humanitarian law (when the AP I regulations provide only for civilian assets and civilians).

In a controversial judgment of November 16, 2012, the second instance of the ICTY acquitted Ante Gotovina of the act he had been charged with, essentially duplicating the arguments put forward by the defense in the appeal. First of all, it was argued that there were no fundamental premises and circumstances in favor of adopting the 200-meter standard by the court of first instance, as a result of which the ICTY Trial Chamber committed an error of discretion in factual findings[205] in this regard. This thesis was not supported by any convincing arguments nor was it supported by expert opinions. In addition, it was found that the mere fact that shells had fallen at distances greater than 200 meters could not in any way determine the real intention of the gunner, as this conclusion did not take into account the circumstances related to errors and technical conditions of artillery fire, as well as the possibilities of conducting the so-called spontaneous fire against moving targets. To a large extent, the issuance of the reformatory judgment was

202 "Considering the evidence on the ethnic composition of Knin in Chapter 4.2.9 (Knin town), the Trial Chamber finds that the unlawful attack on civilians and civilian objects in Knin discriminated in fact against Krajina Serbs" – *ibidem*, para. 1912.

203 "Further, while the Trial Chamber was not able to establish exactly how many projectiles impacted on these civilian objects or areas, the Trial Chamber considers that even a small number of artillery projectiles can have great effects on nearby civilians" – *ibidem*, para. 1922.

204 ICTY, *Prosecutor v. Ante Gotovina et all*, paras. 28–34.

205 *Ibidem*, paras. 68–70.

caused by errors of a procedural nature or defects in the findings of the factual state, the appearance of which made it impossible to acknowledge the objections of substantive law (due to their previous effectiveness). The rejection of the view of the Tribunal of first instance and the lack (according to the majority of judges) of the possibility of supplementing the missing elements of the Trial Chamber's judgement made it impossible to conclude that the bombing of four cities during Operation "Storm" was indiscriminate. As a result, the failure to meet the above circumstance resulted in the collapse of the indictment against Gotovina and other Croatian commanders, who, in addition to violations of the laws and customs of war, were accused of a crime against humanity consisting in a systematic and extensive attack on the Serbian population living in the area of Krajina.[206] As a consequence, the elimination of the first element in the form of classifying acts of bombing as illegal acts also resulted in the need to acquit the accused of all the alleged acts.[207]

This ruling was met with considerable controversy, but also with general approval of the doctrine of international law confirming the need to reject the 200-meter standard in the form proposed by the court of first instance.[208] In this respect, it was important to look at the operation in a holistic way – only a small percentage of all launched missiles exceeded the 200-meter standard.[209] Two judges of the Appeals Chamber submitted extensive opinions, agreeing that the 200-meter standard had been erroneously adopted, but at the same time arguing that it could have been corrected by making their own determinations on the matter. According to Judges Aguis and Pocar, this was feasible and should have been applied in the *Gotovina* case.[210] Judge Pocar also pointed out that the Appeals Chamber's exclusive focus on procedural aspects of the judgement of the court of first instance effectively prevented a thorough examination of the issues of substantive law, including an analysis of the principles governing artillery bombardments under Articles 51–57 of AP I. The analysis of the judgment of the second instance court offers no valuable interpretative guidance on these matters, limiting itself only to a cassation decision without indicating the correct interpretation of the term "indiscriminate attack" as defined in Article 51 paras. 4 and 5 of AP I. The only legally relevant circumstance from the perspective of international humanitarian law, which appears to remain uncontested by the second instance court, is the rec-

206 J. Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia*, Oxon 2014, p. 131.

207 See: M. Piątkowski, *Sprawa Gen. Ante Gotoviny i zasada 200 metrów w świetle ius in bello* [*Ante Gotovina Case and 200 Meter Principle in the Light of Ius in Bello*], "Międzynarodowe Prawo Humanitarne" 2014, vol. V.

208 L. Arimatsu, *The Rule of Law in War. A Liberal Project*, [in:] R. Liivoja, T. McCormack (eds.), *Routledge Handbook of the Law of Armed Conflict*, Oxon 2016, p. 652.

209 W. Huffman, *Margin of Error: Potential Pitfalls of the Ruling in the Prosecutor v. Ante Gotovina*, "Military Law Review" 2012, vol. 211, pp. 45–50.

210 S. Darcy, *Judges, Law and War*…, p. 210.

ognition of BM-21 Grad multi-barrel systems as a *prima facie* legal weapon *per se* that could also be deemed (in the context of the method) an acceptable type of armament in urban warfare. This ruling may raise potential doubts, particularly in the context of Article 57 of AP I, specifically regarding the obligation to take all feasible precautions.

Yoram Dinstein points out that the ruling in the *Gotovina* case, despite having been issued specifically in the context of artillery bombardment, will have practical implications for other types of attack, including aerial bombardments conducted in urban environments.[211] Unfortunately, this reference will not be have classificatory, but quite the opposite – the judgment of the second instance court further complicates the legal framework governing bombardments (including the law of aerial bombardment).[212] The practical interpretation of so-called apparent indiscriminate bombardment has proved to be extremely difficult. Geoffrey S. Corn, who was a participant in the trial, claims that the judgment did not, in any way, question the possibility of using the so-called indirect fire in urban conditions as prohibited *per se*.[213]

16. Report of the Committee to the ICTY Prosecutor on the NATO Bombing Campaign in Serbia in 1999

The 1999 Allied Force air campaign over Serbia, undertaken as part of the North Atlantic Treaty Organization's response to the humanitarian situation in Kosovo, became the subject of legal analysis by the ICTY's Prosecutor's Office in the context of compliance with international humanitarian law. Given that the ICTY jurisdiction was not temporally defined and was geographical first and foremost (Article 8 of the ICTY Statue), the ICTY had the potential capacity to examine the

211 Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge 2016, p. 164.

212 M. Piątkowski, *Zasada zero „casualty warfare" oraz „standard 200 metrów" stworzony przez Międzynarodowy Trybunał Karny ds. b. Jugosławii w sprawie Gotovina w świetle dawnych i współczesnych zasad wojny powietrznej* [*The zero rule of "casualty warfare" and the "200 meters standard" created by the ICTY on Gotovina case in the light of the ancient and modern principles of air warfare*], [in:] K. Lankosz, G. Sobol (eds.), *Wybrane problemy współczesnego prawa międzynarodowego* [*Selected Problems of Contemporary International Law*], Kraków 2013, pp. 59–61.

213 G.S. Corn, G.P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, „Texas International Law Journal" 2012, vol. 47, p. 370.

conduct of NATO states in 1999 in the light of Article 3 of the ICTY Statue.[214] As part of its preliminary investigation *ad rem*, the ICTY Prosecutor's Office decided to establish a special committee tasked with drafting a report addressing two key issues: 1) whether the alleged violations by NATO were credible and could contribute breaches of international humanitarian law, 2) whether there were possibilities for prosecuting potential perpetrators of these violations in the context of the jurisdiction of the ICTY.[215] The committee based its findings on documents submitted by the parties to the conflict (NATO member states, Serbia) as well as reports and analyses presented by non-governmental organizations such as Human Rights Watch and Amnesty International.

First, the committee rejected the view that NATO air forces caused "widespread, long-term and severe damage" to the natural environment, arguing that the provisions of Article 35 para. 3 of AP I and Article 55 of AP I could only apply to extreme cases, which do not occur in conventional military campaigns.[216] The experts pointed out that, under the rule of proportionality, environmental protection aspects must be considered, noting that the greater the military advantage, the proportionally greater environmental risk that may be incurred. However, the experts were unable to determine clear criteria for assessing when the environmental risk becomes excessive. It was also claimed that determining the *mens rea* of potential perpetrators is extremely difficult, as they would need to have acted with the intent to cause environmental harm at the time of the attack (referring, among others, to the Rendulic rule).[217] The findings of the report in this regard reveal the fundamental difficulty in applying environmental protection standards in an armed conflict, both within the framework of international humanitarian law and international criminal law. In this context, the committee evaluated the issue of NATO air forces using depleted uranium ammunition as an anti-armor weapon.[218]

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214 "The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991" – Statute of the International Criminal Tribunal for the Former Yugoslavia, UNSC Resolution 827/1993.

215 *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, n.d., http://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal (accessed: 2.01.2021).

216 "In any case, Articles 35(3) and 55 have a very high threshold of application. Their conditions for application are extremely stringent and their scope and contents imprecise. For instance, it is generally assumed that Articles 35(3) and 55 only cover very significant damage. The adjectives 'widespread, long-term, and severe' used in Additional Protocol I are joined by the word 'and', meaning that it is a triple, cumulative standard that needs to be fulfilled" – *ibidem*, para. 35.

217 *Ibidem*, para. 23.

218 *Ibidem*, para. 26.

The committee also evaluated the interpretation of the *Martić* case judgment in the context of employing cluster munitions, recognizing that it does not establish a formal prohibition on the use of cluster munitions *per se*. Instead, in this specific case, the weapon was deemed an instrument of terror against the inhabitants of the city due to its inaccuracy and the awareness of the attacker intending to directly attack the civilian population in that way. Transposing the standard defined in the *Martić* case, experts evaluated that it was impossible to claim that a similar pattern had occurred in relation to NATO operations undertaken in Serbia.[219]

In the context of applying the active precautionary measures, the committee accepted the view that a commander is obliged to choose a means of combat that reduces or minimizes the risk of accidental losses; However, as part of the preparatory process, they are entitled to take multiple factors into account, such as the state of available supplies and potential future operational needs.[220] It was noted that Article 57 of AP I is a practical reflection of the principle of distinction, and that the obligation to take all feasible measures creates a high standard but not one of absolute character.[221] Among the direct responsibilities of an air operation commander, the committee highlighted the necessity to: 1) establish a system for gathering information on potential targets; and 2) use available technical means to properly verify targets – while allowing a certain degree of discretion for both the commanding officer and aircrew.[222] Crucially, in the case being under the scrutiny of the committee, it was indicated that isolated incidents involving improper choice or incomplete application of so-called active precautionary measures, which had worked in the vast majority of cases, cannot render these measures to have been inadequate.[223] In this context, the committee also evaluated adoption of the 15,000 feet rule by NATO air forces, concluding that there was nothing illegal about it *per se*; what is more, visual identification could be replaced by the extensive use of modern technology, which, according to the committee, was actively employed by NATO combat aviation in 1999.

219 *Ibidem*, para. 27.

220 "If there is a choice of weapons or methods of attack available, a commander should select those which are most likely to avoid, or at least minimize, incidental damage. In doing so, however, he is entitled to take account of factors such as stocks of different weapons and likely future demands, the timeliness of attack and risks to his own forces" – *ibidem*, para. 21.

221 "Obligation to do everything feasible is high but not absolute. A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets" – *ibidem*, para. 29.

222 *Ibidem*.

223 "If precautionary measures have worked adequately in a very high percentage of cases then the fact they have not worked well in a small number of cases does not necessarily mean they are generally inadequate" – *ibidem*.

When interpreting the concept of "military objective", the committee confirmed that its application follows a two-step test and that the above wording includes *implicite* the right to target combatants in armed attacks.[224] The experts pointed out that this definition applies to straightforward situations, while its proper interpretation becomes significantly more complex in the context of dual-use objects. In this regard, the committee extensively cited the list of military objectives from the 1956 ICRC document, supported by the view presented in the doctrine (by A.P.V. Rogers), and also referred to critical views on the expansion of the military objectives category to include infrastructure elements related to the economic aspects of conducting an armed conflict. Commenting on NATO documents concerning the selection of tactical targets, including artillery emplacements of armed forces, or military vehicles, and strategic targets, such as air defense, the so-called C2 (Command and Control) centers, aviation and air bases, headquarters, refineries (with due regard for environmental effects), ministry buildings (provided their destruction offers actual military advantage) and supply routes. The committee emphasized that, in its opinion, the vast majority of the above targets were definitely military, while pointing out inaccuracies in terms of attacks on state-owned media and administration buildings. In the context of the press and TV, it was argued that their possible use to incite anyone to commit international crimes equates to classifying them as military objectives, while pure propaganda activities do not constitute grounds for changing the classification of the target.[225]

In the context of applying the rule of proportionality, the committee stated at the outset that "the source of the problem is not the existence of this paradigm, but its practical application".[226] The experts indicated that the abstract formulation of the principle is much easier than taking it into account in the conditions of a given situation The critical elements of the assessment process were identified as: 1) concretization of benefits obtained through harming non-combatants and military benefits; 2) determining whether additional factors beyond the ones mentioned above should be considered; 3) determining a comparative scale within a given time and space; 4) assessing the threat to one's own military personnel in relation to the civilian population. Referring to the documentation submitted by non-governmental organizations, the committee noted the inherent difficulty in reconciling the perspectives of a military commander and a human rights lawyer; nevertheless, in the experts' view, these concerns can be resolved through reference to the normative model of a reasonable commander. At the same time, the committee criticized the test applied in the *Kupreškić* case, which cumulatively

224 *Ibidem*, para. 36.

225 *Ibidem*, paras. 47, 55.

226 "It is difficult to assess the relative values to be assigned to the military advantage gained and harm to the natural environment, and the application of the principle of proportionality is more easily stated than applied in practice" – *ibidem*, para. 19.

assessed collateral damage by summing the casualties and damage resulting from attacks. The committee argued that if such losses occur in the context of legitimate military objectives, their accumulation cannot determine the illegality of the attack. According to the experts, the consequence of Kupreškić ruling should be a combined assessment of the total civilian harm and losses in relation to the objectives of the military campaign (in the strategic sense – M.P.).[227]

In the further part of the report, the committee referred to the most controversial incidents during Operation Allied Force:

1. The attack against a passenger train on the bridge in Grdelica on April 12, 1999. The committee at the ICTY Prosecutor's Office stated that, in its opinion, the recordings submitted and disclosed by NATO from the attacking F-15E Strike Eagle fighter jet indicated that the pilot's direct intent had been to destroy the bridge, and the crew could not control the full range of the attack, which had been guided via a teleoptical system over a long distance. It was claimed in this regard that the bridge in Grdelica had been a legitimate military target, and the crew had failed to recognize the approaching passenger train within the few seconds available to them.[228]
2. The attack on the refugee convoy in Djakovica on April 14, 1999. The committee at the ICTY Prosecutor's office indicated that the civilian population had not been the target of a deliberate attack. It was argued that the NATO aircraft crews, attacking the convoy at different times of the day, had initially considered the column of cars and refugees to be a line of wheeled traffic of a mixed military-civilian nature. Once the targets were positively identified as civilian, the attacks were halted, which disproves deliberate intent. It was pointed out that, in many cases, pilots had been both the ones identifying objectives and those operating combat aircraft. It was argued that, although the 15,000-feet rule had made positive identification difficult, neither the commanders nor the flight crew had exhibited recklessness to such a degree that their failure to take active precautionary measures could be deemed as crossing the threshold of war crime.[229]
3. Bombing of the RTS station on April 23, 1999 – the experts stated that, in their opinion, radio-television stations were inherently legitimate military objectives, and that they had been part of a strictly military plan aimed at disrupting communication within the Serbian armed forces. Achieving success in the way of stopping state propaganda had been illegal, but it had only been a secondary military advantage, with the primary objective being the

227 "The committee understands the above formulation, instead, to refer to an overall assessment of the totality of civilian victims as against the goals of the military campaign" – *ibidem*, para. 52.

228 *Ibidem*, para. 62.

229 *Ibidem*, para. 70.

reduction of the capacity to communicate military data. Due to the above, it was found that the attack against the RTS station had been aimed at a target which was legitimate in the light of the requirements under Article 52 para. 2 of AP I, and the civilian casualties (17 dead), although "unfortunately high, but […] clearly disproportionate".[230] The committee also rejected the view of non-governmental organizations about NATO failing to provide a prior warning (Article 57 para. 2 of AP I, arguing that partial responsibility for the death of persons at the station was borne by the Belgrade government. It was also noted that, although the interruption in the broadcasting of the station had lasted only a few hours, a broader perspective on NATO's justified actions aimed at the Serbian radio-television infrastructure (understood as a communication tool for Serbia's command chain, military aviation, and air defense) led to the conclusion that any incidental losses should be assessed in the context of the strategic gains from a coordinated attack on Serbia's communication and power supply networks.[231]

4. Attack on the Chinese embassy on May 7, 1999 – in this case, the committee stated that the aircrew had not been responsible for the incorrect classification of the target (classified as an unambiguous civilian object), which resulted from the lack of relevant information, and noted the fact that NATO had acknowledged the error and had paid high compensation to the embassy staff and the PRC.[232]
5. Bombing of the village of Koriša on May 13, 1999 – in the case of this attack, it was assumed that there had been no reliable information that would have helped to assess the actual situation around the village (perceived by NATO as a stationing location of Serbian military units), indicating the possibility of deliberately deploying civilians around a legitimate military target, as well as the fact that when deciding to attack, the North Atlantic Treaty Alliance air force had had the means of both ground and on-board intelligence verification.[233]

In the overall conclusion, the committee decided that (based on the documents submitted and information known to the experts *ex officio*) there were no grounds for the ICTY Prosecutor to initiate criminal proceedings regarding the acts committed by the NATO air force during the air campaign over Serbia in 1999. It was pointed out in this regard that the NATO had admitted to having committed violations during their air operations and had acknowledged the possibility of making unavoidable errors of judgement, as well as a controversial selection of

230 "Assuming the station was a legitimate objective, the civilian casualties were unfortunately high but do not appear to be clearly disproportionate" – *ibidem*, para. 72.

231 "The proportionality or otherwise of an attack should not necessarily focus exclusively on a specific incident" – *ibidem*, para. 78.

232 *Ibidem*, para. 85.

233 *Ibidem*, para. 89.

the targets for air bombardment. As a consequence, the continuation of criminal proceedings was not only justified by the lack of legal clarity but also by the low probability of gathering appropriate evidence and formulating charges against NATO commanders and aircrews participating in direct military operations.[234]

Although the report of the committee appointed by the ICTY Prosecutor is, in principle, only the opinion of an *ad hoc* team of experts, it is considered one of the most important documents on the law of air warfare in terms of interpreting the provisions of Additional Protocol I concerning fundamental issues related to the selection of targets in the light of Article 52 of AP I. It determines the scope of the proportionality rule, as well as its interpretation in the context of the so-called active and passive precautions. Its legal authority is all the greater due to the fact that the document was developed as part of the measures taken by the official body of international justice (and became the foundation for the ICTY Prosecutor's official refusal to initiate criminal proceedings regarding violations of international law during bombings in 1999 in Serbia) and also, until 2018, the issue of air warfare, in particular, the circumstances of conducting modern air campaigns, was not examined in a quasi-judicial procedure. Apart from the controversy related to the reception of the report by the doctrine of international law, it should be noted that the premise of the document seems rational from the perspective of military commanders. The novelty proposed by the committee was a holistic analysis of the Allied Force operation – i.e., an evaluation of to what extent the general war effort, the scale of the operation and the general strategy influenced the potential correlation between incidental casualties among the civilian population or the negligence of particular precautions in individual cases (para. 29). This approach definitely convinced experts not to recommend initiating *ad personam* proceedings against NATO pilots and commanders to the ICTY Prosecutor – also in the context of assessing the conduct of the North Atlantic Treaty Alliance as a potential "humanitarian intervention".[235] The committee's stance on the disqualification of allegations of violations of the Additional Protocol I in the context of environmental protection (paras. 14–24) does not seem to raise any reservations. However, recognizing depleted uranium ammunition as an acceptable means of combat (para. 26) comes across as too cursory. Moreover, the committee did not examine in a sufficiently thorough way the cases in which cluster munitions had been used in urbanized conditions nor those in which the civilian population had been in potential danger, limiting itself only to the exclusion of

234 "In all cases, either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences" – *ibidem*, para. 90.

235 "From the standpoint of the committee, it was evident that NATO's actions were not comparable to the kinds of large-scale, deliberate crimes that the ICTY was set up to prosecute" – D. Wippman, *Kosovo and the Limits of International Law*, "Fordham International Law Journal" 2001, vol. 25, p. 147.

a fairly obvious view testified to a lack of intention to spread terrorism (para. 27). The reliance on the paradigm of a reasonable commander as a reference point in the relation to the equation of proportionality, for which the committee proposed new elements, such as a reference scale applicable in time and space or taking into account additional circumstances affecting the equation positively or negatively (without specifying them) should be positively assessed. The obligation to take into account the proportionality of threat to one's own armed forces seems to be more controversial (though it is not unfounded in the light of the interpretative objections made by the parties to the Additional Protocol I).

The committee's report is not free from criticism on the part of the doctrine of international law.[236] First of all, the reiteration of the indirect statement made by the official body of international justice and confirming the existence of a *non liquet* option is criticized – the report pointed to the insufficient clarity of the law as a foundation for negative recommendations.[237] In the case of the analysis of some incidents, omissions related to the incorrect classification of the subject of the offence were pointed out, e.g., failure to notice negligence in the course of the attack against the bridge in Grdelica.[238] Many of the allegations are based on the findings of an Amnesty International report.[239] The organization accused the North Atlantic Treaty Alliance of unlawful adoption of the 15,000-feet rule, as well as of violating the principle of distinction by carrying out an airstrike on a television station building, arguing that the spread of propaganda is not a "significant contribution to military operations".[240] According to H. Olásalo, a requirement for the use of the precautionary measures in a broader scope will be imposed on a party that is

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236 L.C. Green, *Commentary: Part V*, "International Law Studies" 2002, vol. 78, p. 369.

237 "Report concludes that for several reasons, not the least because the law of armed conflict in the area of «dual-use» targets is not clear, no «in-depth» investigation of the NATO air campaign as a whole was warranted, nor should there be further investigations into specific incidents" – J. Miller, *Commentary: Part II*, "International Law Studies" 2002, vol. 78, p. 111. "This is equivalent to a *non liquet*. Difficulties in interpretation are not a good excuse for not starting an investigation. There are aspects of international humanitarian law, as in any body of law, which are not sufficiently clear. However, it is precisely the task of the Tribunal to interpret and «clarify» the law; it cannot therefore conclude by saying that it cannot adjudicate the case, since the «law is not clear». The *non liquet* is not part of the ICTY's jurisprudence or that of any other tribunal. It should also be pointed out that one of the main achievements of the Tribunal has been the clarification of controversial rules of humanitarian law, taking into account State practice and developments in this field" – N. Ronzitti, *Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia acceptable?*, "International Review of the Red Cross" 2000, vol. 840.

238 H. Post, *War Crimes*…, p. 174.

239 *Federal Republic of Yugoslavia/NATO: Collateral damage or unlawful killings? Violations of the Laws of War by NATO during Operation Allied Force*, 2000, https://www.amnesty.org/download/Documents/140000/eur700182000en.pdf (accessed: 3.01.2021).

240 *Ibidem*, pp. 17, 46.

in a privileged strategic position (e.g. one holding air supremacy) because, in the circumstances given, the enemy's effective influence on the conduct of warfare by the technologically superior party declines.[241] In turn, A.P.V. Rogers argued, regarding the 15,000-foot standard, that protection of one's own crews cannot be the cause of negligent performance in target identification.[242] Other authors even accused pilots of recklessness which resulted in casualties among the civilian population.[243] However, many experts point out that the general conclusion of the committee's report is correct, especially when the overall NATO war effort is compared with the number of civilian casualties.[244]

In the context of the attack on the RTS station, it was indicated that the possible reliance on the need to consider the station a military target due to its involvement in spreading propaganda creates, in fact, extralegal elements which are not part of Article 52 para. 2 of AP I.[245] However, it should be maintained after M. Bothe, that the report quite clearly prohibited the conduct of hostilities on the premise of demoralization of the civilian population, as it does not produce a clear military advantage.[246] It was also argued that the adoption of a unified stance (that would refer to the entirety of losses in the strategic context), in fact, deprives the proportionality rule of the normative premise by not allowing the rule to be applied

241 H. Olásalo, *Unlawful Attacks in Combat Situations: From ICTY's Case Law to the Rome Statute*, Leiden 2008, p. 136.

242 A.P.V. Rogers, *Zero-casualty Warfare*, "International Review of the Red Cross" 2000, vol. 837.

243 "The lack of proper precautions resulted in the death of innocent civilians, and the pilots should therefore incur individual criminal responsibility for the reckless killing of civilians" – A.-S. Massa, *NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion*, "Berkeley Journal of International Law" 2006, vol. 610, p. 632.

244 "Pending the presentation of further evidence, one may safely conclude that the injury and damage to civilians caused by the NATO bombing campaign were not excessive but rather proportionate to the military advantage gained. Hence the bombing did not violate the law of armed conflict merely because it resulted in collateral damage" – J.F. Murphy, *Some Legal…*, p. 253; W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, "European Journal of International Law" 2001, vol. 12, p. 502.

245 "Clearly, it does not. One can argue that there is a huge difference between genocide and the destruction of private property. This is beyond doubt, but the point is that if «extra-military» arguments are introduced, it is difficult, if not impossible to distinguish formally between the two examples" – A. Laursen, *NATO, the War Kosovo and ICTY Investigation*, "American University International Law Review" 2002, vol. 17, p. 786. "If they were targeted merely because they were spreading propaganda to the civilian population, it appears at least doubtful whether their destruction offered a definite military advantage" – T. Stein, *Coalition Warfare and Differing Legal Obligations of Coalition Members under International Humanitarian Law*, "International Law Studies" 2003, vol. 78, p. 332.

246 M. Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, "European Journal of International Law" 2001, vol. 12, p. 534.

to individual cases of air attacks.[247] The report was also criticized for completely omitting the circumstances related to the bombing of the city of Niš in southern Serbia, during which a municipal hospital was struck. Michael Bothe argued that, in his opinion, the selection of NATO targets did not always meet the requirements of the two-part test specified in Article 52 para. 2 of AP I in terms of making a significant contribution to warfare (this comment concerned primarily infrastructure elements located at great distances from the front line).[248] This is also confirmed by C. Greenwood, who points out that the selection of targets based on the need for political influence does not meet the condition of significance in light of the definition of a military target specified in Additional Protocol I. At the same time, the author pointed out that it is not illegal to indirectly undermine the morale of the civilian population. However, it cannot be a decisive factor during the attack planning phase.[249] Paolo Benvenuti pointed out in his analysis that the *ad hoc* committee had completely discredited the existing decision of the ICTY and, by using vague legal standards, had, in fact, avoided a detailed examination of the case.[250]

As a side note to the assessment of the attack on the radio and television station, it is noteworthy that W.J. Fenrick pointed out that the regulations of *ius in bello* may allow targeting objects that do not qualify as military objects *per se* but are used to commit serious violations of international humanitarian law, indicating, for example, the Former Nazi German Concentration and Extermination Camp at Auschwitz-Birkenau concentration camp and the Mille Collines radio station, operating during the war in Rwanda and inciting people to commit war crimes and crimes against humanity.[251] In this regard, the question about the admissibility of the so-called humanitarian bombing arises. An

247 "The limitation to «a given tactical operation» is both sound and reasonable as opposed to the «integrated attack» approach adopted by the OTP Report, which, as pointed out, logically will end up comparing the complete number of casualties to the entire bombing campaign, thereby robbing the principle of proportionality of any restraining power" – A. Laursen, *NATO*…, p. 796.

248 M. Bothe, *The Protection of the Civilian Population*…, p. 534.

249 "As demonstrated above, the principle that the enemy civilian population and individual civilians are not themselves legitimate targets is now clearly established in that law. Moreover, the definition of a military objective requires both that the object in question make an effective contribution to the enemy's military action and that the destruction or damage of the object offers a definite military advantage to the State whose forces attack it" – C. Greenwood, *The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign*, "International Law Studies" 2003, vol. 78, p. 48.

250 P. Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, "European Journal of International Law" 2001, vol. 12, p. 526.

251 W.J. Fenrick, *Targeting and Proportionality*…, p. 496. An example of a contemporary site of mass extermination could be the Syrian Saydnaya prison, where up to 13,000 people, opponents of the Al-Assad regime, may have been executed.

interesting analysis in this matter was conducted by R. Kolb, who argued that the above type of attack could not be directly justified by the definition of a military target but also indicated the possibility of extending the scope of the provision to include the above cases.[252] It seems that such attacks cannot be excluded *per se*; however, situations in which it is possible to classify a given object as a target must be meticulously proved and justified. The above change is partially signaled by the combined attack of the United States, the United Kingdom and France in April 2018 on chemical installations in Syria, the military purpose of which was relatively insignificant.

17. The Goldstone Report

In 2009, UN Human Rights Council established United Nations Fact Finding Mission to investigate any violations of international humanitarian law and human rights that took place during Operation "Cast Lead" – the Israeli intervention in the Gaza Strip.[253] Richard Goldstone, a former ICTY prosecutor, became the head of the mission. The mission carried out many field visits but did not receive any documents from the Israeli side, which refused to cooperate with the experts. The above lack of documentation was a serious methodological shortcoming of the mission's work and one of the many critical errors upon which an extensive report consisting of nearly 500 pages was created.[254] Another shortcoming was the fact that the mission clearly exceeded the powers and role of a fact-finding body because, according to the report, the UN mission was able to determine the circumstances in which violations of international law were committed, also taking into account the deliberate or non-deliberate nature of the perpetrators' acts.[255] The above finding was in itself a contradiction of the rules governing the assessment of the legality of particular incidents related to the classification of military objectives as well as the application of precautions and the rule of proportionality, which required taking into account subjective elements and circumstances.

252 R. Kolb, *Advanced Introduction to International Humanitarian Law*, Cheltenham 2014, pp. 174–177.

253 Human Right Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, A/HRC/12/48.

254 D.W. Lovell, *Introduction: The Challenges of Investigating Operational Incidents*, [in:] *idem* (ed.), *Investigating Operational Incidents in a Military Context: Law, Justice, Politics*, Leiden 2015, p. 6.

255 Human Right Council, *Report of the United Nations*…, para. 25.

It is noteworthy that, in the context of the air operations conducted, the mission, relying on publicly available data, indicated that 80% of Israeli air missions were conducted using precision-guided munitions while 20% were carried out using unguided missiles, which still met the condition of accuracy.[256] The mission experts decided that in this situation, the Israeli air force acted with the specific intent to destroy a particular target – excluding by that any possibility of honest mistakes *per se*.[257] On these grounds, the Israeli version of events in terms of possible operational errors was questioned.[258] In the case of the Israeli air strikes on the Namar wells group on December 27, 2009, it was pointed out that the use of F-16 aircraft with the support of unmanned aerial vehicles guaranteed high precision of the attack, which excludes the possibility of errors in aiming and indicates the deliberate intent to attack the wells.[259] At the same time, the mission did not find any possible military advantages that would result from attacking water supply sites, nor any evidence of Hamas using this area. In other fragments of the report, e.g., in the context of assessing the legality of the attack on the Palestinian administration centers in the Gaza Strip, the mission, despite the lack of adequate information from the Israeli side, determined that there had been no grounds for attacking these facilities according to the provisions of Article 52 para. 2 of AP I (arguing that the existing lists of targets only testify to the permissibility of attacking buildings that belong to the ministries of national defense) and declared the attack a violation of customary international law (Article 51 of AP I).[260]

In the context of issuing advance warning, the mission expressed the view that when assessing whether a military necessity requires a warning not to be issued, criteria similar to those of the proportionality rule equation should be used (i.e. military perspective and reasons for the protection of the civilian population), recognizing that in certain circumstances issuing a warning is impossible.[261] The

256 *Ibidem*, para. 1189.

257 "These represent extremely important findings by the Israeli Air Force. It means that what was struck was meant to be struck" – *ibidem*, para. 1190.

258 "The last incident concerns the bombing of a house resulting in the killing of 22 family members. Israel's position in this case is that there was an «operational error» and that the intended target was a neighboring house storing weapons. On the basis of its investigation, the Mission expresses significant doubts about the Israeli authorities' account of the incident" – *ibidem*, para. 47.

259 *Ibidem*, para. 985.

260 "There is an absence of evidence or, indeed, any allegation from the Israeli Government and armed forces that the Legislative Council building, the Ministry of Justice or the Gaza main prison «made an effective contribution to military action». On the information available to it, the Mission finds that the attacks on these buildings constituted deliberate attacks on civilian objects in violation of the rule of customary international humanitarian law whereby attacks must be strictly limited to military objectives" – *ibidem*, para. 389.

261 "There may be other circumstances when a warning is simply not possible" – *ibidem*, para. 529.

mission adopted several prerequisites for an effective warning: 1) reliable, unambiguous information, 2) information on what to do in order to avoid the threat, 3) adequate time to evacuate, 4) indication of specific areas that may be affected by the effects of attacks.[262] The mission rejected recorded telephone information, leaflets (para. 539) or the use of the so-called "roof knocking" tactic (para. 541) as ineffective. Elsewhere in the report, it was stated that the use of mortar shells to combat a single target that simultaneously threatens the health as well as the lives of many non-combatants sheltering in shelters does not meet the standard of a reasonable commander and is also a violation of the provisions of Article 57 of the AP I.[263] It was also considered disproportionate to attack Palestinian police stations (approx. 100 people killed), only some of whom were also members of Hamas. The report also considered the deployment of certain types of weaponry in the form of flechette munitions and white phosphorus to be impermissible in urban warfare conditions, recognizing the need to adopt an international ban on the latter type of weaponry.[264] In its final conclusion, the committee pointed to a number of violations of international humanitarian law by the Israeli side, accusing it not only of deliberately treating civilians as legitimate targets of attack, but even of acting to spread terror against them, incidentally, finding a violation of the reasonable commander standard when estimating the rule of proportionality under Article 57 para. 2(a)(ii)(iii) of AP I and defective non-application of the precautions.[265]

The so-called *Goldstone Report* received strong criticism from the doctrine of international law.[266] The United States also officially protested against the selective

262 *Ibidem*, para. 530.

263 *Ibidem*, para. 703. "With regard to one incident investigated, involving the death of at least 35 Palestinians, the Mission finds that the Israeli armed forces launched an attack which a reasonable commander would have expected to cause excessive loss of civilian life in relation to the military advantage sought, in violation of customary international humanitarian law as reflected in Additional Protocol I, articles 57(2)(a)(ii) and (iii)" – *ibidem*, para. 1922.

264 "In relation to the weapons used by the Israeli armed forces during military operations, the Mission accepts that white phosphorous, flechettes and heavy metal (such as tungsten) are not currently proscribed under international law. Their use is, however, restricted or even prohibited in certain circumstances by virtue of the principles of proportionality and precautions necessary in the attack" – *ibidem*, para. 1924.

265 *Ibidem*, paras. 1920–1922.

266 "Without information regarding the information used by IDF commanders, and facts known only by Israeli planners and politicians-both prior to and during Operation Cast Lead the Mission was hamstrung with insufficient information with which to make a reasoned and unbiased analysis" – J. Kessler, *The Goldstone Report: Politicization of the Law of Armed Conflict and Those Left Behind*, "Military Law Review" 2011, vol. 69, p. 116. "The tough and widespread criticism that literally overwhelmed the mission led by Goldstone – which also led him to partially recant – provides evidence of the misgivings of this approach" – M. Frulli, *Fact-Finding or Paving the Road to Criminal Justice? Some Reflections on United Nations Commissions of Inquiry*, "International Criminal Justice" 2012, vol. 10, p. 1335.

findings of experts in the context of the facts at the Human Rights Council.[267] It was emphasized that, in the context of air attacks, even of a precise nature, the mission completely excluded the possibility of the so-called error *in facti*.[268] On the sidelines of the Goldstone Report, it is worth noting an interesting comment by M.N. Schmitt, who argues that, in the context of the mechanisms developed by human rights organizations investigating violations of international humanitarian law, these bodies should refrain from applying the standards which are in force in the sphere of human rights protection, pointing to their different genesis and purpose.[269]

18. Libya 2011

An international commission of inquiry was set up under the mandate of the UN Human Rights Council to investigate violations of international human rights and international humanitarian law during the 2011 armed conflict in Libya.[270] The scope of the commission's inquiry also included NATO activities as part of Operation "Unified Protector", which were generally assessed as "a high-precision air campaign, in which NATO demonstrated an intention to avoid civilian casualties".[271] It was emphasized that the aviation operating in NATO missions had taken significant precautions during its combat missions, in the form of the use of delayed-fuse missiles and small-size munitions.[272] From the finding on the current state of the law, it is worth quoting an excerpt regarding the application of Article 57 of AP I. The commission concluded that failure to take all

267 "Although the Goldstone report deals briefly with these issues, its findings of fact and law are tentative and equivocating" – *U.S. Response to the Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 12th Session of the Human Rights Council Statement by Michael Posner United States Assistant Secretary of State for Democracy, Human Rights and Labor.

268 A. Dershowitz, *The Case Against the Goldstone Report: A Study in Evidentiary Bias*, "Harvard Law School" 2010, vol. 99, p. 14.

269 M.N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, "Harvard National Security Journal" 2011, vol. 2, p. 55.

270 Human Rights Council, *Report of the International Commission of Inquiry on Libya*, A/HRC/18/68.

271 "NATO conducted a highly precise campaign with a demonstrable determination to avoid civilian casualties" – *ibidem*, para. 122.

272 "The Commission found NATO did not deliberately target civilians in Libya. For the few targets struck within population centres, NATO took extensive precautions to ensure civilians were not killed" – *ibidem*, para. 89.

available precautions does not necessarily mean that the attack was illegal *per se*. However, if the death of a protected person could have been avoided by taking all practically available precautions, the strike in question was launched in violation of the principles of international humanitarian law.[273] It was noticed in this regard that there must be a clear and direct link between the failures to take the steps required under Article 57 of AP I and the result in the form of fatality (but also the destruction of a protected asset) to determine the illegal nature of the attack.

However, a lack of grounds was discerned (both on the basis of local and satellite imagery from before the attack) in several cases, notably in relation to the incident in the locality called Majer, where approx. 50 people being killed or wounded. Despite the evidence found at the site and the testimony of witnesses, due to the lack of sufficient explanation from the North Atlantic Treaty Alliance, the commission was unable to assess the military value of the attacked area.[274] It is worth noting that, as in the case of the report of the Committee to the Prosecutor of the ICTY on the NATO bombing of Serbia in 1999, findings relating to the rule of proportionality were made in the context of the entire air campaign, both in terms of the number of civilian casualties and by reference to the use of the precautions and precision-guided munitions.[275]

19. Operation "Protective Edge"

The renewed fighting between Hamas and the Israeli Defense Forces (IDF) took place in 2014 following the launch of improvised missiles from the Gaza Strip against targets located in the south of the state. The air and land offensive carried out by the IDF was once again the subject of interest of the United Nations Human Rights Council, which established a new fact-finding commission chaired by Prof. William Schabas.[276] In this case, the commission clearly indicated that the standards for assessing individual incidents and classifying them as violations of international humanitarian law are based on requirements different from those of the

273 *Ibidem*, para. 616.

274 *Ibidem*, para. 625.

275 "The Commission recognizes the large numbers of sorties and the proportionally low number of civilian casualties in comparison to other campaigns figures show the campaign conducted by NATO was conducted with precision weapons and a demonstrated concern to avoid civilian casualties" – *ibidem*, para. 649.

276 Human Rights Council, *Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1*, A/HRC/29/CRP.4.

international criminal process and cannot be the basis for recognizing individual criminal responsibility.[277] It was also emphasized that the mere fact that civilian casualties occurred does not necessarily mean that a war crime was committed in the course of an armed conflict – only attacks that are intentional and carried out with the knowledge that the collateral losses will be clearly excessive in relation to the expected military advantage are prohibited.[278] The standard adopted by the commission on this issue suggests that the relevant provisions of the Rome Statute, particularly those relating to the crime of disproportionate attack, have significantly modified the interpretation of the AP I from 1977, which appears to be evidence of the acceptance of the above view by international law doctrine in this regard.

In the context of the use of warnings – recognizing Article 57 para. 3 of AP I as customary international law – the commission pointed out that the obligation to provide prior notification is not absolute. The element of surprise or immediate tactical advantage was indicated as an example of a legitimate abstention from its implementation. The content of an effective warning, in the commission's view, consists of two elements in the form of: 1) comprehensibility and clarity of the warning, which must be comprehensible to the addressee, 2) feasibility – that is, the addressee is able to realistically adapt his or her behavior to the conditions indicated in the warning.[279] The report indicated that in its assessment, the warnings issued by Palestinian militant groups met the above requirements, affecting the evacuation of areas of southern Israel, restricting air traffic around Ben Gurion Airport and movement in open areas in Tel Aviv. In the context of Hamas rocket attacks, it was pointed out that the effectiveness of the warnings in no way absolves the attacking party from its obligation to refrain from indiscriminate attacks or those directly targeting civilians. It was indicated that the missiles fired from makeshift launchers located in the Gaza Strip had primitive guidance devices or were devoid of any devices of this type. The Commission assumed that missiles of Iranian manufacture or from the former USSR and Yugoslavia have no aiming devices and are therefore inaccurate, with dispersal of up to 6 km from the intended targeting point. The commission highlighted that the above-mentioned projectiles do not meet the requirement of being capable of being aimed at specific military objectives, thus their use violates the provision of Article 51 para. 4 of AP I and is treated as an indiscrim-

277 "The factual conclusions formed the basis for the legal analysis of the individual incidents and their qualification as possible violations of international human rights law or humanitarian law. As the «reasonable ground» threshold is lower than the standard required in criminal trials, the commission does not make any conclusions with regard to the responsibility of specific individuals for alleged violations of international law" – M.N. Schmitt, *Investigating Violations*…, p. 55.

278 Human Rights Council, *Report of the detailed findings*…, para. 21.

279 *Ibidem*, para. 94.

inate attack. The circumstance relating to the shortage of armament resources is not relevant in this regard.[280] The report pointed out that the fact of using rockets with a zero or very low level of accuracy against urban centers meets the criteria of the crime of direct terrorist attack against the civilian population (Article 52 para. 2 of AP I).[281] Assessing attacks carried out with mortars, the commission pointed out that this is not a recommended means of combat in a situation in which military objectives are located next to a significant concentration of civilian facilities, recognizing that making an effective distinction in such circumstances is hampered.[282] The report argued that the use of such weaponry could be treated as an indiscriminate attack and further considered that the use of mortars in urbanized conditions does not fulfill the imperative of taking all practicable precautions.[283] At the same time, the report did not recognize this type of armament as inherently illegal.[284]

The commission assessed the ongoing air campaign over the Gaza Strip, under Operation "Protective Edge" during which the Israel Defense Forces carried out almost 6,000 airstrikes with casualties ranging from 740 to 1,000 killed. The report covered – both in the form of local inspections, witness statements, photo analysis and satellite data readings – approx. 15 locations of the most serious incidents involving the use of JDAM bombs and Hellfire missiles by Israeli aviation. A controversial element of the legal analysis was an attempt to recreate the grounds for classifying certain civilian objects as military objectives, which, as the Commission pointed out, required information of classified status to be obtained from the IDF command to ascertain their substantive accuracy, which was rejected by the Israeli side.[285] The commission called upon the IDF to provide information to achieve a minimum level of transparency in its military operations.[286] In the six cases analyzed, it was found that there was no basis for treating the targets in question as military, and explanations were demanded

280 "The rockets available to armed groups in Gaza are unguided and inaccurate. Estimates, confirmed by the commission, indicate that the Fajr-5 and similar J-80 and M-75 rockets can land as far as 3 km from any intended target. The longer range rockets, such as the R-160, can land as far as 6 km away from the target because their accuracy decreases with range. Such rockets cannot be directed at a specific military objective and therefore strikes employing these weapons constitute indiscriminate attacks in violation of the customary rule reflected in article 51(4) of Additional Protocol I" – *ibidem*, para. 97.

281 *Ibidem*, para. 99.

282 "The imprecise nature of mortars makes it difficult for an attacking party using this weapon in an area in which there is a concentration of civilians to distinguish between civilians and civilian objects and the military objective of the attack, and to limit its effects as required by international humanitarian law" – *ibidem*, para. 102.

283 *Ibidem*, para. 103.

284 "Mortars can be directed at a specific target" – *ibidem*, para. 101.

285 *Ibidem*, para. 215.

286 *Ibidem*, paras. 216–218.

of the IDF command with regard to the reasons for attacking facilities covered by the presumption stemming from Article 52 para. 3 of AP I.[287] Nine incidents identified the possibility of legitimate military objectives, while recognizing that only active and permanent Hamas members directly involved in armed activities could be targeted, including political representatives and the administration.[288] The commission concluded that most of the attacks concerned residential buildings located in residential areas at a time when most of the inhabitants were at home and were carried out with large-caliber weapons. The report indicates that *prima facie* the above actions of the Israeli air force did not meet the standard of the reasonable commander and without presenting the data of the Israeli side, there was a reasonable assumption that they were of a disproportionate nature.[289] The commission also expressed reservations about some of the missiles used – in particular the GBU-32 and GBU-31 bombs weighing 1,000 and 2,000 pounds respectively – arguing that the possibility of precise targeting of this type of munitions is of secondary importance in the light of the weapon's impact magnitude, the scope of which blurs the boundaries between combatants and civilians and may in fact be a violation of the provisions of Article 51 para. 4 of AP I and determine the possibility of launching indiscriminate attacks in urban conditions.[290] Similar remarks were made in the context of deploying large-caliber (155 mm) projectiles and mortar bombs.[291] It was found that the scope of damage to civilian infrastructure can in fact be treated as part of the thoughtless destruction of civilian goods, penalized under Article 147 of the Fourth Geneva Convention of 1949.[292]

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287 *Ibidem*, para. 219.

288 *Ibidem*, para. 220.

289 *Ibidem*, para. 221.

290 "Attacks, which used this type of weapon in densely populated, built up areas of Gaza, are therefore likely to constitute a violation of the prohibition of indiscriminate attacks" – *ibidem*, para. 226.

291 "The large impact area of some of the explosive weapons used by the IDF during the ground operations, including the large air dropped bombs and 155 mm shells; the sheer volume of ordnance fired towards areas of Gaza; and the imprecise nature of artillery, including mortars; make it difficult for an attacking party using those methods and means in a densely populated and built up area to distinguish between civilians and civilian objects and the military objective of the attack, and thus to limit the attack's effects as required by international humanitarian law. Therefore, the use of weapons with wide-area effects by the IDF in the densely populated, built up areas of Gaza, and the significant likelihood of lethal indiscriminate effects resulting from such weapons, are highly likely to constitute a violation of the prohibition of indiscriminate attacks" – *ibidem*, para. 415.

292 "The extensive destruction carried out by the IDF in Shuja'iya, Khuza'a and other localities situated in proximity to the Green Line, in particular the razing of entire areas of these localities by artillery fire, air strikes and bulldozers indicates that the IDF carried out destructions that may not have been strictly required by military necessity. Article 147 of the Geneva Convention IV qualifies the extensive destruction of property «not justified by mil-

In the context of employing the precautions on the part of the Israeli air force, the commission considered that one of the elements required by the norms of international humanitarian law is to launch attacks at times of day when civilian activity is at its lowest, pointing out that the IDF carried out air strikes in the evening against targets located in residential homes.[293] Warnings issued via mobile phone were considered appropriate practice, while such an attribute was denied to the "knock on the roof" tactics, the reception of which was unclear.[294] The commission also questioned the failure of IDF forces to undertake a change in the guidelines for the conduct of combat operations in a situation where the course of the campaign had indicated that a significant level of non-combatant casualties had been achieved.[295]

20. Eritrea-Ethiopia Claims Commission

The most important part of the deliberations carried out by the Eritrea-Ethiopia Claims Commission, with regard to the subject matter of this dissertation, was the incident of June 5, 1998, in which the Ethiopian and Eritrean air forces carried out airstrikes targeting each other's airports. There has always been an unequivocally expressed opinion that the attack on the airport where military aircraft are stationed is without any doubt legal under international humanitarian law. It was assessed, however, that there was no objective basis for bombing residential areas and schools located approx. 7 km from the airport. Eritrea indicated that one of the Italian-made Aeromacchi MB-339 aircraft had attacked air defense positions located some distance from the airport, also citing the possibility of error. The commission pointed out that despite the damage to civilian property, Eritrea had had the right to attack the Ethiopian air base. Moreover, the lack of interest in attacking the civilian population was deemed credible in a situation where Ethiopia had air superiority – which all the more necessitated focusing military efforts on destroying the enemy's air bases. Attention was also drawn to the lack

itary necessity and carried out unlawfully and wantonly» as a grave breach of the Geneva Conventions" – *ibidem*, para. 419.

293 *Ibidem*, para. 232.

294 "Based on its findings, the commission concludes that the «roof-knocking» technique is not effective, in particular if not combined with other specific warnings" – *ibidem*, paras. 233–242. The roof-knocking tactic involved dropping small explosives or small sound bombs onto the roofs of residential buildings, which were to serve as a warning before the final attack by the IDF.

295 *Ibidem*, para. 242.

of experience of the pilots and the possibility of incorrect data programming on the onboard computers. Significantly, in the context of Article 57 of AP I it was pointed out that although the selection of the target and means had been correct, and the crews had had the right to be inexperienced, the Eritrean Air Force had carried out the combat mission carelessly, and there was no evidence that the guidelines in this regard had been changed at a later stage. Based on this, it was ultimately concluded that although the Eritrean military aircraft had not deliberately targeted civilians, the provisions of Article 57 of AP I were violated, which became the grounds for compensation.[296]

The Commission also addressed the case of the bombing of the civilian airport in Aksum, noting that an airport is always a legitimate military target, regardless of whether there are military assets within its premises, pointing out the potential future use of the runway for military aviation purposes.[297]

21. The case of *Col. Georg Klein*

On September 4, 2009, during operations conducted by the ISAF (International Security Assistance Force) in the Kunduz province as part of the German military contingent, Col. Georg Klein, in charge of the local area, received information about the hijacking of two fuel tankers by the Taliban. Due to the fact that the trucks were located near the German military camp, a decision was made to carry out an airstrike against the vehicles, which had become stuck in the sandy terrain. Between the moment the order was given and the airstrike, many civilians had gathered around the tankers – as a result of the bombing, between 40 and 140 people were killed. The attack was carried out using combat aircraft belonging to the USAF.[298]

The Attorney General of the Federal Republic of Germany (*Generalbundesanwalt*) refused to initiate criminal proceedings against Col. Klein, arguing that the suspect had been unaware of the presence of civilians near the tankers and that he had exhausted all possibilities to obtain a clear picture of the situation.[299] The

296 *Reports of International Arbitral Awards*, Recueil Des Sentences Arbitrales, Eritrea-Ethiopia Claims Commission – Partial Award: Central Front – Ethiopia's Claim 2, April 28, 2004, Partial Award Central Front – Ethiopia's Claim 2 Decision of 28 April 2004, vol. XXV, paras. 101–113.

297 *Ibidem*, para. 114.

298 L. Wexler, *International Humanitarian Law Transparency*, "Journal of Transnational Law and Policy" 2013, vol. 23, p. 101.

299 "The Generalbundesanwalt comes to the conclusion that Klein did not know about the presence of civilians near the trucks, and he further states that Klein had exhausted every

assessment of the behavior of the German officer was made in accordance with the provisions of Article 11(1) of the German Code of International Criminal Law (*Voelkerstrafgesetzbuch*), which is essentially a reflection of the crime of disproportionate attack under Article 8 para. 2(b)(iv) of the Statute of the ICC. According to the provisions of the regulation, the following elements are included in its characteristics: 1) the fact of carrying out the attack, 2) the existence of a causal link between the attack and the death of civilians, 3) the disproportionality between the civilian casualties and the expected military advantage. On the part of the perpetrator, all of the above-mentioned criteria must be combined with their deliberate intent. The Attorney General pointed out that the commander's decision to use force must be assessed from the *ante factum* perspective. Furthermore, in his opinion, even if the German officer had anticipated the possibility of civilian casualties, the attack could still be considered proportional given the significant pressure and the choice of a precise method of attack by using the smallest possible bombs.[300] The considerations regarding the form of the above-mentioned crime are also interesting and the role of the German officer can be equated to an appropriate concept of the principal offender under Polish criminal law. In this context, the crews of combat aircraft are accountable as those assisting in the commission of crime or offence. However, their responsibility in this specific form is problematic, as military aircraft pilots cannot be attributed to the deliberate intent element in the aforementioned act.

Commenting on the actions of the German commander, C. von der Groeben emphasizes that, in his view, the extreme subjunctivization of the normative model of a reasonable commander leads to a situation where the discretionary nature of the commander's decisions becomes unlimited.[301] The author also criticized the actions of the German prosecution, arguing that it had failed to determine the specific military advantage which was to have been achieved through the German commander's actions – whether it was a defensive measure related to force protection (given the presence of the tanker near the *Bundeswehr* camp) or a purely offensive operation aimed at eliminating key figures in the Taliban leadership.

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means to clarify the situation; therefore, Klein cannot be blamed for his false assessment of the situation. On this basis Klein cannot have violated Art 11(1) Nr. 3 Volkerstrafgesetzbuch" – C. von der Groeben, *Criminal Responsibility of German Soldiers in Afghanistan: The Case of Colonel Klein*, "German/European Law Conversation Series" 2010, vol. 11, p. 478.

300 *Idem*, *German Federal Prosecutor Terminates Investigation against German Soldiers With Respect to NATO Air Strike in Afghanistan*, 2010, https://www.ejiltalk.org/german-federal-prosecutor-terminates-investigation-against-german-soldiers-with-respect-to-nato-air-strike-in-afghanistan/ (accessed: 2.01.2021).

301 "But without objective standards the proportionality of an attack has to be assessed by the attacker himself, in which case he enjoys not only a great margin of discretion, but in fact an unlimited margin. This undermines the value of the prohibition-for a prohibition that leaves the definition of its content to its addressee does in fact not prohibit anything at all" – *idem*, *Criminal Responsibility*…, p. 480.

Referring to the application of precautionary measures, the decision on discontinuation stated that "since the suspect had reasonable grounds to believe that there were no civilians around the tankers, he was therefore not obliged to take additional precautionary measures".[302] According to the German author, the decision of the German prosecution is flawed insofar as it fails to take into account the obligation arising from the provisions of Article 57 para. 2(c) of AP I in the phrase when attacks "may endanger the civilian population," which is hypothetical in nature and allows for the omission of so-called active precautionary measures only in cases of 100% certainty that the civilian population cannot be subject to protection.[303] A similar position regarding the case of *Isayeva v. Russia* before the ECtHR was taken by L. Blank.[304] The author considered that a significant omission in this regard was the German commander's decision to forgo the so-called low pass over the tankers to warn the civilian population before the intended airstrike.

22. Independent International Commission of Inquiry on the Syrian Arab Republic

In a report covering the period from March to July 2017, the commission investigated the case of the US air force attack on a religious complex in Al-Jinah on March 16, 2017, which resulted in approx. 50 people being killed or wounded. According to the USAF, the attack was carried out based on information regarding a meeting of local Al-Qaeda leaders. However, they acknowledged that the religious nature of the facility and the overall situational awareness – including all circumstances surrounding the attack – had not been adequately considered.

302 *Ibidem*, p. 484.

303 "There is a textual, a systematic, and a teleological argument for this contention: First, Art 57(2)(c) AP I speaks of attacks which «may» affect civilians, not of attacks which definitively will affect them. Second, Art 57(2) AP I distinguishes between the obligation to verify that the objects to be attacked are not civilians (Art 57(2)(a) AP I), and the obligation to give an advance warning (Art 57(2)(c) AP I). Finally, Art 57(2)(c) AP I has to be understood as designed to provide protection to civilians also in situations of doubt. Nothing illustrates the necessity for such warnings better than this attack, which caused so many civilian casualties despite *Klein's* legitimate conviction that he was only attacking the Taliban" – *idem*, *German Federal Prosecutor*…

304 "Second, commanders must take steps necessary to minimize civilian losses when targeting a military objective. Even if a target is legitimate according to the laws of war, failure to take the requisite precautions will make the attack unlawful" – L. Blank, A. Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, "Harvard National Security Journal" 2010, vol. 25, p. 57.

The commission confirmed that the use of GBU-39 bombs by F-15 aircraft and the launch of Hellfire missiles from a drone fulfilled the obligation to employ weaponry that minimizes collateral damage. It also highlighted the aspect of using delayed-fuse bombs, which allowed for limiting the impact of a direct hit on a given structure.[305] The commission stated that at the time of the attack, regular religious gatherings were taking place in the mosque building. It acknowledged that its special status under international humanitarian law could change if the site was used for military purposes. However, it found no data indicating that the leadership of the terrorist organization had been present in the religious building. It was also pointed out that the failure to properly classify the facility as a place of religious worship and the omission in verifying the actual nature of the meetings constituted a violation of the obligation to take all practically available measures to minimize civilian casualties by the United States.[306]

23. Report to the United States Congress on the course of action during the First Gulf War

The position expressed in the annex to the report omitted an analysis of the customary nature of the provisions contained in AP I, relying instead on the provisions of the 1907 Hague Regulations and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[307] Interestingly, the report indicated that the source of protection for civilian objects and the basis for the prohibition of clearly disproportionate attacks is the content of Article 23(g) of the Hague Regulations from 1907.[308] The uncodified rule of proportionality

305 "The GBU-39, used to target specific parts of a building, is a low-yield bomb with minimal blast and fragmentation. It was used to destroy the target with minimal collateral damage to the surrounding area, including the adjacent prayer hall" – Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/36/55, para. 57.

306 "In this regard, the Commission notes that even though bombs designed to inflict low collateral damage were used, the United States targeting team lacked an understanding of the actual target, including that it was part of a mosque where worshippers gathered to pray every Thursday" – *ibidem*, para. 61.

307 Department of Defense, *Conduct of The Persian Gulf War: Final Report to Congress*, Washington 1992.

308 "While the prohibition contained in Article 23(g) generally refers to intentional destruction or injury, it also precludes collateral damage of civilian objects or injury to noncombatant civilians that is clearly disproportionate to the military advantage gained in the attack of military objectives, as discussed below" – *ibidem*, p. 697.

was defined as the undertaking of military action whose negative effects clearly outweigh the military benefits obtained. The above test was applied *in casu*, but the report confirms that the assessment of benefits could have had a general dimension and pertained to the strategic scope of the entire campaign, such as its relation to achieving the primary military objective, namely the liberation of Kuwait from Iraqi occupation.[309] The application of active precautionary measures, in addition to the requirement of direct target identification, also included an assessment of the danger posed to one's own flight crews. In the context of so-called dual-use objects, the report indicates that the construction of roads, airports, and railways was funded by the U.S. Congress for defense purposes and played a tangible role in enabling the efficient deployment of U.S. forces to the Middle East. By the same analogy, similar types of infrastructure in Iraq were considered legal targets. The U.S. Congress report recognizes that the use of road and energy networks for both military and civilian purposes allows for the classification of a given target/object as military if its destruction or damage provides a specific military advantage. The report highlighted numerous violations of the obligation to take passive precautionary measures by the Iraqi side, including the deliberate placement of military objectives near cultural sites, schools, and hospitals.[310] Despite the above-mentioned, American planners decided to refrain from attacking these targets, explicitly indicating that their destruction would have been justified in light of state practice.

On the subject of Additional Protocol I, the report indicated that Articles 48 and 49 of AP I define the term "attack" as an element of military operations of both offensive and defensive nature, emphasizing that "minimizing collateral damage and injury is a responsibility shared by attacker and defender".[311] Article 51 para. 8 of AP I was considered to be an element of customary international law, in the context of Article 52 para. 3 of AP I, it was assumed that the introduction of the presumption of the civilian status for certain types of objects – such as places of worship and schools – establishes an unjustified and unacceptable standard, in light of state practice, by shifting the burden of determining the correct nature of the target from the defending party (which has actual control over the target's status) to the attacking party, which lacks relevant information. This restricts the legality of the attacking party's actions and may even encourage the opposing side to take steps contrary to its obligations regarding passive precautionary measures.[312]

The extensive part of the report submitted to Congress referred to the issue of the act of surrender in *ius in bello*. The report also stated that the action of

309 "«Military advantage» is not restricted to tactical gains, but is linked to the full context of a war strategy, in this instance, the execution of the Coalition war plan for liberation of Kuwait" – *ibidem*, p. 699.

310 *Ibidem*, p. 702.

311 *Ibidem*, p. 700.

312 *Ibidem*, p. 703.

Iraqi tanks during the Battle of Ras Al-Khafji, consisting of turning their turrets around, does not constitute an act of surrender.[313] He also justified the actions taken against Iraqi units retreating from Kuwait, pointing out that the U.S. Air Force issued a warning before the attack (which was not an obligation under international law) to allow Iraqi personnel to leave wheeled vehicles located on the Kuwait–Basra road. The final conclusion in this regard was the determination that the Iraqi armed units during the attack on the so-called highway of death had the status of retreating units, not surrendering ones.[314]

Another example of proper conduct is the preservation of ancient monuments located in the Chaldean Ur, where the Iraqi side deliberately stationed two fighter jets away from the runways – the coalition command decided to refrain from attacking this installation.[315] However, it is essential to consider the contextual nature of airstrike conditions – a decisive factor in this regard was certainly the belief that there was no need to weaken the Iraqi Air Force to a degree requiring an attack on the stationed military aircraft, especially given the conditions of air superiority.

As observed by C.B. Shotwell, the 1991 air campaign confirmed the emergence of a new customary rule known as the principle of economy in the use of military force, which focused on concentrating war efforts exclusively on targets that directly affect the opponent's ability to engage in armed conflict.[316]

24. The OSCE expert report under the so-called Moscow Mechanism concerning the course of military operations in Ukraine

In April 2022, the OSCE activated the so-called Moscow Mechanism, which served as the basis for establishing an expert panel to investigate violations of human rights protection standards and international humanitarian law

313 "As that battle began, Iraqi tanks entered Ras Al-Khafji with their turrets reversed, turning their guns forward only at the moment action began between Iraqi and Coalition forces. While there was some media speculation that this was an act of perfidy, it was not; a reversed turret is not a recognized indication of surrender per se" – *ibidem*, p. 709.

314 *Ibidem*, p. 772.

315 R. O'Keefe, *Protection of Cultural Property under International Criminal Law*, "Melbourne Journal of International Law" 2010, vol. 11, p. 354.

316 C.B. Shotwell, *Economy and Humanity*…, p. 16.

committed in Ukraine after February 24, 2022.[317] The experts devoted a subsection to analyzing the course of military operations, emphasizing that they are unable to present definitive conclusions on whether a specific attack constituted a violation of international humanitarian law without adequate knowledge of all the circumstances surrounding the decision to carry out the attack.[318] The panel pointed out that, apart from a few instances where the Russian side explicitly admitted to having attacked certain installations – such as radio and television stations in Kyiv in March 2022 – it is not possible to absolutely rule out that Russian airstrikes were directed at military objectives. The experts emphasized that in many cases, the circumstances and the repetitive nature of certain practices provide grounds for assuming a likelihood of violations of international humanitarian law.

The report makes several comments related to the course of aerial operations. Referring to precision-guided munitions, on the one hand, it was emphasized that the possession of such munitions does not affect the rule of proportionality, but the lack of a weapon sufficiently accurate to meet its requirements in a specific attack determines its illegality.[319] The experts also pointed out that when applying this principle, the Russian side should take into account the reverberating effects of the attacks. The report mentions the importance of the aforementioned munitions once again in the context of the rules of caution, stating that, in its assessment, the Russian side, being a technologically advanced state, should have used precision-guided munitions much more frequently than was actually the case. This assumption was accompanied by a valid comment that without accurate data, the experts are unable to assess whether the attacking side actually used "all *feasible* means." Finally, the report addressed the issue of using bombs with significant weight and size in urban environments, noting that experts have difficulty justifying their use in situations that occurred during the armed conflict in Ukraine.

Both the OSCE report and the reports issued by the UN Independent Commission of Inquiry established to investigate the armed conflict in Ukraine demonstrate considerable caution in drawing categorical conclusions regarding the assessment of aerial operations, highlighting difficulties in accessing complete data, the occupation of the most affected areas by Russian troops (such as Mariupol),

317 Report of the OSCE Moscow Mechanism's mission of experts entitled *Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022*, 2022, https://www.osce.org/odihr/515868 (accessed: 14.06.2025).

318 *Ibidem*, p. 25.

319 "It must be stressed that the (un)availability of precise weapons does not play any role in the respect of the proportionality rule. If an attacker does not have sufficiently precise weapons to comply with the proportionality rule in case of a given attack, the attack is unlawful"– *ibidem*, p. 29.

and the possible presence of military objectives near the attacked locations.[320] On the one hand, the available visual material strongly suggests that in many Ukrainian cities (Chernihiv, Sumy, Mariupol), the Russian side did not apply precautionary measures (or did so insufficiently), leading to violations of the prohibition on indiscriminate attacks. In some cases, Russian aviation may have deliberately attacked civilian targets (such as the bombing of the theater and maternity hospital in Mariupol in March 2022). Nevertheless, the significance of the Rendulic rule and the need for *ante factum* evaluation of the conduct of the attacking forces hinder the formulation of further categorical conclusions.[321]

25. Gaza 2023–2024

The reports submitted by the UN Independent Commission on Occupied Palestinian Territories regarding the events in Gaza in 2023–2024 focused to a limited extent on strictly aerial aspects, categorically considering the Israeli air campaign as being conducted in violation of the principles of distinction, proportionality, and precaution.[322] The data from the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) indicates that the number of casualties includes over 46,000 killed and 110,000 injured, and 92% of the households in Gaza have been destroyed or damaged.[323] According to experts, the IDF air campaign during Operation "Iron Swords" involved the application of the so-called Dayiha doctrine, which consists in the deliberate destruction of civilian infrastructure using excessive firepower to create a coercive effect aimed at weakening support for extremist structures.[324] The assessment of the course of this campaign

320 "In both cases, the Commission identified potential military objectives in the vicinity, which might have been the intended target. However, the area impacted was much larger and the attacks were therefore indiscriminate" – Independent International Commission of Inquiry on Ukraine, A/77/533.

321 M. Piątkowski, *Air Warfare over Ukraine and International Humanitarian Law*, "Acta Universitatis Lodziensis. Folia Iuridica" 2024, vol. 106, p. 23.

322 "Even when military objectives were allegedly present, attacks lacked regard for the principles of distinction, proportionality and precaution, resulting in thousands killed and injured and widespread destruction of entire neighbourhoods, including in Al-Yarmouk, Jabaliya, Maghazi and Rimal al-Shamali" – para. 45.

323 *Reported impact snapshot | Gaza Strip (14 January 2025)*, 2025, https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-14-january-2025 (accessed: 14.06.2025).

324 "This provides further indication of the use of the 'Dahya doctrine' in heavily bombing civilian neighbourhoods in the Gaza Strip to destroy militant strongholds. The likely alignment with a strategy known for causing high civilian casualties and extensive damage to civilian

in light of international humanitarian law could be subject to proceedings before the ICC. What is noteworthy, however, is that by issuing arrest warrants against Prime Minister Netanyahu and Defense Minister Gallant, the ICC focused solely on war crimes unrelated to the course of the aerial bombardment, which highlights the difficulties in judicial and investigative assessment of the phenomenon of air warfare.[325]

infrastructure, potentially exceeding what is militarily necessary, raises similar concerns over ISF's adherence to the principles of distinction, proportionality and precaution in the current military operation' – Detailed findings on the military operations and attacks carried out in the Occupied Palestinian Territory from 7 October to 31 December 2023* Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, para. 167.

325 *Situation in the State of Palestine: ICC Pre-Trial Chamber I rejects the State of Israel's challenges to jurisdiction and issues warrants of arrest for Benjamin Netanyahu and Yoav Gallant*, 2024, https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges (accessed: 5.06.2025).

CHAPTER X

UNMANNED OPERATIONS AND AUTONOMY IN AIR WARFARE

1. Unmanned operations in air warfare

1.1. General Remarks

It is worth noting that the rise of unmanned warfare in aviation is not solely tied to the events of November 3, 2002, when a Predator drone struck the terrorists who had been behind the attack against USS Cole in Yemen.[1] In fact, as early as 1812, during the French occupation of Moscow, the Russian military planned to attack the location where the French emperor was staying using an unmanned balloon filled with explosives.[2] Similarly, in the field of international law, potential legal frameworks addressing the emergence of unmanned technology were already being considered at the beginning of the 20th century. In 1911, P. Fauchille pointed to the existence of the category of unmanned aerostats, and J.M. Spaight drew attention to their military potential.

Unmanned operation, understood as the lack of a human operator's physical presence on board an armed platform, has been a relevant issue since the interwar period, when work on research on various types of remotely controlled vehicles capable of performing specific tactical tasks began.[3] As part of these activities, the operator controlled the device using an unwinding cable that connected the vehicle to a simple control instrument, which managed its basic movements. In the domain of aviation, the first trials related to aircraft without a physical pilot on board began in the pre-war period witnessing the development of radio technology.[4] After

1 C.S. Rinehart, *Drones and Targeted Killing in the Middle East and Africa: An Appraisal of American Counterterrorism Policies*, London 2016, p. 1.

2 P. Fauchille, H. Bonfils, *Traité de Droit International Public*, Paris 1921, pp. 599–600.

3 V. Prisacariu, *The History and the Evolution of UAVs from the Beginning till the 70s*, "Journal of Defense Resources Management" 2017, vol. 8.

4 P. Polkowski, *Bezzałogowe statki powietrzne* [*Unnmanned Aerial Vehicles*], "Rocznik Bezpieczeństwa Międzynarodowego" 2016, vol. 10, p. 238.

World War II, advancements in television technology enabled the remote control of unmanned aircraft and enhanced the capabilities of the platform itself. During the Vietnam War, the US Air Force used the Firebee and Lightning Bug models, performing a total of nearly 3,400 different reconnaissance tasks.[5] In 1995, the U.S. Air Force adopted the RQ-1 Predator drone, which, during the same period, conducted its first reconnaissance missions over Bosnia as part of NATO's implementation of the UN mandate in the region. In 2001, the platform was further equipped with air-to-ground Hellfire missiles. The Reaper aerial vehicle is a developmental version of the Predator system offering greater tactical capabilities, as is the Global Hawk drone, widely used as a reconnaissance craft. The development of the technical capabilities of drones, by increasing the range, capacity and improvements in targeting and reconnaissance devices, has made unmanned aircraft an indispensable element of air operations, primarily as a tool of ISR (Intelligence Surveillance and Reconnaissance).[6]

In this regard, however, it is important to distinguish unmanned aerial vehicles from flying rockets and missiles (such as the German Fritz X-type flying bomb or Tomahawk cruise missiles, as well as other types of smart weapons, like the loitering munitions currently used in the Ukraine conflict).[7] According to the adopted definitions, an unmanned aerial vehicle is supposed to be expendable or recoverable.[8] This excludes the above-mentioned types of weaponry from the scope of unmanned vehicles – unmanned operation can therefore be understood *sensu largo* and *sensu stricto.* All platforms and vehicles without a physical operator on board should be recognized as unmanned *sensu largo*. Unmanned operation *sensu stricto* is limited to vehicles designed for destruction or any other form of using them up which is the essence of their functioning.[9]

In Anglo-Saxon literature, the definition of an Unmanned Aerial Vehicle (UAV) defines an aircraft moving without the physical presence of a human operator on board, possessing the necessary equipment to control it and having the ability to carry various types of weapons and reconnaissance tools.[10] NATO standardization

5 J.F. Keane, S.S. Carr, *A Brief History of Early Unmanned Aircraft*, "John Hopkins Apl Technical Digest" 2013, vol. 32, p. 568.

6 C. De Cock, *Operation Unified Protector and the Protection of Civilians in Libya*, "Yearbook of International Humanitarian Law" 2011, vol. 14, p. 226.

7 R.P. Schwig, *Unnamed Aerial Vehicles – Revolutionary Tools in War and Peace*, USAWC Strategy Research Project, p. 5, https://apps.dtic.mil/sti/tr/pdf/ADA469608.pdf (accessed: 14.06.2025).

8 *Dictionary of Military and Associated Terms*, US Department of Defense 2005.

9 C. Wills, *Unmanned Combat Air Systems in Future Warfare: Gaining Control of The Air*, 2016, e-book.

10 "An Unmanned Aircraft (sometimes abbreviated to UA) is defined as an aircraft that does not carry a human operator, is operated remotely using varying levels of automated functions, is normally recoverable, and can carry a lethal or non-lethal payload" – UK JDN 2/11, *UK Approach to Unnamed Aircraft Systems*, p. 202, https://assets.publishing.service.gov.uk/media/5a81d239ed915d74e34003bc/20110505-JDN_2-11_UAS_archived-U.pdf (accessed: 14.06.2025).

documents define an unmanned aircraft as "a self-propelled aircraft […] flying independently or piloted remotely".[11] The American Federal Aviation Administration specifies unmanned operation in functional terms – by the absence of the possibility to perform control functions on board an aircraft.[12] The Polish legislator, in relevant aviation law documents, uses the term "unmanned aircraft" as a legal definition for flying objects with their own propulsion. Therefore, there is a semantic distinction between the terms "vehicle" and "aircraft".[13] Documents relating to international civil aviation also use the phrase "Remotely Piloted Aircraft" (RPA). This definition, in turn, draws attention to the extent of human control over the aircraft, emphasizing that while an aircraft is unmanned, it is continuously controlled through various forms of remote communication.[14] An extension of the above definition is the formulation of the Unmanned Aircraft System, which, in addition to the unmanned platform, encompasses all components necessary for the operation of the vehicle, including ground handling personnel.[15]

Like conventional manned aircraft, unmanned aircraft are classified into civil and state-owned aircraft, with their intended use being the decisive factor of their classification.[16] As mentioned earlier, international civil aviation law does not provide a definition of a military aircraft; instead, it is established based on customary law in the context of air warfare law.[17] Therefore, an unmanned aircraft

11 "An unmanned vehicle that can be controlled from a certain distance through the use of means of communication. Usually designed as a returning device" – AAP-6, *Słownik terminów i definicji NATO* [*NATO Glossary of Terms and Definitions*], 2005, http://akacja.wzks.uj.edu.pl/~schaedag/materialy/unesco/slownik_terminow_i_definicji_NATO.html (accessed: 5.01.2021).

12 "Unmanned aircraft means an aircraft operated without the possibility of direct human intervention from within or on the aircraft" – 14 CFR (Code of Federal Regulations) para. 107.3.

13 Article 126 of the Act of July 3, 2002 – Polish Aviation Law (Dziennik Ustaw [Journal of Laws] of 2020, item 1970, as amended).

14 Office of General Counsel, Department of Defense, *Law of War Manual*, 6.5.8, p. 351; Glossary, *Unmanned Aircraft Systems (UAS)*, ICAO Circular 328-AN/190; M. Gregorski, *Regulacje dotyczące bezzałogowych statków powietrznych w prawie Unii Europejskiej w kontekście międzynarodowym* [*Regulation regarding the UAV's in EU in international context*], "Studia Europejskie" 2017, vol. 2, p. 138.

15 "A system consisting of an unmanned aircraft, a support system and all the equipment and personnel necessary to operate an unmanned aircraft" – AAP-6, *Słownik terminów i definicji NATO* [*NATO Glossary of Terms and Definitions*], 2017, p. 464, https://wcnjik.wp.mil.pl/u/AAP-6PL.pdf (accessed: 5.01.2021). "A set of configurable elements consisting of a remotely-piloted aircraft, its associated remote pilot station(s), the required command and control links and any other system elements as may be required, at any point during flight operation" – Glossary, *Unmanned Aircraft Systems (UAS)*, ICAO Circular 328-AN/190.

16 A. Lazarski, *Legal Implications of the Uninhabited Combat Aerial Vehicle*, "Aerospace Power Journal" 2002, vol. XVI, pp. 78–79.

17 W.H. Boothby, *The Law of Targeting*, Oxford 2012, p. 336.

will hold the status of military aircraft if it meets the requirements outlined in the 1923 Hague Rules of Air Warfare, supplemented by the provisions of the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea and the HPCR Manual.[18] The latter document recognizes both manned and unmanned aerial vehicles as aircraft, meaning that unmanned military aircraft can be considered a means of combat under the law of air warfare.[19] In fact, the most controversial issue in the literature is the question of controlling or programming them by appropriate personnel, that is, those subjected to military discipline. This is particularly relevant in the case of armed drones being supervised by intelligence agency operators (e.g., the American CIA), who do not hold the status of armed forces personnel, wear no uniforms, and are not subjected to military discipline.[20] There also appears the issue of uniforms being worn by armed forces personnel operating unmanned aerial vehicles – I. Henderson and B. Cavanagh indicate that in the event of an international armed conflict there exists an obligation for members of the armed forces to wear distinctive mark[21] due to the need to wear uniforms in the event of a crew being separated from their military aircraft. However, there is no practice in this respect in the context of a non-international armed conflict.[22]

Military aircraft may serve different purposes, but undoubtedly the moist impartant challenge from a legal perspective is the use of UAVs that possess the capability of attacking specific targets or objects, which are referred to as Unmanned Combat Aerial Vehicles (UCAV).[23] Another term proposed by the Initiative for International Criminal Law and Human Rights in Central and Eastern Europe

18 I. Henderson, B. Cavanagh, *Unmanned Aerial Vehicles: Do They Pose Legal Challenges?*, [in:] H. Nasu, R. McLaughlin (eds.), *New Technologies and the Law of Armed Conflict*, The Hague 2014, p. 197; W.H. Boothby, *How Far Will the Law Allow Unmanned Tarageting to Go?*, [in:] D. Saxon (ed.), *International Humanitarian Law and the Changing Technology of War*, Leiden 2013, p. 48.

19 "Based on assumption that in aerial warfare aircraft executing an attack is generally as such regarded as «means» of warfare, it is concluded that under international law UAVs are considered as a «mean» of warfare, as actually any instrument capable of attack may represent it" – P. Ochmannova, *Unmanned Aerial Vehicles and Law of Armed Conflict, Implications*, "Czech Yearbook of International Law" 2011, vol. 2, p. 148.

20 D. Glazier, *The Drone: It's in the Way That You Use It*, [in:] K. Fisk, J. Ramos (eds.), *Preventive Force: Drones, Targeted Killings and the Transformation of Contemporary Warfare*, New York 2016, p. 162.

21 I. Henderson, B. Cavanagh, *Unmanned Aerial Vehicles*…, p. 199.

22 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge 2013, p. 318.

23 "An unmanned combat aerial vehicle consists of an advanced remote/robotic armament system equipped with electronic sensors and munitions of war. These systems used in identification missions in order to identify war and military zones and monitor the battlefield" – R. Mousazadeh, A. Basiri, M. Babaee, A. Tavakoli Tabasi, *Analyzing the Legal Dimensions of Unmanned Combat Aerial Vehicle in the International Law*, "Journal of Politics and Law" 2016, vol. 9, p. 1.

is the phrase *systemy bojowych bezzałogowych pojazdów latających SBBPL* – i.e. unmanned combat aerial vehicle systems. The purpose of this definition is to emphasize that unmanned aerial vehicles operate as part of manned systems and to narrow the scope of applying the definition to devices that can be used by the armed forces.[24]

1.2. Unmanned operation and the Law of Air Warfare

Unmanned operation is not treated as a serious challenge to international humanitarian law.[25] This stems from the fact that an unmanned aircraft is essentially only a platform for carrying missiles, hence the legality of its use in specific combat conditions will depend on the type of weapons used by the UCAV or how they are employed.[26] In addition, unmanned aerial vehicles still operate within human-controlled systems and do not feature autonomy as part of the so-called critical functions (the concept will be elaborated on below). The only difference compared to manned aircraft is the absence of an operator on board; however, control is still conducted remotely. It is worth remembering that in the era of Fire-and-Forget missiles, many functions of conventional aircraft are strongly automated, despite having a crew on board.[27] Therefore, the operation of unmanned aircraft (unlike autonomous systems) is legislatively assessed as extremely similar to the legal situation of a manned aircraft.[28] Looking through the lens of Articles 35,

24 See: K. Kowalczewska, J. Kowalewski, *Systemy dronów bojowych: analiza problemów i odpowiedź społeczeństwa obywatelskiego* [*The Systems of Combat Drones: The Outline of Issues and the Response of Civic Society*], Warszawa 2015, pp. 7–8.

25 W.H. Boothby, *The Law of Targeting*, p. 281; T.D. Gill, J. Van Haaster, M. Roorda, *Some Legal and Operation Considerations Regarding Remote Warfare: Drones and Cyber Warfare Revistied*, [in:] J. Ohlin (ed.), *Research Handbook on Remote Warfare*, Northampton 2017, p. 316.

26 "Therefore, it appears drones comply with the various weapon laws, however, when a drone is acting as a «weapons platform», the ordinance carried by the drone is still governed by other specific areas of weapons law" – V. Sehrawat, *Legal Status of Drones Under LOAC and International Law*, "Penn State Journal of Law and International Affairs" 2017, vol. 5, p. 184. "Drones are advanced weapons platforms, hence, the lawfulness of the system also depends on the equipped weapon. That is, the legal status of UCAVs upends if an unlawful weapon is employed" – H.D. Jang, *The Lawfulness and Case for Combat Drones in The Fight Against Terrorism*, "National Security Law Journal" 2013, vol. 2, p. 10. See also: W. Bieńkowski, *Bezzałogowe aparaty latające na polu walki – nowe wyzwanie dla prawa wojennego czy powtórka z historii?* [*UAV's on the battlefield – new challenge or repetition from history*], "Międzynarodowe Prawo Humanitarne" 2013, vol. IV, pp. 127–168.

27 T. Zieliński, *Użycie uzbrojonych bezzałogowych statków powietrznych w kontekście prawa międzynarodowego* [*The use of combat UAV's in the light of international law*], "Zeszyty Naukowe" 2017, vol. 3, p. 210.

28 "In summary, UAVs as such do not pose problems with respect to a legal assessment under international law that are different from other uses. This is partially due – in contradistinction

51–52 and 57 of AP I and regarding the legality of the deployment and use of armed drones, they are not a means of causing excessive injury or unnecessary suffering *per se*, nor are they capable of striking indiscriminately or threatening the natural environment.[29] Unmanned operation is often presented by some authors as an advantage in the context of applying precautions[30] since an unmanned aircraft may remain longer over the target external factors (stress) do not affect the operator themselves, who are aided by numerous sensors and precision-guided munitions.[31] Interestingly, as a result, operations conducted with unmanned aircraft will be assessed under a different, potentially higher standard of care, due to the absence of negative factors typically associated with manned flights (e.g., the issue of crew protection, which raised many concerns when NATO aviation implemented the so-called 15,000-feet rule in 1999).[32] In this respect, F. Rosen points to the deep transformation of the paradigm resulting from the content of

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to autonomous weapon systems, where these decisions are made through machine code – to the decision over whether and how to attack remaining with an individual or a group of individuals. The legal assessment differs in cases in which a UAV is used as a platform for weaponry that contravenes the rules just laid out, such as certain biological, chemical or nuclear weapons" – M. Wagner, *Unmanned Aerial Vehicles*, [in:] F. Lachenmann, R. Wolfrum (eds.), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*, Oxford 2017, para. 21, p. 1284.

29 Another view is presented by W. Qureshi, who believes that UCAV operators' reliance on unverified transmitted data as well as automatically transmitted information, undermines the legality of drones from the perspective of the inability to apply the principle of distinction – W. Qureshi, *The Legality and Conduct of Drone Attacks*, "Notre Dame Journal of International and Comparative Law" 2017, vol. 7, p. 104. But see "Evidently, there is no basis for arguing that UCAV technology that is currently in use is inherently of a 'nature to cause superfluous injury or unnecessary suffering' or that the 'dictates of public conscience' militate against the use of UCAVs" – M. Hagger, T. McCormack, *Regulating the Use of Unmanned Combat Vehicles: Are General Principles of International Humanitarian Law Sufficient?*, "JLIS Special Edition: The Law of Unmanned Vehicles" 2011–2012, vol. 21(2), p. 13. M.J. Deegan, *Unmanned Aerial Vehicles: Legitimate Weapon Systems or Unlawful Angels of Death?*, "Pace International Law Review" 2014, vol. 26, p. 227.

30 See J.D. Herbach, *Into the Caves of Steel: Precaution, Cognition and Robotic Weapon Systems under the International Law of Armed Conflict*, "Amsterdam Law Forum" 2012, vol. 3, pp. 1–20.

31 "According to the U.S. Air Force, one of the more salient features of these cutting-edge aircraft is the Multi-Spectral Targeting System («MTS-B»), which integrates an infrared sensor, a color/monochrome video camera, an image-intensified video camera, a laser designator, and a laser illuminator to maximize precision" – H.D. Jang, *The Lawfulness*…, p. 12. "This can serve to improve military commanders' situational awareness and target identification, allow for a more robust assessment of potential collateral damage, widen the range of precautionary measures in advance of an attack and permit more precise targeting, with the real potential of lowering the risk of civilian casualties" – The United Nations Office for Disarmament Affairs, *Study on Armed Unmanned Aerial Vehicles Prepared on the Recommendation of the Advisory Board on Disarmament Matters*, United Nations 2015, p. 37.

32 A. Kasher, A. Plaw, *Distinguishing Drones: An Exchange*, [in:] B.J. Strawser (ed.), *Killing by Remote Control: The Ethics of an Unmanned Military*, Oxford 2013, pp. 56–57.

Article 57 AP I, by modifying three elements of the precautionary principle in the form of: 1) strategic considerations (understood as the time and possibility of conducting an analysis in a dynamic combat environment), 2) personal considerations (risk to the crew), 3) material considerations (cost of an unmanned aircraft in relation to a conventional one).[33] Some experts, in turn, point out that from an operational point of view, drones can expand the options for conducting military operations, thus exposing the civilian population to danger.[34] Another issue is the observed increase in the distance between the operator and the target. However, the above arguments seem unconvincing insofar as the distance between combatants in air warfare has always been significant and has been determined by the range of radars or sensors exceeding by far the capabilities which visual identification methods have provided for nearly 70 years now.

The HPCR Manual of 2009 indicated that unmanned aircraft fall into the category of aircraft, with the difference that they do not have a human operator on board. It was pointed out that while an unmanned aircraft can be civilian, state-owned or military, an unmanned combat aircraft can only be the latter (in accordance with the principle that such aircraft can only participate in military operations). Rule No. 39 emphasized that general rules for conducting armed combat, including those concerning precautions, apply to the activities of unmanned aircraft. The manual highlights the benefits stemming from drone specifications, while indicating that the use of conventional air support may also be recommended in certain circumstances.[35] As a result, the manual confirms the lack of significant differences in the legal regime relating to manned and unmanned combat aviation.

Much greater doubts arise regarding the methods of using unmanned aerial vehicles, particularly in relation to non-international conflicts or areas outside the zone of active hostilities. To this extent, doubts arise regarding the relationship between international humanitarian law and human rights protection standards, as well as the principles of *ius ad bellum*.[36] A synonym for drone operations at

33 F. Rosen, *Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility*, "Journal of Conflict and Security Law" 2014, vol. 19, pp. 127–128.

34 N. Weizmann, *Remotely Piloted Aircraft and International Law*, [in:] M. Aaronson, A. Johnson (eds.), *Hitting the Target? How New Capabilities are Shaping International Intervention*, London 2013, https://www.icrc.org/en/doc/assets/files/2013/remotely-piloted-aircraft-ihl-weizmann.pdf (accessed: 4.01.2021), p. 36; F. Megret, *The Humanitarian Problem with Drones*, "Utah Law Review" 2013, vol. 5, p. 1301.

35 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, pp. 156–157.

36 See more: M. Piątkowski, *Analiza porównawcza regulacji prawnych w zakresie SBBPL w kontekście międzynarodowych standardów ochrony praw człowieka* [*Comparative analyze of the legal regulations in the context of LAWS and international human rights protection standards*], [in:] K. Kowalczewska, K. Kowalewski (eds.), *Systemy dronów bojowych: analiza problemów i odpowiedź społeczeństwa obywatelskiego* [*Combat drones systems: problem analysis and civil society answer*], Warszawa 2015.

the threshold of the 21st century is the phenomenon of so-called targeted killing, which involves the killing of a specific person through the use of lethal force. This is sometimes referred to as "extrajudicial killing" and encompasses the legal foundations of what is known as war on terror in the context of *ius ad bellum* and the application of human rights standards.[37] However, this phenomenon is not inherently tied to the activities of unmanned aviation, nor to its specific characteristics, although it is true that unmanned aircraft are most often used to carry out such missions.

1.3. Status of Civilian Operators of Unmanned Military Aircraft

From the perspective of the definition of a military aircraft, many reservations arise from the fact that unmanned aerial vehicles are operated by individuals who are not part of the armed forces of a given state. In the context of international armed conflicts, the consequence of the above is the loss of a military aircraft's right to exercise the powers granted to combatants (due to the loss of the necessary fourth attribute in the definition of a military aircraft) and, consequently, the inability to claim combatant status.[38] At the same time, such persons may become a legal military target in the light of Article 51 para. 3 of AP I, and in the case of non-international armed conflicts may be treated as directly involved in military operations (as indicated by J. Chojnacki, this also applies to ISR mission operators whose activities are directly related to combat operations).[39] However, as M.N. Schmitt rightly noted, in the matter of armed conflicts of a non-international nature, where the category of combatants does not occur, this problem is

37 See more: H. Duffy, *The 'War on Terror' and the Framework of International Law*, Cambridge 2015, pp. 387–440; K. Benson, '*Kill'em and Sort it Out Later:' Signature Drone Strikes and International Humanitarian Law*, "Global Business and Development Law Journal" 2014, vol. 27.

38 "If the respective national and military identifications are applied, the human criteria becomes problematic. Per definitionem there is no crew subject to regular armed forces disciplines. Therefore the requirements of (iii) commanded by and (iv) controlled or pre-programmed by a member of the armed forces is of even more importance. At this point one realises that one cannot generalise, but has to assess the status of UCAVs in cases of doubt on a case-by-case analysis" – C. Lufl, *Modern Technologies and Targeting under International Humanitarian Law*, "IFHV Working Paper" 2013, vol. 3, p. 24. The commentary to the HPCR Manual of 2009 does not specify whether the obligation to mark military aircraft is also applicable during a non-international armed conflict.

39 J. Chojancki, *Status operatorów bezzałogowych statków powietrznych w świetle międzynarodowego prawa humanitarnego* [*Status of UAV's operators in the light of international humanitarian law*], "Zeszyty Naukowe Państwowej Wyższej Szkoły Zawodowej im. Witelona w Legnicy" 2017, vol. 22, p. 143; similary: M. Lewis, *Drones and the Boundaries of the Battlefield*, "Texas International Law Journal" 2011, vol. 47, p. 294.

reduced to the possibility of being the subject of an armed attack in the light of the Common Article 3 of the 1949 Geneva Convention.[40] Moreover, as indicated by M.W. Lewis and E. Crawford, while the removal of military marks from the surface of an unmanned aerial vehicle is a violation of the principle of distinction (and potentially perfidious behavior), the fact that drone operators are not uniformed is essentially irrelevant to their legal situation.[41]

The situation of civilian personnel operating in the conditions of an international armed conflict, who have been integrated into the armed forces of the fighting party or are accompanying them, may be more specific. Article 4 para. A(2)(4) of the Third Geneva Convention of 1949 indicates that prisoner-of-war status may also be granted to civilians who are not members of the armed forces, mentioning, among others, civilian crew members of military aircraft. Accordingly, the definition of a military aircraft is maintained as long as the person is subject to military discipline, which does not imply that they must be a member of the armed forces.[42]

2. Autonomy and future aerial warfare

2.1. Preliminary comments

As indicated earlier, the unmanned operation of military aircraft of the Predator and Reaper types generally refers to the lack of a physical operator on board the aircraft but does not mean that these platforms are deprived of a controller. In fact, the above-mentioned aircraft operate on the basis of manned systems, as part of a mechanism that, by definition, includes not only the platform itself, but also its supervisory devices and the person managing the vehicle's activities and, in the context of combat craft, makes the decision to attack. Nevertheless, certain specific functions of a given craft may be implemented and performed without human control. In order to increase the efficiency and effectiveness of manned systems, at the turn of the 21st century, means of combat were introduced in which the operator's intervention was essentially limited solely to the decision to deploy (or launch) a given weapon. Navel mines were the first example

40 M.N. Schmitt, *Unmanned Combat Aircraft System and International Humanitarian Law: Simplifying the Oft Benighted Debate*, "Boston University International Law Journal" 2012, vol. 30, pp. 617–618.

41 M.W. Lewis, E. Crawford, *Drones and Distinction: How IHL Encouraged the Rise of Drones*, "Georgetown Journal of International Law" 2013, vol. 44, p. 1161.

42 M.N. Schmitt, *Air Law and Military Operations*, [in:] T. Gill, D. Fleck (eds.), *The Handbook of the International Law of Military Operations*, Oxford 2010, p. 342.

of the above-mentioned devices, whose extensive use during the Russo-Japanese War in 1905 was the reason for including their use in the agenda of the Second Peace Conference in the Hague in 1907. Although naval mines did not have any special decision-making mechanism and are structurally based on electromagnetic interaction exclusively, the lack of any control of fuse ignition in these weapons was an object of controversy.[43] As a result, the so-called automatic contact mines were subjected to the legal regime under the Eighth Hague Convention of 1907, which banned the use of mines other than those that could be deactivated after at most an hour of losing control over them or after being released from their moorings. It was precisely the factor of being unable to influence the process of launching the devices as well as the fear and possibility of harming civilian or neutral shipping that was the basis for adopting a ban on the deployment of uncontrolled mines.[44] A similar legal regime was also applied to torpedoes, which did not disarm after missing the target. It is worth noting that during World War II, the German *Kriegsmarine* was equipped with acoustic homing torpedoes of the GNAT type, which, guided by the sound of ship screws, autonomously navigated themselves towards the sound signal. This torpedo did not make any distinction between targets (destroying the ship which it had been launched by on multiple occasions) but used a complicated automatic instrument allowing it to correct the bearing on its own.[45]

Two remarks on mines and torpedoes are necessary. Firstly, the above-mentioned armament (at the time of adopting the Seventh Hague Convention of 1907) was not autonomous, but automated. There is a fundamental difference between the above concepts, as autonomy is defined as the freedom of decision-making expressed through the ability to function in an open environment and respond to non-programmed external factors.[46] In addition, it seems that the full scope of autonomy also means consent to the possibility of making unpredictable decisions. Its opposite is automation, as a phenomenon of operation in a closed, programmed environment with a limited number of variables.[47] The second cir-

43 M. Piątkowski, *Fully Autonomous Weapons Systems and the Principles of International Humanitarian Law*, The International Conference of PhD Students and Young Researches, Conference Papers, Vilnius 2017, pp. 300–301.

44 "Accordingly, naval mines, in particular mines that do not become harmless within a short period after control over them is lost, may not be used in circumstances where control over them is lost and they therefore pose an indiscriminate threat to all shipping. This prohibition reflects the requirement for military operations to be conducted only against military objectives" – D. Letts, *Naval Mines: Legal Considerations in Armed Conflict and Peacetime*, "International Review of the Red Cross" 2016, vol. 98, p. 558.

45 M. Llewellyn-Jones, *The Royal Navy and Anti-Submarine Warfare 1917–49*, Oxon 2006, pp. 25–26.

46 B. Kastan, *Autonomous Weapons Systems: A Coming Legal "Singularity"*, "Journal of Law, Technology and Policy" 2013, vol. 1, p. 51.

47 M. Wagner, *Autonomy in the Battlespace: Independently Operating Weapon Systems an the Law of Armed Conflict*, [in:] D. Saxon (ed.), *International Humanitarian Law and the Changing Technology of War*, Leiden 2013, pp. 104–105.

cumstance is the stipulation of the international doctrine whereby combat means which are disposable by nature, i.e. all types of mines, missiles, warheads or torpedoes, are excluded from considerations of autonomous weapon systems.[48] It should be noted that this exclusion may be difficult to accept from a practical perspective, as many advanced precision-guided missiles represent features of far-reaching autonomy with a degree higher than its basic levels. However, the final decision to launch a missile is still made in the first place by a human, and the weapon itself, despite the fact that it is unmanned and has extensive autonomous functions, still operates in the framework of a manned system.[49]

The special nature of naval warfare, with its strong dehumanization of targets, and the dominance of the air force as the leading branch of armed forces in the post-World War II era, meant that this category of armed forces was in particular need of devices that would facilitate a rapid response because of the emergence of long-range missile weapons. Therefore, all kinds of Close-In Weapons System (CIWS) were developed. An example of this is one of the best-known autonomous devices, which is the Aegis system installed on US Navy ships since the 1970s. (some specialists argue that this system is merely an advanced automated device, while M.N. Schmitt and J. Thurner classified it as an example of a semi-autonomous, supervised weapon).[50] Aegis operates in several modes, one of which is casualty mode, which can recognize threats and execute fully autonomous defensive maneuvers without human input.[51] In 1988, the system was involved in an incident involving the cruiser USS Vincennes, which mistakenly treated an Iranian Airbus A300 airliner as the radar signature of an Iranian F-14 Tomcat.

Autonomy is most commonly found in the context of ship or vehicle defense systems. The requirements of the modern battlefield involve an immediate response against an enemy attack, which is beyond human capabilities – the task of increasing the "survivability" of vehicles in the era of intelligent missiles can only be accomplished in this regard by sensors and a system permitting a response to external threats.[52] In aerial warfare, two projects should ultimately deserve the full attention of scientific circles. The first is the XB-47 autonomous aircraft project, undergoing operational testing, which has, among other things, conducted aerial refueling and landing on the deck of an aircraft carrier in autonomous mode. The second is the BAE Taranis concept, which exhibits similar characteristics.

48 See: P.J. Springer, *Military Robots and Drones: A Reference Handbook*, 2013, e-book.

49 P. Scharre, *Army of None: Autonomous Weapons and the Future of War*, New York 2018.

50 B. Kastan, *Autonomous Weapons Systems*…, p. 47; M.N. Schmitt, J. Thurner, *"Out of the Loop": Autonomous Weapon Systems and the Law of Armed Conflict*, "Harvard Security Law Journal" 2013, vol. 4, p. 236.

51 R. Crootof, *War Torts: Accountability for Autonomous Weapons*, "University of Pennsylvania Law Review" 2016, vol. 164, p. 1367.

52 J.M. Beard, *Autonomous Weapons and Human Responsibilities*, "Georgetown Journal of International Law" 2014, vol. 45, p. 631.

Both aircraft are considered to be the future of aviation development, while the fifth-generation aircraft, that is the Boeing F-35, is considered as the last aircraft with an operator on board. Yet, there is no information that both projects have the ability to independently select and attack targets.[53]

The Russo-Ukrainian war has further revised the approach to autonomous operation on the battlefield. On the one hand, unmanned aerial vehicles of considerable size (such as Bayraktar) have proven too easily detectable by the enemy's anti-aircraft defenses. On the other hand, the conflict has demonstrated the enormous potential of small-sized drones, especially loitering munitions, whose widespread use can breach anti-aircraft defenses or electronic warfare measures at modest manufacturing costs. The swarms tactics employing artificial intelligence seems to be the next direction for the development of unmanned aerial vehicles (whether in the form of aircraft or munitions).

2.2. Definition of autonomous operation

It is worth noting that from the terminological point of view, the phrase "autonomous system" or "unmanned autonomous system" may be subject to definitional confusion.[54] As already mentioned at the beginning, a system as a certain set of components, in the context of unmanned operation, refers to the entirety of the components comprising it – including not only the platform but also the operators or controllers. The reference to the above pattern in relation to autonomous systems may be problematic and in fact refers to ideal autonomy, which is currently a theoretical assumption. It seems more reasonable in this context to refer to the concept of an autonomous aircraft as a platform, but not a system.

As noted earlier, the concept of autonomy is not uniform and diverse levels of autonomy have been adopted while drawing up its definition. This is due to possible configurations where only a part of the system tasks can be delegated to a human operator and *vice versa*. One of the best-known divisions in this regard is the Autonomy Levels for Unmanned Systems (ALFUS) Framework, which distinguishes between remote-controlled (where operation is entirely dependent on the operator), semi-autonomous (where functions are delegated between the operator and the device) and fully autonomous (where the initiative is given entirely to

53 See more: P. Scharre, *Army of None*…

54 "Second, given that a machine or system in totality cannot be autonomous in a literal sense, the term 'autonomous system' is used with the unstated assumption that not all parts or functions of the system exhibit autonomous-like behavior. This creates scope for ambiguity, as any or all of potentially millions of system functions could exhibit autonomous-like behaviors" – Multinational Capability Development Campaign (MCDC) 2013-2014 Focus Area, *Role of Autonomous Systems in Gaining Operational Access*, Policy Guidance Autonomy in Defence Systems, Norfolk 2014, p. 9.

the device).[55] An alternative model was based on the mutual relationship between a machine (robot) and a human (the so-called HRI – Human Robot Interference). Classified as human in the loop (the autonomous system awaits the operator's approval), human on the loop (the operator has the right to veto the system's operation) and human out of the loop (the operator has no influence over the device's operation), this model encompasses insights into various degrees of human supervision over individual functions of the system.[56] This division has also been criticized for this, and some robotics experts have advocated using the concept of autonomous functions instead, due to the constant presence of the human factor, at least at the level of producing or programming a given system. In 2012, the US Department of Defense recommended a departure from the system indicated in ALFUS due to "excessive emphasis on the device instead of cooperation between the operator and the device, allowing the achievement of the assumed goals, as well as an attempt to divide it into different levels of intelligence".[57] It seems that underlying the above criticism is the belief that the human element will not be removed in the near future, even in the case of the most advanced autonomous weapon platforms.

2.3. Ideal autonomy of operation in aerial warfare

From a technical point of view, nevertheless, it is worth noting the possibility of a new category of autonomy, which is the emergence of the so-called level of ideal autonomy, which will in fact be a situation in which an autonomous device will be able to construct another autonomous device without any human input. From a purely theoretical point of view, such a possibility perfectly fits the definition of autonomy, which implies intellectual and cognitive freedom, acquiring certain anthropological traits.[58] In the legal context, this implies a necessity to start considering the potential legal capacity of devices endowed with advanced artificial

55 *Autonomy Levels for Unmanned Systems (ALFUS) Framework Volume I: Terminology Version 2.0*, 2008, pp. 22–23, https://www.nist.gov/system/files/documents/el/isd/ks/NIST-SP_1011-I-2-0.pdf (accessed: 5.01.2021).

56 P. Scharre, *Autonomous Weapons and Operational Risk*, Ethical Autonomy Project, February 2016, p. 9, https://s3.us-east-1.amazonaws.com/files.cnas.org/hero/documents/CNAS_Autonomous-weapons-operational-risk.pdf (accessed: 14.07/2025).

57 *Final Report of the Defense Science Board (DSB) Task Force on the Role of Autonomy in Department of Defense (DoD) Systems*, Washington 2011, p. 4.

58 "Again, the fact that the AWS is not a responsible agent for purposes of criminal law is irrelevant to determining whether the AWS should be viewed and interpreted with the combatant's stance. Moral agency for purposes of determining rights and responsibilities is one thing; treating the AWS as an enemy combatant is quite another" – M. Ohlin, *The Combatant's Stance: Autonomous Weapons on the Battlefield*, "International Law Studies" 2016, vol. 92, p. 20.

intelligence. In military terms, this will lead to the emergence, alongside conventional combatants, of entirely new platforms capable of conducting a whole range of activities, from mobility, reconnaissance to attacking other assets, people or platforms. As J.M. Petman rightly indicated, autonomous platforms that are merely an extension of the functions performed by conventional combatants do not pose a significant challenge to the *ius in bello* because of the element of direct control. However, once they become an equivalent entity in terms of capabilities on the battlefield, the currently applicable rules of *ius in bello* cease to be an adequate solution in this regard.[59]

A potential obstacle to the introduction of ideally autonomous platforms is the norm prohibiting the use of means and methods whose impact cannot be limited to military purposes in a combat zone. In this context, it is worth emphasizing the difference in the content of Article 51 para. 4 points a and b of AP I, where it was indicated that measures that cannot be controlled or whose effects cannot be limited to military purposes are prohibited during attacks. *Prima facie*, it seems that the above considerations cannot apply to autonomous platforms, which, like unmanned aerial vehicles, will certainly use exclusively precision-guided munitions.[60] However, it should be noted that in the case of fully autonomous platforms, decisions regarding target elimination are entirely left to the artificial intelligence of the device, without the necessity to be approved by a human operator. The outcome of the above-mentioned circumstance is a consent to the possibility of making an unpredictable decision, "the effects of which may not be controlled".[61] In fact, the *ratio* of Article 51 para. 4 points a and b of AP I, in a historical approach, included the deployment of ultimately primitive weapons (e.g. V-2 missiles), blind ones (German "Big Bertha" cannon used during World War I) or uncontrolled in time and space (biological or chemical weapons) by the combatant. In particular, the last element seems to be particularly relevant in the context of perfectly autonomous platforms, which, by definition, cannot be subject to external supervision. In fact, the position of such a platform becomes more similar to that of a combatant who is the addressee of the provision than the

59 J.M. Petman, *Autonomous Weapons Systems and International Humanitarian Law: 'Out of the Loop?'*, Helsinki 2017, p. 17.

60 "So, for example, an autonomous attack system might be procured to undertake the sort of bombardment missions traditionally undertaken using manned platforms" – B. Boothby, *How Will Weapons Review Address the Challenges Posed by New Technologies*, "Military Law and the Law of War Review" 2013, vol. 52, no. 1, p. 43.

61 "Use of such a weapon is clearly unacceptable. There is an expectation that the effects of weapons are sufficiently controlled and limited in space and time" – *Meaningful Human Control*, Presentation by Maya Brehm, Researcher, Geneva Academy of International Humanitarian Law and Human Rights (ADH), to the informal meeting of experts on lethal autonomous weapons systems of the Convention on Certain Conventional Weapons (CCW), Geneva, 14 April 2015.

object (method or means) which is regulated by the norm.[62] Against this background, a potential revolution in defining legal subjectivity emerges, which may be accompanied by the development of deep artificial intelligence, in addition to highlighting the inadequacy of the legal norms in force.[63] However, M. Waxman and K. Anderson disagree with the above argument, claiming that the illegality of armament *per se* must result "from the assumptions of its functioning", which makes it impossible to apply the provisions of the norm to LAWS (Lethal Autonomous Weapons Systems) and moreover, "uncontrollability" does not apply to the effects of autonomous devices.[64] Other authors also argue that it is incorrect to refer to Article 51 para. 4(c) of AP I in the discussion on the legality of LAWS, because the mere fact of artificial intelligence controlling a weapon does not imply that it will indiscriminately attack military objectives and civilian assets.[65]

The second obstacle to the functioning of fully autonomous platforms is the definition of a military aircraft, which assumes the presence of (Article 13 Hague Rules of Air Warfare) or at least control/supervision/programming by a crew subject to military discipline (Rule 1(x) of the 2009 HPCR Manual). The above rules still recognize the presence of a person responsible for programming an autonomous unmanned aerial vehicle necessary for the vehicle to qualify as a military aircraft. The consequence of eliminating the above premise is the inability of perfectly autonomous platforms to participate in air warfare and exercise the rights enjoyed by combatants.[66] The lack of this element is the same challenge *per se* for the law of air warfare and the scope of its application. Comments on perfectly autonomous platforms can also be addressed to systems with the highest degree of autonomy, where the actual role of the human operator is marginalized only to the placement of weapons, while in the long run it has no possibility of affecting the devices.

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62 G.E. Marchant, B. Allenby, R.C. Arkin, E.T. Barrett, J. Borenstein, L.M. Gaudet, O.F. Kittrie, P. Lin, G. Lucas, *The International Governance of Autonomous Military Robots*, "Science and Technology Law Review" 2011, vol. XII, p. 284.

63 "Thus, even if an autonomous weapon system is capable of making more accurate decisions about targeting and engagement and other crucial matters, its decisions still cannot be morally evaluated, making the international law of war beside the point" – R. Elias, *Facing the Brave New World of Killer Robots: Adapting the Development of Autonomous Weapons Systems into the Framework of International Law of War*, "Indonesian Journal of International and Comparative Law" 2016, vol. 3, p. 118.

64 "Although some might view an autonomous weapon system as «uncontrollable», its effects are not uncontrollable within the meaning of the legal provision" – K. Anderson, D. Reisner, M. Waxman, *Adapting the Law of Armed Conflict to Autonomous Weapon Systems*, "International Law Studies" 2014, vol. 90, pp. 399–401.

65 B. de Vries, *Individual Criminal Responsibility for Autonomous Weapons Systems in International Criminal Law*, Leiden 2023, p. 127; D. Mauri, *Autonomous Weapons Systems and the Protection of the Human Person: An International Law Analysis*, Northampton 2022, p. 133.

66 In the case of land-based systems, the above issue was pointed out by D. Akerson, *The Illegality of Offensive Lethal Autonomy*, [in:] D. Saxon (ed.), *International Humanitarian Law and the Changing Technology of War*, Leiden 2013, p. 89.

2.4. The legality of lethal autonomy

Currently, autonomy is more likely to function within the so-called Lethal Autonomous Weapons Systems (LAWS), which, unlike perfectly autonomous platforms, assume a certain degree of human control in terms of production, design or deployment. An important function of the above devices is to "independently identify and attack targets within the available autonomy".[67] According to the Swiss definition, LAWS are described as "weapons systems, capable of performing tasks covered by international humanitarian law, under which a human being is replaced as part of the targeting cycle".[68] The United States, in turn, questions the need for any definition of LAWS, including those drawn up as part of the activities in the working group, promoting the terms used under its own directive No. 3000.09.[69] In the context of the latter state, it was pointed out that "it is not the weapon that is obliged to make distinctions or estimations within the framework of the proportionality rule, but the human being".[70] However, it seems that the above statement may become obsolete in the context of the function of a weapon user being taken over by the autonomous operation mode. In this regard, the effects of the discussion that took place in April 2018, where it was decided to exclude from the discussion the issue of machines that may possess self-awareness and learning potential, should be approached with concern.[71]

It should be noted that, unlike unmanned aircraft, the unmanned operation of the platform itself is not considered a challenge from the perspective of *ius in bello* due to the performance of operations within a manned system in which the sole decision-making factor is exercised by the human being. In the case of combat autonomous systems, it should be noted that they will consist of a platform that

67 A different definition is proposed by the U.S. Department of Defense, which recognizes AWS (Autonomous Weapons Systems) as weapon systems that, once activated, can select and attack targets without the further involvement of a human operator. This term also includes supervised devices, the tasks of which can be cancelled – Department of Defense, Directive 3000.09, *Autonomy in Weapons Systems*, 2012, pp. 13–14. The phrase *LAR* (*Lethal Autonomous Robotics*) was used by the UN Special Rapporteur to describe "devices capable of selecting and engaging targets without further human intervention" – *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Christof Heyns, 26 April 2013, A/HRC/23/47, p. 38.

68 CCW/GGE.1/2017/WP.9, para. 29.

69 CCW/GGE.1/2017/WP.7, para. 6.

70 CCW/GGE.1/2017/WP.6, para. 11.

71 "Was felt that issues such as lethality, 'stop button', whether LAWS currently exist or not as well as the extent to which self-learning should be a characteristic could be left aside for a later discussion; agreement on each and every characteristic was not essential at the outset and the Group could proceed in a step-by-step manner when characterising the systems under consideration" – Chair's summary of the discussion on Agenda item 6(a) 9 and 10 April 2018 Agenda item 6(b) 11 April 2018 and 12 April 2018 Agenda item 6(c) 12 April 2018 Agenda item 6(d) 13 April 2018.

can take over most or ultimately all tasks carried out within the system by a human operator. This may cause some definitional complications, however, from the perspective of Article 36 AP I providing for the obligation to carry out a legal review at each stage of developing new weapons, means or methods of warfare, it seems that in each configuration LAWS will be subject to legal review, both as a weapon and a means of conducting warfare. On the other hand, however, as pointed out by N.E. Sharkey, states will strive to circumvent the conditions specified under Article 36 of AP I by demonstrating that a given autonomous platform is unarmed, while being fully prepared for its arming in the future.[72] Moreover, as D. Coupland pointed out, if LAWS are treated as a method of conducting warfare, it is not clear whether states are obliged to determine the legality of the new method of conducting warfare (due to the lack of the registered practice of states in this regard).[73]

In the context of air warfare, attention should be paid to the importance of delegating tasks due to the so-called critical and remaining functions. The ICRC used this term, distinguishing in a special way the issue of autonomy possessed by a given weapons system as within the scope of what is ultimately related to the identification, selection and decision to launch an attack.[74] This separation seems reasonable, because in actual fact the delegation of tasks directly related to the decision to carry out an attack which is conducted by artificial intelligence, instead of a human operator (as in the case of classic unmanned aerial vehicles), is the most important difference in relation to conventional weapons.[75]

Rule No. 9 of the HPCR Manual emphasized the need to implement legal weapons review specified under Article 36 of AP I during air warfare. The phrase "weapon system" in the light of the commentary to the Manual indicates that this concept is understood as all the components of the weapon – e.g. the platform and devices for controlling it – arguing that in fact a weapon system is a means within the meaning of the provisions of international humanitarian law (rule No. 1(t)).[76]

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72 N.E. Sharkey, *The Evitability of Autonomous Robot Warfare*, "International Review of the Red Cross" 2012, vol. 94, p. 797.

73 D. Copeland, *Legal Review of New Technology Weapons*, [in:] H. Nasu, R. McLaughlin (eds.), *New Technologies and the Law of Armed Conflict*, The Hague 2014, p. 48.

74 "Any weapon system with autonomy in its critical functions – that is, a weapon system that can select (search for, detect, identify, track or select) and attack (use force against, neutralize, damage or destroy) targets without human intervention" – ICRC, *Views of the ICRC on autonomous weapon Systems*, paper submitted to the Convention on Certain Conventional Weapons Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS), 11 April 2016, *Report of the ICRC Expert Meeting on 'Autonomous weapon systems: technical, military, legal and humanitarian aspects', 26–28 March 2014, Geneva*.

75 R. Geiss, *The International Law-Dimensions of Autonomous Weapons Systems*, 2015, p. 6, http://library.fes.de/pdf-files/id/ipa/11673.pdf (accessed: 5.01.2021).

76 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 31.

However, the practical application of the provision encounters significant difficulties resulting from the unspecified nature of the obligation (non-self-executive norm), as well as difficulties related to the decoding of the actual practice of states in the implementation of the above obligation, due to reasons of state secrecy and national security.[77] Moreover, Article 36 AP I imposes an obligation only to review a given weapon, means or method from a legal point of view, without determining the further consequences of the review. Collectively, Article 36 AP I requires analysis with regard to the treaty and customary law norms which contain prohibitions (e.g. Geneva Protocol of 1925 on Chemical Weapons), as well as general principles limiting the use of certain types of weapons, means of combat or methods resulting from the provisions of the Additional Protocol I or the rules of customary law based on it.[78]

The first element of the assessment does not seem to present much difficulty in the field of research and practice, and the expected specification of LAWS operations in the aerial version, which consists in its being a platform for carrying precision-guided missiles, is characteristic of conventional manned aircraft. Therefore, the assessment of legality in this respect will not concern the platform, but the means used by it. The second premise seems to be more complex, as it concerns any new weapon, method or measure that has not been disqualified due to prohibitions resulting from treaties prohibiting *per se*. Three norms play the primary role here: the prohibition of causing excessive injury and unnecessary suffering, the prohibition of using weapons capable of indiscriminate attack, and the prohibition of causing extensive damage to the natural environment.

As mentioned in earlier chapters, the premise of prohibiting excessive injury and unnecessary suffering is extremely difficult to capture and measure, especially in the light of the difficulties articulated by the ICJ on the basis of the advisory opinion on nuclear weapons of 1996. An even greater difficulty is posed by making reference to the properties possessed by LAWS, where the source of all doubts lies not in the weapon itself, but in exercising control over it.[79] In this respect, it is more justified to refer to a method of fighting which causes unnecessary suffering, which is defined under Article 35, para. 2 of AP I. Agreeing with T. Chengeta, it should be noted that in the case of LAWS the user of the weaponry carried by the platform will not be a human operator, but artificial intelligence.[80] Therefore, the

77 M. Sassòli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified*, "International Law Studies" 2014, vol. 90, p. 322.

78 ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare Measures to Implement Article 36 of Additional Protocol I of 1977*, Geneva 2006, pp. 11–16.

79 J.M. Beard, *Autonomous Weapons*…, p. 638.

80 T. Chengeta, *Are Autonomous Weapon Systems the Subject of Article 36 of Additional Protocol I to the Geneva Conventions?*, "University of California Davis Journal of International Law and Policy" 2016–2017, vol. 23, p. 89.

prohibition of unnecessary suffering is more focused on the use of weapons that can be legal in a way "going beyond the legal object of conducting warfare", which is "only the weakening of the enemy's armed forces".[81] These considerations essentially lead to reflections upon the possibility of artificial intelligence recognizing a much larger context than target selection and execution of the attack (as well as the form of its implementation), which prevents converting a legal tool into a method going beyond the premise listed in Article 35, para. 2 of AP I. This is a completely new perspective in the discussion on the content of the premise prohibiting unnecessary suffering, which in principle was only related to the issue of the use of certain types of weapons – nuclear, biological or incendiary ones. The focus of the discourse on the study of international law solely on the aspects of the means of combat and the actual role of the platform as a carrier of missiles ignores the possibility of using a legal means of combat in an illegal way by a platform user who is not human.[82] In this respect, the statements of B. Kastan that in the context of the use of LAWS "the premise of humanitarianism raises the least doubts" may be surprising.[83] While the use of overwhelming force alone in order to eliminate a means of combat (as previously indicated in the context of the proportionality rule, the use of heavy artillery to kill one combatant) does not display features of causing excessive injury and unnecessary suffering, it is forbidden, for example, to use small arms to maim an opponent to an extent greater than is

81 W.H. Boothby, *Dehumanization: Is there a Legal Problem under Article 36?*, [in:] W. Heintschel von Heinegg, R. Frau, T. Singer (eds.), *Dehumanization of Warfare: Legal Implications of New Technologies*, Cham 2018, pp. 35–36.

82 "Rather, this Comment argues, it is the munitions that are attached to the platform – as well as how those munitions are utilized – that will determine the type and amount of suffering that an attack inflicts" – B. Thomas, *Autonomous Weapon Systems: The Anatomy of Autonomy and the Legality of Lethality*, "Houston Journal of International Law" 2015, vol. 37, p. 253. "Such a warhead would unnecessarily complicate medical treatment and would consequently be unlawful. This rule only presents a problem for an autonomous system if the specific warheads or weapons installed on the system would violate the rule. The fact that the system autonomously decides to engage a target does not itself affect or violate the prohibition on unnecessary suffering or superfluous injury" – J.S. Thurnher, *The Law that Applies to Autonomous Weapons Systems*, "ASIL Insight" 2013, vol. 17. "Perhaps this is because autonomy is unlikely to present unnecessary suffering and superfluous injury issues since the rule addresses a weapon system's effect on the targeted individual, not the manner of engagement (autonomous). Nevertheless, an autonomous system could be used as a platform for a weapon that would violate the prohibition, such as a bomb containing fragments that are designed to be difficult to locate during the treatment of wounded combatants" – M.N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, "Harvard National Security Journal Features" 2013, vol. 2, p. 9.

83 "Of course, they may not be used in a way to cause unnecessary suffering. For instance, they may not be equipped with fragmentation weapons whose fragments are not detectable by x-ray. Absent some addition like impermissible fragmentation weapons, however, the principle of humanity, ironically, may be the least problematic LOAC principle for AWSs" – B. Kastan, *Autonomous Weapons Systems*…, p. 62.

necessary to eliminate them from further combat.[84] Such a nature significantly increases the requirements imposed on the artificial intelligence environment. In addition, it creates specific operational problems – the premise of not causing excessive injury and unnecessary suffering is addressed essentially in relation to combatants, i.e. legitimate military objectives.[85] On the other hand, it should be noted that in air warfare, potential use of legal weapons (which should be emphasized) in a manner that may violate the provisions of Article 35, para. 2 of AP I is unlikely, due to the significant and overwhelming power of precision weapons and bombs of significant strength.

The second element that raises doubts in the context of autonomous platforms is the issue of the distinction principle and the capacity of weapons with artificial intelligence to respect it. It should be noted that the cognitive ability of platform sensors may be varied in this regard. There already exist categories of artillery shells that have the ability to track the so-called thermal signature of armored vehicles (e.g. Excalibur or SMArt). In this regard, recognition of objects with a simple and complex nature should be distinguished. In the case of targets which are inherently military in nature, this situation seems technically feasible, taking into account the technologies used in the case of precision-guided missiles.[86] Significant complications occur during asymmetric conflicts, especially when it is necessary to distinguish civilians from persons directly involved in military operations. Fundamental difficulties in this respect exclude the possibility of offensive operations carried out by LAWS in urbanized areas, where the number of variables that must be adopted, analyzed and assessed by the system creates an extremely high programming and cognitive standard.[87] In addition, the classification of military objectives that are not purely classical in nature, such as dual-use installations is a serious challenge.[88]

The extremely subjective estimation taking place in connection with the so-called proportionality rule is still more difficult for artificial intelligence to process.[89] This would require artificial intelligence to achieve a contextual understanding of

84 S. Harris, *Autonomous Weapons and International Humanitarian Law or Killer Robots are Here: Get Used to It*, "Temple International and Comparative Law Journal" 2016, vol. 30, p. 83.

85 E. Barak, *Deadly Metal Rain: The Legality of Flechette Weapons in International Law: A Reappraisal Following Israel's Use of Flechettes in the Gaza Strip (2001–2009)*, Leiden 2011, p. 136.

86 "The ability of an autonomous weapon system to comply with the above rules will depend on its recognition technology and the environment in which it is used. Certain objects (tanks or combat aircraft) will consistently meet the definition of a military objective" – Geneva Academy of International Humanitarian Law and Human Rights, *Autonomous Weapon Systems under International Law*, Geneva 2014, p. 14.

87 B. Thomas, *Autonomous Weapons Systems*…, p. 263.

88 M. Wagner, *Autonomy*…, p. 112.

89 T. Chengeta, *Measuring Autonomous Weapon Systems against International Humanitarian Law Rules*, "Journal of Law and Cyber Warfare" 2016, vol. 5, pp. 119–120.

the battlefield.[90] However, some specialists argue that various algorithms are already used in the so-called collateral damage assessments (CDA) during conventional military operations, which suggests a kind of automation in the context of calculating potential losses among civilians.[91] Marco Sassòli believes that a more challenging requirement for artificial intelligence will be not only to determine the extent of excessive losses among civilians but also to determine the value of a military advantage correctly.[92] A similar stance is expressed by J. Thurnher.[93]

Many comments emphasize that, from the perspective of Article 57 of AP I and precautions, LAWS can be extremely useful for carrying out tasks that pose too significant a threat compared to manned weapon systems. For example, in the events related to the NATO campaign in Serbia, in which the threat from Serbian anti-aircraft systems made it impossible to operate at low altitudes, the presence of airborne LAWS would have helped eliminate the factor of having to protect one's own aircrew. Sassòli also believes that if the level of civilian protection increased and LAWS operated more effectively in this respect than a manned aircraft, a given party to an armed conflict would be obliged to use it.[94] The commentary to the 2008 HPCR Manual stated that autonomous aircraft have the authority to exercise the rights characteristic of military aircraft, provided that they maintain the above status. The commentary defined autonomous operation as the ability of an unmanned aircraft to make decisions about an attack based on sensors and internal data. In this regard, the system must be able to comply with the principle of distinction in both material and personal contexts.[95]

It is worth noting, however, that in some environments, there are no doubts regarding the content of Article 35 para. of AP I and Article 51 paras. 4 and 5 of AP.[96]

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90 "The ability of an autonomous weapon system to apply force proportionately will ultimately depend on the armaments with which it is equipped, as well as the capabilities allowed by its programming and design. Because proportionality is concerned with preventing excessive collateral damage, a factor which itself depends greatly on context, human judgment is likely to be an irreplaceable requirement, at least until technology develops immensely" – B. Thomas, *Autonomous Weapons Systems*…, p. 269.

91 See: *Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM)*, 2009, https://www.aclu.org/files/dronefoia/dod/drone_dod_ACLU_DRONES_JOINT_STAFF_SLIDES_1-47.pdf (accessed: 4.01.2021); M.N. Schmitt, J. Thurner, *"Out of the Loop"*…, p. 254.

92 M. Sassòli, *Autonomous Weapons*…, p. 331 ff.

93 J.S. Thurnher, *Examining Autonomous Weapons Systems from a Law of Armed Conflict Perspective*, [in:] H. Nasu, R. McLaughlin (eds.), *New Technologies and the Law of Armed Conflict*, The Hague 2014, pp. 221–222.

94 M. Sassòli, *Autonomous Weapons*…, p. 320.

95 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 106.

96 Some authors argue that conditions for the exclusive presence of military objectives rarely exist in practice; see: J. Foy, *Autonomous Weapons Systems: Taking the Human out of International Humanitarian Law*, "Dalhousie Journal of Legal Studies" 2014, vol. 23, p. 57. "The civilian objects that could, on the ocean, be mistaken for an incoming missile are limited (but

An example of the above is, for example, naval warfare. The Aegis System ultimately only responds to threats associated with a missile attack, so the target of its operation is, of course, a dehumanized military target. It may be similar during air warfare, especially if the target of the attack is another unmanned platform. Titus Hattan points out that appropriate LAWS programming may also allow them to make a simple distinction, pointing to the example of an autonomous platform that, operating in airspace, will be able to recognize only enemy military aircraft, excluding passenger aircraft.[97] Consequently, some problematic aspects of using LAWS can be solved by creating directives and guidelines explicitly limiting the operational scope of autonomous devices in terms of so-called critical functions.[98]

2.5. Surrender to an autonomous unmanned military aircraft

A reflection of the distinction principle is, among other things, the recognition of the status of persons *hors de combat*, as well as the issue of the obligation to recognize surrender. In accordance with Article 41 of AP I, a person excluded from the fighting due to illness, wounds, or disability, a person already detained or who categorically expresses the will to surrender cannot be made the object of the attack. In the context of air warfare, it is worth noting that, based on Article 62 of the Hague Rules of Air Warfare, all unregulated matters were to be examined in accordance with the provisions applicable in land warfare. The issue of surrender was regulated in the same scope. In principle, the practice of surrender in air warfare has always been problematic due to the objective difficulties related to presenting it in an understandable and unambiguous way for the combatant. Lowering the altitude or releasing the landing gear may, in some circumstances, be treated as a *ruse de guerre*.[99] Therefore, as noted in the HPCR Manual of 2009, while the general rules remain entirely in force in the context of air warfare (including the obligation to recognize surrender if it is unambiguous), a detailed practice has not been developed to this extent. In the light of the commentary to the Manual, the manifestation of the intention to surrender is, first and foremost,

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do occur, as the case of the USS Vincennes illustrates, see below). To be sure, if for example an autonomous drone is only programmed to fire at tanks, then the scope for mistakenly targeting civilian objects is significantly reduced (albeit not eliminated, for it may be impossible for a robot to tell apart for example a tank that was a museum exhibit, or a tank that had been abandoned in a civilian area). The range of circumstances in which targeting only weapons systems could sufficiently avoid the risk of mistaken targeting may, however, be limited" – J. Petman, *Autonomous Weapons Systems*…, p. 31.

97 T. Hattan, *Lethal Autonomous Robots: Are They Legal under International Human Rights and Humanitarian Law?*, "Nebraska Law Review" 2014, vol. 93, p. 1048.

98 M.N. Schmitt, *Autonomous Weapons Systems*…, pp. 13–14.

99 Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR*…, p. 21.

the use of open communication channels. With reference to the principle defined in Article 41 of AP I, the rule of Article 15(b) was introduced. Upon closer examination, experts pointed out several important details about the conditions for conducting combat air operations. Firstly, regarding the clear intention to surrender, it was pointed out that in many cases, the crew of a military aircraft attacking with long-range weapons cannot recognize the attacked targe's intention to surrender (e.g., a group of combatants). In such cases, the intention should be indicated in a way that can be received by the aircraft.[100] In this regard, the possibility of raising a white flag or laying down arms and making a gesture of surrender was mentioned. Secondly, in air combat, it is difficult to determine the status of a person incapable of conducting armed combat because a military aircraft is the target of a military attack by nature until clear premises reveal that the object of the attack is *hors de combat*.[101]

The doubts, however, revealed certain facts related to the inability of a military aircraft to accept an act of surrender and detain combatants – especially in a situation in which its own land forces were not able to take over the surrendering individuals. In this way, there was a danger that, in fact, such an act may be treacherous and, as a result, not relevant to the combatant. Protection of combatants who were unable or did not intend to conduct armed combat also required that a given person did not attempt to escape. In addition, the lack of intention to conduct military operations cannot be equated with the incapability of effective defense against an air attack – only a clear intention to surrender can be the basis for demanding the recognition of such an act as binding under international law.[102]

Nevertheless, the remark mentioned above does not imply that surrendering to an unmanned vehicle is impossible in all circumstances, especially if the unmanned vehicle's actions are considered part of the process of the combatant surrendering to the authorities of the opposing party. During the Russo-Ukrainian conflict, several scenes may be encountered in which an unmanned (but not autonomous) vehicle was part of the process of capturing a Russian soldier.[103] The legal consequence of the drone's involvement was, in these specific conditions, activation of the provisions of Article 42 of AP I and recognition of the soldier as *hors de combat*.[104] It should, therefore, be pointed out that the possibility of surrendering to aircraft (both manned and unmanned) has a strongly contextual dimension, as there might be situations in which such an act cannot be accepted

100 *Ibidem*, p. 101.
101 *Ibidem*, p. 102.
102 *Ibidem*, p. 103.
103 S. Kalin, I. Coles, *The Russian Soldier Who Surrendered to a Ukrainian Drone*, 2023, https://www.wsj.com/articles/russia-soldier-surrender-ukraine-drone-3860ab6a (accessed: 14.06.2025).
104 W.C. Biggerstaff, C. Chiaramonte, *Ukraine Symposium – The Legal and Practical Challenges of Surrendering to Drones*, 2023, https://lieber.westpoint.edu/legal-practical-challenges-surrender-drones/ (accessed: 14.06.2025).

(e.g., in the case of conducting air missions deep behind enemy lines), but there might also be cases in which there is a practical possibility of accepting an act of surrender due to the proximity of one's own ground troops.

The above circumstances seem even more complex than ground war. Robert Sparrow rightly demonstrated the fundamental lack of capability on the part of artificial intelligence managing an autonomous platform to recognize and acknowledge an act of surrender.[105] The requirements of recognizing a strongly contextual situation and distinguishing simulation from an actual intention impose highly stringent requirements.[106] One of the proposals – albeit unrealistic, in the author's opinion – is an attempt to limit the LAWS operating environment so that it may encounter only non-human targets.[107] The conditions governing air warfare were mentioned as examples in this matter.[108] However, it should be noted that in modern air warfare, there are more ways than ever to notify the intention to surrender on account of various possibilities of data transmission.

2.6. Treaty solution regarding LAWS

Currently, there is no treaty regulating the deployment of LAWS, which seems quite dangerous from a positivist perspective. In 2014, during informal work held at the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 1980, discussions began on the future regulation of the status of autonomous combat devices. The discussion started with the 2013 report of the UN Special Rapporteur, which called upon the Member States to consider introducing a temporary moratorium on autonomous weapons development pending the adoption of a treaty-based solution to the LAWS problem.[109] Similar opinions began to be expressed by non-governmental organizations, which in 2013 established the so-called Campaign to Stop Killer Robots. A series of expert

105 For a similar view, see: T. Chengeta, *Measuring*…, p. 133 ff.

106 "The possibility of perfidious indications of surrender means that not only must robots be capable of recognizing the conventional indicators of surrender but they also must be capable of distinguishing between real and feigned intentions. There are circumstances in which it is legitimate to attack enemy forces who are acting in a way that would ordinarily clearly indicate a desire to surrender – when it is reasonable to conclude that, in fact, their intent is perfidious. However, the task of assessing whether a signaled intention is likely to be perfidious or not is significantly more difficult than the task of recognizing the signal in the first place" – R. Sparrow, *Twenty Seconds to Comply: Autonomous Weapons Systems and the Recognition of Surrender*, "International Law Studies" 2015, vol. 91, p. 708.

107 *Ibidem*, p. 713.

108 *Ibidem*, p. 717.

109 UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, 9 April 2013, A/HRC/23/47.

meetings took place from 2013 to 2016, which led to the establishment of a group of government experts at the Fifth Review Conference of the CCW Convention with a mandate to examine technical and legal issues related to the possibility of equipping the armed forces of the Member States with LAWS.[110]

The first meeting of a group of government experts appointed to the Fifth Review Conference of the CCW Convention took place from November 13 to 17, 2017. The ICRC stressed the need for "the states parties to the CCW Convention to work on restrictions on the autonomy of combat systems".[111] Switzerland pointed out that at the current stage of technology and robotics development, it is not possible for LAWS to obtain the ability to comply with the *ius in bello* rules without a human factor in the targeting process.[112]

In April 2018, further discussion was based on four points: 1) description of LAWS for the purposes of joint discussion within the CCW Convention format; 2) the scope of human interference in the process of designing, equipping, deploying and targeting LAWS; 3) presentation of current achievements in LAWS technology. Point 4 of the proceedings added an element of mystery, stating that it was "about considering the possibility of adopting solutions related to humanitarian threats and security breaches within new technologies under the mandate of the CCW Convention".[113] Since 2017, a noticeable trend has been observed in the committee's work, essentially striving to develop a political solution that would emphasize the importance of the already existing network of international humanitarian law regarding LAWS. In fact, this suggests an evident lack of political will among the participants in the CCW Convention to regulate the matter of autonomous platforms in the form of positive law.

The United Kingdom pointed out that "the *ius in bello* rules will always require a basic form of control" and "they will work better in the area of regulating LAWS than a possible and premature prohibition of their deployment"[114]. This

110 M. Piątkowski, *Postulat zakazu rozpowszechniania autonomicznych systemów bojowych w konfliktach zbrojnych – perspektywa międzynarodowego prawa humanitarnego* [*Prohibition of proliferation of the LAWS in armed conflicts – the International Humanitarian Law Perspective*], "Wojskowy Przegląd Prawniczy" 2017, no. 1, pp. 72–73.

111 Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts on Lethal Autonomous Weapons Systems, 13–17 November 2017, Geneva, *Statement of the International Committee of the Red Cross (ICRC)*.

112 "Accordingly, given the current state of robotics and artificial intelligence, it is difficult today to conceive of an autonomous weapon system that would be capable of reliably operating in full compliance with all the obligations arising from existing IHL without any human control in the use of force, notably in the targeting cycle" – *A "compliance-based" approach to Autonomous Weapon Systems Working Paper submitted by Switzerland*, CCW/GGE.1/2017/WP.9.

113 CCW/GGE.1/2018/1.

114 "The UK believes that, whatever the environmental complexity that the system operates within, a minimum level of human control is always required to fulfil the principles of

state also argued that "at the moment, there exist no practical examples of LAWS – only highly automated weapons".[115] Switzerland postulated that in the form of recommendations, practical guidelines should be introduced to assess the human impact on LAWS technology at the national level.[116] FRG, France and Italy opted for a political solution regarding LAWS.[117] At the same time, FRG pointed out that "the final decision about the death or life of an individual must always be made by a human being".[118] The EU also made a similar statement.[119] On the other hand, the Netherlands perceives the threat posed by the possibility of further developing ideal autonomous platforms but opposes a possible

International Humanitarian Law (IHL). The technology will continue to change rapidly, but this minimum level of control will not; therefore the UK believes understanding this is the key to advancing the LAWS debate" – UK Statement for discussion on the human element in the use of lethal force and aspects of human-machine interaction in the development, deployment and use of emerging technologies in the area of Lethal Autonomous Weapons Systems, Meeting of the Group of Government Experts on Lethal Autonomous Weapons Systems, Wednesday 11 April 2018. "IHL is a more agile metric for assessing all emerging lethal capabilities on a case-by-case basis than the pre-emptive instrument of a ban. Trying to impose a legal prohibition without understanding what is being regulated will lead to such an instrument becoming redundant, requiring revision, and risks causing unintended consequences on civilian developments" – UK Statement for the General Exchange of Views, Meeting of the Group of Government Experts on Lethal Autonomous Weapons Systems, Monday 9 April 2018.

115 *UK Statement for discussion on characterisation of the systems under consideration*, Meeting of the Group of Government Experts on Lethal Autonomous Weapons Systems, Tuesday 10 April 2018.

116 R. Wollenmann, *Agenda item 6 b) Further consideration of the human element in the use of lethal force; aspects of human-machine interaction in the development, deployment and use of emerging technologies in the area of lethal autonomous weapons systems*, Geneva 2018, https://web.archive.org/web/20191025012451/https://www.unog.ch/80256EDD006B8954/(httpAssets)/37E72F1F348D2A84C1258272005837F9/$file/2018_LAWS6b_Switzerland.pdf (accessed: 14.06.2025).

117 "There is no need to modify or adapt IHL with regard to autonomous weapon systems. In this respect we refer to our comprehensive submission on legal aspects of autonomous weapon systems submitted to the 2014 CCW Expert Meeting on LAWS" – Statement delivered by Germany on Security Dimension and Options, Meeting of the Group of Governmental Experts on Lethal Autonomous Weapons Systems Geneva, 9 to 13 April 2018; Statement by France and Germany; CCW Group of Governmental Experts on Lethal Autonomous Weapons Systems Geneva, 9–13 April 2018; Statement by Ambassador Gianfranco Incarnato Permanent Representative of Italy to the Conference on Disarmament General exchange of views.

118 *Statement delivered by Germany on Working Definition of LAWS/"Definition of Systems under Consideration"*.

119 "Without prejudice to its outcome, the work in the GGE could pave the way for identifying possible ways forward. EU Member States have tabled proposals in this regard. We are looking forward to further elaborating on appropriate policy options" – EU Statement Lethal Autonomous Weapons Systems (LAWS) Group of Governmental Experts Convention on Certain Conventional Weapons Geneva, April 9–13, 2018.

moratorium, considering the prohibition "troublesome" to implement.[120] The state supported the concept of significant human control but without adopting a treaty-based regulation in this regard.[121] Recognizing the adequacy of the current regulation, the Russian Federation pointed out the need to consider national interests in developing LAWS.[122] Australia, recognizing that the deployment of LAWS on the battlefield is a challenge for *ius in bello* regulations, simultaneously pointed out that the prohibition of their use was "premature".[123] The United States emphasized "the potential of LAWS to adhere to the basic principles of international humanitarian law" and recognized the creation of a code of "good practice"[124] as advisable. A different vision of LAWS was presented by China, which was the first state to point out the possibility of achieving "autonomy beyond human imagination, including making unpredictable decisions in an open environment" by combat platforms.[125] The need to adopt a definition of LAWS was also raised, and it was also pointed out that solutions of a political nature implemented at the national level are burdened with apparent weaknesses.[126] Other states in Africa, the Middle East and South America emphasize the need to adopt a "legally binding solution".[127] The need to adopt a "legally binding solution" was also noted by non-governmental organizations.[128] The ICRC

120 "The Netherlands outright rejects the development and subsequent deployment of such fully autonomous weapon systems, but does currently not support a moratorium on the development of fully autonomous weapon systems" – CCW/GGE.1/2017/WP.2.

121 "The concept of meaningful human control does not require immediate new or additional legislation, as the concept should be regarded as a standard deriving from existing legislation and practices (such as the targeting process)" – CCW/GGE.1/2017/WP.2.

122 "The Russian Federation believes that the GGE could conduct a thorough review of existing provisions of international law, including international humanitarian law and human rights law that could potentially be applied to LAWS, and express its opinion as to the adequacy of such provisions to address the existing concerns" – CCW/GGE.1/2017/WP.8.

123 Group of Governmental Experts on Lethal Autonomous Weapons Systems, November 13–17, 2017, *Australian Statement – General Exchange of Views.*

124 Group of Governmental Experts on Lethal Autonomous Weapons Systems, November 13–17, 2016, *United States Opening Statement.*

125 "Meaning that through interaction with the environment the device can learn autonomously, expand its functions and capabilities in a way exceeding human expectations" – CCW/GGE.1/2018/WP.7.

126 CCW/GGE.1/2018/WP.7, para. 5.

127 "This week, we again observed a large majority of States, including my own, express the strong desire to pursue a legally binding instrument stipulating prohibitions and regulations on LAWS. This should clearly be listed as the first opti" – Statement by Ambassador Farukh Amil Permanent Representative of Pakistan, first Session of the CCW Group of Governmental Experts on Lethal Autonomous Weapons Systems, April 9–13, 2018; CCW/GGE.1/2018/WP.1.

128 "The negotiation and adoption of a legally binding instrument that preemptively prohibits weapons lacking such control is a logical and effective way to achieve that goal" – Human Rights Watch Statement on Meaningful Human Control in Lethal Autonomous Weapons

argued that "a machine will never be able to apply international humanitarian law, and responsibility for decisions related to the use of force cannot be attributed to a machine, computer or artificial intelligence".[129]

In addition to the above considerations, invoking the Martens Clause emerges as an element of the "moral assessment on the phenomenon of LAWS by the international community".[130] According to the Swiss delegation, the lack of treaty regulation does not negate the evaluation of state obligations in the light of the preamble to the Hague Convention of 1899.[131] The representative of the Republic of Poland at the CCW Convention, in turn, stated that "the clause is a moral compass" establishing the border line in discussions on the scope of autonomy in combat systems.[132] The ICRC also admitted that there were doubts regarding the normative value of the preamble as a "political statement".[133]

The outcome of the discussion in the above cycle was the emergence of three camps: the "supporters" of LAWS technology development while maintaining the existing international humanitarian law framework, the "compromise" group advocating the adoption of a "meaningful human control standard," and the "opponents" of LAWS opting for the adoption of a dedicated treaty-based prohibition of this type of weaponry. There is no doubt that the dividing line is determined by the technological and military capabilities of the states involved.

Systems, Delivered by Bonnie Docherty Human Rights Watch, April 11, 2018, Group of Governmental Experts on Lethal Autonomous Weapons Systems.

129 Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts on Lethal Autonomous Weapons Systems, April 9–13, 2018, *Geneva Statement of the International Committee of the Red Cross (ICRC)*.

130 N. Davison, *A legal perspective: Autonomous weapon systems under international humanitarian law*, "UNODA Occasional Papers", no. 30, pp. 8–9; AI and Lethal Autonomous Weapons Systems Remarks delivered at the meeting of the Group of Governmental Experts on Lethal Autonomous Weapons Systems, Geneva, November 13, 2017; N. Mickevičiūtė, *Lessons from the Past for Weapons of the Future*, "International Comparative Jurisprudence" 2016, vol. 2, p. 103.

131 "Accordingly, not everything that is not explicitly prohibited can be said to be legal if it would run counter the principles put forward in the Martens clause" – Informal meeting of experts on lethal autonomous weapons systems (LAWS) Geneva, April 11–15, 2016, *Towards a "compliance-based" approach to LAWS Informal Working Paper* submitted by Switzerland, March 30, 2016, para. 21.

132 "In the review process states should consider the weapon in the light of the Martens Clause and examine whether the weapon, means or method of warfare is of nature that contravenes the principle of humanity or the dictates of public conscience. This principle provides moral guidance to our discussion on setting limits on autonomy in weapon systems" – CCW/GGE.1/2018/WP.3.

133 "There is debate over whether the Martens Clause constitutes a legally-binding yardstick against which the lawfulness of a weapon must be measured, or rather an ethical guideline" – CCW/GGE.1/2018/WP.5, para. 9.

2.7. "Meaningful human control"

The term "meaningful human control" has gained significant popularity, especially among non-governmental organizations, as a proposed principle aimed at restricting the deployment of autonomous platforms on battlefields. The authorship of the concept should be attributed to specialists gathered in the so-called International Committee for Robots Arms Control. Noel E. Sharkey outlined acceptable and unacceptable levels of human control over autonomous platforms, asserting that its operator must: 1) have full awareness of the target and the ability to respond in case of changes in legal parameters, 2) possess effective influence and sufficient amount of time to make decisions, 3) be guaranteed the ability to halt the platform at any stage of the operation.[134] CNAS (Center for New American Studies) argues that the information regarding the target to be attacked should be precise enough to allow a comprehensive legal assessment, and the operator's role cannot consist merely in "simple approval of orders for the machine".[135] Reports from NGOs indicated that in the near future autonomous systems may make unpredictable choices, operating in open environments. Concerns were raised about low trust levels between operators and platforms due to technological shortcomings. The organization Article 36.org emphasizes the need for greater transparency and a thorough understanding of how these technologies function.[136] In the context of meaningful human control, obtaining information regarding the platform's operational limitations in terms of the operating environment constraints and other limitations that might prevent task execution is hugely important, which is particularly raised by the ICRC.[137] A common thread in all these discussions is the general belief that reducing the role of human operators

134 N.E. Sharkey, *Guidelines for the human control of weapons systems*, 2018, p. 4, https://www.icrac.net/wp-content/uploads/2018/04/Sharkey_Guideline-for-the-human-control-of-weapons-systems_ICRAC-WP3_GGE-April-2018.pdf (accessed: 14.06.2025).

135 "1. Human operators are making informed, conscious decisions about the use of weapons. 2. Human operators have sufficient information to ensure the lawfulness of the action they are taking, given what they know about the target, the weapon, and the context for action. 3. The weapon is designed and tested, and human operators are properly trained, to ensure effective control over the use of the weapon" – M. Horowitz, P. Scharre, *Meaningful Human Control in Weapons Systems: A Primer*, "Center for New American Studies Working Paper" 2015, p. 14, https://www.files.ethz.ch/isn/189786/Ethical_Autonomy_Working_Paper_031315.pdf (accessed: 14.06.2025).

136 Background paper to comments prepared by Richard Moyes, Managing Partner, Article 36, for the Convention on Certain Conventional Weapons (CCW) Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS) Geneva, *Key elements of meaningful human control*, April 11–15, 2016.

137 Convention on Certain Conventional Weapons (CCW) Group of Governmental Experts on Lethal Autonomous Weapons Systems, April 9–13, 2018, Geneva, *Statement of the International Committee of the Red Cross (ICRC)*.

to passive overseers with a veto right limited in time is unacceptable.[138] Artificial intelligence will never be able to grasp the meaning of an act of armed violence.[139] Human decision-makers should retain control over functions related to attacking other targets, with autonomous systems serving to assist in the decision-making process rather than replacing human judgement.[140]

However, some suggest that the concept of meaningful human control should be approached with caution. Keith Anderson and Matthew Waxman argue that this term is deliberately vague, and defining a precise standard in this respect may prove significantly difficult. Furthermore, they suggest that the concept may stem from a misunderstanding of the principle of humanitarianism, whose core is not about maintaining human control at every phase of military operations but rather ensuring that combat is conducted with fundamental humane regard for the adversary.[141] It is also difficult to determine the role of the concept of meaningful human control within international humanitarian law – K. Neslage believes that the term has no basis within the normative framework of *ius in bello*, which makes it a completely novel legal concept.[142] On the other hand, R. Crootof considers the lack of clarification of the above concept to be an advantage, arguing that existing discussions clearly outline what level of control is considered insufficient (as demonstrated by P. Schaare and M. Horowitz, as well as N.E. Sharkey in their works).[143]

It should be noted that in modern air warfare, control over the weaponry of a manned aircraft is executed in a multi-phase mode and implemented at various levels. First of all, a means of combat is selected, as part of the military operation plan (the so-called OPLAN). Wiesław Marud uses the term "military targeting" here, which entails selecting objectives and actions based on the requirements set by commanders and their subordinate forces. More detailed in this respect is the so-called air targeting, i.e. concretization of selected actions concerning air

138 F. Santoni De Sio, J. van den Hoven, *Meaningful Human Control over Autonomous Systems: A Philosophical Account*, 2018, p. 4, https://www.frontiersin.org/articles/10.3389/frobt.2018.00015/full (accessed: 4.01.2021); G. Lucas, *Legal and Ethical Precepts Governing Emerging Military Technologies: Research and Use*, "Utah Law Review" 2013, vol. 5, p. 1279.

139 P. Asaro, *Ius nascendi. Robotic Weapons and the Martens Clause*, [in:] R. Calo, A.M. Froomkin, I. Kerr (eds.), *Robot Law*, Northampton 2016, p. 385.

140 T. Chengeta, *Defining the Emerging Notion of 'Meaningful Human Control' in Autonomous Weapon Systems (AWS)*, "International Law and Politics" 2016, vol. 49, p. 44.

141 K. Anderson, M. Waxman, *Debating Autonomous Weapon Systems, Their Ethics and Their Regulation under International Law*, [in:] R. Brownsword, E. Scotford, K. Yeung (eds.), *The Oxford Handbook of Law, Regulation and Technology*, Oxford 2017, pp. 1113–1114.

142 K. Neslage, *Does "Meaningful Human Control" Have Potential for the Regulation of Autonomous Weapon Systems?*, "University of Miami National Law Security and Armed Conflict Law Review" 2015–2016, vol. VI, p. 171.

143 R. Crootof, *A Meaningful Floor for "Meaningful Human Control"*, "Temple International and Comparative Law Journal" 2017, vol. 30, pp. 62–63.

forces.[144] Beyond strategic-level control, there also appears a tactical assessment which includes classifying the nature of the target, selecting appropriate means of destruction, and considering legal aspects. The third level involves the decision to approve or reject the plan.[145] From the tactical level, operations transition into the direct execution phase, where the aircraft crew prime the weapon by programming it correctly (through onboard systems). The final control phase involves the operator's decision whether to launch it or not and ensures the possibility to prevent the missile from striking the target by its deactivation. Currently, many precision-guided means of destruction employ a variety of guidance systems (semi-automatic or automatic) and homing mechanisms. In the course of infrared homing or radar homing, the missile generally follows a thermal or radar signature. In contrast to optoelectronic guidance, the crew no longer have control over the selection of the target, except for the potential self-destruction of the missile. In some cases, weapons can be guided using celestial navigation data or laser targeting controlled from the ground.[146] As a consequence, it remains evident that an overwhelming majority of critical decisions in modern warfare still depend on human operators. This also applies to pilots of unmanned aerial vehicles. The introduction of autonomous platforms to the air force is a breakthrough in this respect, for it introduces autonomous operation as the causative factor of the targeting process, and is not (the way it has taken place to date) only an executive part (there occurs autonomous operation, but only after a human operator decides to approve the target and launch the missile). Mark Rooda argues that LAWS should function similarly to precision-guided munitions, i.e. they should be subject to strict strategic and tactical procedures.[147]

As indicated earlier, autonomous operation is already at least partially implemented in various defense systems shielding vehicles, facilities and naval units. Examples of the most advanced functions are actions taken in the so-called emergency situations, where the primary goal of autonomous defense components is to ensure the survival of the protected object. In accordance with this principle, the Aegis system takes decisions to attack all naval and air targets that pose a threat to a warship, and the Patriot battery can autonomously respond with fire in the event of a loss of communication with the command center (which is treated as a result of the adversary's actions). As a result of an error in 2003, a coalition aircraft was

144 W. Marud, *Ewolucja teorii targetingu lotniczego* [*Evolution of aerial targeting*], Warszawa 2015, pp. 17–18.

145 Allied Joint Publication-3.9, *Allied Joint Doctrine for Joint Targeting*, Edition A Version 1/2016, pp. 2–2.

146 *Kierunki rozwoju lotniczych środków rażenia* [*The further development of aerial munitions*], collective work, Warszawa 2016, pp. 24–26.

147 M. Roorda, *NATO's Targeting Process: Ensuring Human Control Over and Lawful Use of 'Autonomous' Weapons*, "Amsterdam Law School Legal Studies Research Paper" 2015, no. 13, pp. 165–166.

shot down during the Second Gulf War. The malfunctioning of the Aegis system (the 1988 incident) and the incident with Patriot battery are cited as evidence of artificial intelligence being unable to comprehend a broader context of military operations.[148]

2.8. The state of discussions on LAWS after 2019. The issue of loitering munitions

In 2019, as part of discussions on LAWS, the so-called *Guiding Principles*, which are principally a political roadmap without features of an international law document. The guidelines compiled the "least controversial" ideas that had emerged in previous years, including the applicability of international humanitarian law to LAWS, the prohibition of delegating human responsibility, and the obligation to conduct a legal review of weaponry. Undoubtedly, the adoption of the guidelines is the success of states interested in further development of autonomous weapons, recognizing them as a set of best practices for the continued advancement of this technology.[149]

The entire discussion still takes place outside clearly defined conceptual frameworks. Its tone has also fundamentally changed in light of the consequences of Russia's aggression against Ukraine, which has dramatically changed the perspective of individual states on the issue of unmanned and autonomous technologies. The successful use of loitering munitions in this conflict has demonstrated their strong military effectiveness, with the potential for further enhancement through AI-controlled drone swarms.[150] There are no doubts that from a legal perspective, the division of tasks between AI and human operators remains the key issue. However, a gradual shift away from the "one drone, one operator" principle in favor of a single operator overseeing multiple drones in the future seems cer-

148 "The time pressure will result in operators falling foul of all four of the downsides of automatic reasoning described above: neglects ambiguity and suppresses doubt, infers and invents causes and intentions, is biased to believe and confirm, focuses on existing evidence and ignores absent evidence. An example of the errors caused by fast veto came in the 2004 war with Iraq when the U.S. Army's Patriot missile system engaged in fratricide, shooting down a British Tornado and an American F/A-18, killing three pilots" – N.E. Sharkey, *Towards a Principle for the Human Supervisory Control of Robot Weapons*, "Politica and Società" 2014, no. 2, p. 12.

149 *United Kingdom, June 2021, Written Contributions on Possible Consensus Recommendations in Relation to the Clarification, Consideration and Development of Aspects of the Normative and Operational Framework on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems,* 2021, https://documents.unoda.org/wp-content/uploads/2021/06/United-Kingdom.pdf (accessed: 14.06.2025).

150 I. Bode, T.F.A. Watts, *Loitering munitions: flagging an urgent need for legally binding rules for autonomy in weapon systems*, 2023, https://blogs.icrc.org/law-and-policy/2023/06/29/loitering-munitions-legally-binding-rules-autonomy-weapon-systems/ (accessed: 14.06.2025).

tain, which carries the risk of illusory human oversight and susceptibility to the phenomenon of automation bias, as in the case of the Levander system used by the IDF for supporting the targeting process in the Gaza Strip in 2023–2024.[151] Moreover, AI algorithms require continuous data input to keep improving, which in practice necessitates its prior usage in real battlefield conditions.[152] This raises fundamental questions about the role of legal weapon reviews as a kind of "safeguard," given that these reviews are intended to happen before a weapon is fielded by armed forces.[153]

2.9. Lessons from the history of the law of air warfare applicable to future LAWS regulations. *De lege ferenda* postulates

One lesson learnt from history is certain – leaving the matter of regulating new military technologies to the customary law is a flawed solution with potentially significant side effects.[154]

In 1928, M.W. Royse identified three main reasons why states had chosen to ban certain types of weapons: 1) obsolescence, 2) equal impact of the ban on all states, 3) lack of fundamental military significance of a given weapon for states.[155] The history of international humanitarian law has generally proved him right. A rare example of an exception in this regard was the adoption of a proactive ban on the use of blinding laser weapons (Protocol IV) at the CCW Convention, which effectively prevented the development of laser technology for the military.[156] In the

151 "Meanwhile, Shaheds equipped with electro-optical sensors can carry out target identification missions in real time, paving the way for a subsequent wave of numerous drones to strike. By combining autonomous navigation, AI-enabled target detection system, and data sharing, Russia is moving closer to deploying large-scale, coordinated drone swarms that require minimal human input" – K. Bondar, *Inside Russia's plan to build autonomous drone swarms*, 2025, https://breakingdefense.com/2025/01/inside-russias-plan-to-build-autonomous-drone-swarms/ (accessed: 14.06.2025).

152 D. Kirichenko, *The Rush for AI-Enabled Drones on Ukrainian Battlefields*, 2024, https://www.lawfaremedia.org/article/the-rush-for-ai-enabled-drones-on-ukrainian-battlefields (accessed: 14.06.2025).

153 O.Y. Shehabi, A. Lubin, *Israel – Hamas 2024 Symposium – Algorithms of War: Military AI and the War in Gaza*, 2024, https://lieber.westpoint.edu/algorithms-war-military-ai-war-gaza/ (accessed: 14.06.2025).

154 J. Hood, *The Equilibrium of Violence: Accountability in the Age of Autonomous Weapons Systems*, "International Law and Management Review" 2015, vol. 11, p. 35.

155 M.W. Royse, *Aerial Bombardment and the International Regulation*, New York 1928, p. 141.

156 M.N. Schmitt, *Future War and the Principle of Discrimination*, "Israel Yearbook on Human Rights" 1998, vol. 28, p. 53.

context of the discussions involving a group of government experts, there appears to be no strong will among the particularly involved states to adopt a new, legally binding, international treaty, which is even more noticeable following the events of 2022. Certainly, the main reason for this is the great potential of autonomous technology, which, combined with unmanned platforms, enables entirely new strategic and tactical military applications.[157] For the same reasons, in 1907, the Second Hague Peace Conference decided not to extend the moratorium on the use of balloons for bombing. Furthermore, the efforts to ban the use of aircraft for military purposes made at the Disarmament Conference in Geneva in the years 1932–1934 turned out to be a failure.[158] LAWS technology will also be developed by states with the strongest technological base, and as a consequence, a possible ban would benefit regions not endowed with sufficient technological potential. Arguments based on the Martens Clause as a limiting tool are also unconvincing. Apart from doubts regarding its normative content, it should be noted that the above clause was also invoked in the pre-war period in an attempt to introduce restrictions on air bombing. Yet, as is well known, it did not influence the stance of the international community in any way.

What plays a crucial role in defining the future legal boundaries of LAWS is Article 36 of AP I, despite being highly contextual. As mentioned before, the outcome of a legal test does not necessarily result in prohibiting a given type of weapon at once *per se*. In addition, as noted, many states clearly signal that some of the existing vehicle or naval defense systems are not autonomous, but automated, and human control over these systems is manifested through their placement. The outcome of the test may be varied, meaning that, for instance, a certain type of armament may be allowed for operations in highly confined environments.[159] However, as W.H. Boothby pointed out, the legal review does not only cover weapons carried by an autonomous vehicle, but also the analysis of the platform *per se*. The above solution seems to be balanced and in fact aimed at capturing the essence of the issue.[160] As O. Ulgen pointed out, certain states (the United Kingdom) in their documents separated the two components of LAWS, which in turn may lead to the regime covering only the means of combat alone, without taking into account the issue of the platform's legality.[161]

157 P.B. Postma, *Regulating Lethal Autonomous Robots in Unconventional Warfare*, "University of St. Thomas Law Journal" 2014, vol. 11, p. 318.

158 E.P. Warner, *Aerial Armament and Disarmament*, "Foreign Affairs" 1925, vol. 4, pp. 624–636.

159 V. Kanwar, *Post-Human Humanitarian Law: The Law of War in the Age of Robotics Weapons*, "Harvard National Security Journal" 2011, vol. 2, pp. 624–625.

160 W.H. Boothby, *How Far*…, p. 47.

161 O. Ulgen, *Human Dignity in an Age of Autonomous Weapons: Are We in Danger of Losing an "Elementary Consideration of Humanity"?*, European Society of International Law (ESIL) 2016 Annual Conference (Riga), p. 9 ff; *idem*, *Definition and Regulation of LAWS*, Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects Geneva, April 9–13, 2018, paras. 46–52.

Such a surprising proposal is included in the so-called joint Dutch-Swiss proposal submitted to the CCW Convention in November 2017.[162] The analysis prepared by SIPRI indicated that in the context of autonomous devices, it is advisable to carry out weapon tests as often as possible in the target impact environment and they should be carried out as extensively as possible, taking into account the provisions of international humanitarian law, the compliance of the autonomous fire opening mode with the basic principles of *ius in bello* and the assessment of the technical interaction between the user and the system (in particular with regard to the possibilities of exercising full and informed control and knowledge of operational limitations).[163] However, this assessment in the context of LAWS may change – taking into account the capability of the device to self-adapt, and it may turn out that the original review becomes obsolete over time.[164] This is a significant weakness of the control mechanisms based on Article 36 of AP I – apart from the conclusion related to the need to provide AI with actual data resulting from the course of hostilities. In addition to the foregoing observation, one should remember the remark presented above and linked to the phenomenon of loitering munitions: AI algorithms must learn from battlefield data (machine learning).

Therefore, with some concern, one should observe the trend that assumes the submission of a political declaration (*vide* the guidelines of 2019), calling upon states to conduct legal reviews of future autonomous devices, by concretizing the provisions of international humanitarian law applicable to national tests of autonomous weapons, as well as developing a set of so-called good practices.[165] All such actions are in fact aimed at avoiding the adoption of any clearly binding legal instruments in this regard. However, there is a group of states that postulates banning the use of autonomous combat devices altogether.[166] Also, many delegations to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects voiced the need to maintain some form of human control over the decision to attack and use armed forces. Although the group of government experts will certainly not ensure that recommendations for a treaty solution are adopted, from the perspective of this work it is worth trying

162 "While most of the main weapon systems of any military platform rely on the targeting and launching elements of the platform's (integrated or other) systems, most or perhaps all platforms may be outfitted with any variety of weapons and concomitant systems and such weapon systems may be replaced as needed by other weapon systems on the same platform" – CCW/GGE.1/2017/WP.5, paras. 26–29.

163 V. Boulanin, *Implementing Article 36 Weapon Reviews in the Light of Increasing Autonomy in Weapons Systems*, "SIPRI Insights on Peace and Security" 2015, vol. 1, pp. 14–15.

164 International Panel on the Regulation of Autonomous Weapons (IPRAW), *Focus on the Machine-Relation in the La*ws, Report no. 3/2018, p. 10.

165 CCW/GGE.1/2017/WP.9, paras. 30–37.

166 Such a view is criticized by the doctrine. See: G. Noone, D. Noone, *The Debate Over Autonomous Weapons Systems*, "Case Western Journal of International Law" 2015, vol. 47, p. 30.

to create a *de lege ferenda* postulate with the following content: "Draft prohibition: Para. 1. It is forbidden to deploy armed devices, weapons or weapon systems that use violence against human targets, without the conscious decision of a human operator. Para. 2. This restriction does not apply to devices, weapons or weapon systems that cannot be reused (e.g. missiles or projectiles)."

A definition of the above content could be found as one of the points of the new Protocol VI to the CCW Convention. Mostly, it would be based on the definitions applied in the regime regulating anti-personnel mines (the Ottawa Convention and the Protocol II to the CCW Convention). It should be noted that the subject of the definition is "devices, weapons or weapon systems", i.e. the broadest coverage of all possible configurations of the occurrence of LAWS, including both the platforms themselves and the armaments which are part thereof. In para. 2, single-use munitions, over which human control is maintained as part of a wider cycle, would be excluded from the prohibition. The phrase "uses violence" is semantically broader than the phrase "use of force" or "attack", as it also includes non-lethal means. The prohibition would only cover the use of violence against human targets – in the case of the so-called material goods (e.g. tanks or military aircraft), the solution would have the same dimension as *per analogiam* the application of the 1868 St. Petersburg Declaration in air warfare against other air facilities or the Second Protocol to the CCW Convention against anti-vehicle mines. "Conscious decision of a human operator" indicates the need for an individual to make a decision (not approval) that would be based on the premises of significant human control, i.e. the full contextuality of the selected goal and the selection of information that will allow the operator to assess the legality of the attack. The definition does not include non-combat activities of an autonomous nature, especially regarding data collection, reconnaissance or rescue and search missions, as not raising special doubts in the light of international humanitarian law.[167]

The proposals of the definitions of LAWS are also based on the land mines regime set out in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (the so-called Ottawa Convention).[168] Based on the current definition of landmines, M. Guburd defined LAWS as "a lethal weapon system activated as a result of detecting a target or condition, not the action of a human operator".[169] In this context, LAWS, like landmines, are considered devices with insufficient levels of predictability.[170]

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167 W.H. Boothby, *How Far*…, p. 50.

168 J. Lewis, *The Case for Regulating Fully Autonomous Weapons*, "The Yale Law Journal" 2015, vol. 124, p. 1319 ff.

169 M. Gubrud, *The Ottawa Definition of Landmines as a Start to Defining LAWS*, Submitted to the Convention on Conventional Weapons Group of Governmental Experts Meeting on Lethal Autonomous Weapons Systems.

170 T. Chengeta, *Defining*…, p. 9.

CONCLUSION

Hersch Lauterpacht described the *ius in bello* norms as "the vanishing point of international law".[1] To paraphrase the words of the British scholar, it should be pointed out that the law of air warfare is the vanishing point of the international humanitarian law. Significant in this respect is the lack of an international treaty that would comprehensively define all aspects of conducting air operations to this day. This forces researchers and practitioners to analyze the practice of belligerents, which is in fact a historical record, based on the reflections of the 1923 Hague Rules of Air Warfare. With a delay in relation to the changes taking place in technology and doctrine of conducting air operations, there was also evolution of legal thought, trying to fit air warfare within the framework of international law.

Understanding the full normative content of the phrase "the law of air warfare" required a significant broadening of the research perspective based on the analysis of documentation and seemingly historical phenomena. Drawing on the preparatory work of the first and second peace conferences in The Hague in 1899 and 1907 was indispensable. The appearance of balloons and airships as the first tools of air warfare revealed the lack of will of the international community to prematurely limit potentially dangerous means of combat. The development of technology and the recognition of its military advantages caused a quick departure from the idea of a ban to the need for regulation. The answer in this respect was the Franco-Russian idea of 1907, which updated the provisions of the 1899 Hague Regulations. The amendment extended the scope of the ban on shelling towns and undefended facilities to include air operations. A detailed analysis of *travaux préparatoires* reveals a substantive discrepancy between the work of various expert teams in the field of land and naval bombardment regimes that is difficult to understand. Despite the *prima facie* significant similarity between the operations carried out by the air force and the navy, it was decided to regulate air attacks on land targets under the provisions of the Hague Regulations of 1907 on the Laws

1 H. Lauterpacht, *The Problem of the Revision of The Law of War*, "The British Yearbook of International Law" 1952, vol. 29, p. 382.

and Customs of Land Warfare. At the same time, the elementary circumstance related to the inability to enter or occupy a given area by aviation was omitted, recognizing the right of warships to destroy specific assets within undefended areas. The provision adopted and perpetuated through its erroneous interpretation in arbitration courts in the 1920s drew the law of aerial bombardment into a state of complete interpretative chaos. This error had catastrophic humanitarian consequences, as the old principle of artillery bombardment allowed the entire defended area to be shelled. The author reviewed the opinions expressed by lawyers of the interwar period, striving to give the 1907 regulations content acceptable to combatants. Law scholars rightly raised elementary doubts related to the phrase "non-defended locality".

World War I revealed the need to regulate air warfare, at the same time building the first rules of a customary nature, in the form of the status of crewmembers, the issue of illegality of shelling persons bailing out of aircraft, the use of incendiary munitions or military aircraft markings. The effort undertaken by the committee of jurists in 1923 should be considered a landmark and, from the perspective of almost 100 years, the only attempt to create a code of air warfare law. Despite some substantive flaws or interpretative inaccuracies, the experts proposed the introduction of the concepts of "military objective" and "estimation of dangers arising for the civilian population", which wording appeared in the treaty language only as part of the Additional Protocol I. Despite the approving reception by the doctrine of international law, it seems very complicated to recognize the rules of 1923 as binding in the light of *ius in bello*. In this respect, there is a kind of paradox, revealing a serious discrepancy between intentions, declarations and the reality of the battlefield. Significantly, the states accepted and signaled the possibility of being bound by the Hague Rules of Air Warfare. In addition, the lack of ratification was not an obstacle to the indirect implementation of these provisions in the military manuals and guidelines of almost all the states with an extensive air force.[2] The international community agreed with the direction of the solutions proposed in the 1923 document, expressing this in an unambiguous declaration of the Assembly of the League of Nations on September 30, 1938. However, it should be noted that the Italo-Ethiopian, Spanish and Sino-Japanese conflicts, even before the outbreak of World War II, undermined the content of the provisions of 1923. During World War II itself, from May 31, 1942, at the latest, all parties to the conflict decided to adopt the practice of carpet bombing, justifying it partly with the doctrine of reprisals in the *sensu largo*. The practice of states, also combined with a specific attitude of the parties fighting in the second phase of the armed conflict, led to the destruction of the provisions of the 1907 Hague Regulations in relation to air warfare (Article 25), and also undermined the customary nature of the Hague Rules of Air Warfare (assuming that they were of

2 *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, para. 73.

such nature). It seems that those actions cannot be claimed to have formed a new custom (applied in a bizarre manner which permitted attacks against the civilian population), still, however, simultaneously contributing to the fact that until the early 1970s air warfare took place in a legal vacuum. This confirms the ambiguous nature of the Nuremberg Tribunals jurisprudence. It is worth noting that, almost until the 1970s, belligerents could cite textbooks of the law of warfare created in the nineteenth century and justify carpet attacks on towns by pointing out their defensive character.

A certain breakthrough in this respect were the reflections resulting from the course of the air campaign "Linebacker I" and "Linebacker II" over North Vietnam. For the first time since World War II, a precise air campaign carried out against military objectives led to rapid military and political success, confirming the thesis (repeated by observers) that it was necessary to leave civilians out of warfare. The choice of precautions, precise methods and means during this conflict allowed the international community to undertake efforts at the diplomatic conference between 1974 and 1977, which resulted in the adoption of the provisions of the Additional Protocol I of 1977. The provisions of Section IV of AP I unequivocally outlaw the practice of indiscriminate bombing, introducing the idea of preserving war energy by destroying and combating targets and objects of exclusively military nature. The definition of these targets was provided under Article 52 para. 2 AP I, which adequately allows for maintaining flexibility in the selection of targets, while introducing quite clear boundaries limiting the freedom of target classification. Taking into account the necessity to discern military circumstances, it was decided to adopt provisions enabling combatants to carry out attacks that may cause casualties among the civilian population, provided that they are justified by a clear, specific and direct military advantage. Many of the formulations in the language of the Additional Protocol raise doubts or are subject to various interpretations. However, this does not change the belief that the 1977 regulations are generally adequate to the conditions of modern air warfare in relation to jet or unmanned aviation. Subjectivism inscribed in the content of certain principles and rules (proportionality and the obligation to apply the so-called active precautionary measures) is, on the one hand, the subject of doctrinal criticism, and on the other hand, the only reasonable direction of construing the rights and obligations of combatants. It may be surprising that, despite nearly 100 years of air warfare, the issues related to the use of aircraft in an armed conflict have generally not been the subject of rulings issued by international and national courts. The only quasi-judicial body to examine the legal aspects of air warfare in an armed conflict is, to this day, a special ICTY committee established to review the conduct of NATO air forces during the operation in Serbia in 1999. The achievements of the ICTY reveal that international jurisprudence has difficulty distinguishing various types of bombardments, especially when non-prohibited, imprecise means of warfare are used. At the same time, despite the current

widespread use of precision-guided air missiles, the lack of a clear obligation to acquire, collect and use precision-guided ammunition has to be mentioned. Such a stipulation cannot be found in the content of Article 57 of AP I, which only indicates exercising due diligence during warfare with the use of feasible and available resources. However, the possession of the above equipment may affect operational autonomy, allowing for the operations to be carried out in areas of the so-called increased risk. All of the above issues increase the difficulty level of the judicial and investigative assessment of aerial bombardment acts, which is extremely disproportionate to the number of highly controversial airstrikes taking place *en masse* in the ongoing conflicts in Ukraine and the Gaza Strip.

It should be noted that air warfare is, in fact, identified exclusively with air bombardment, which is certainly the most controversial aspect of warfare, but not the only one. Only military aircraft are entitled to exercise combatant rights. This required devoting part of the work to the issues concerning military aircraft marking. Despite the technical nature of the rules governing the markings, their significance is fundamental in the light of the definition of a military aircraft. Another example in this respect is the issue of crew evacuating the aircraft during an emergency or being taken captive by the enemy. This required a historical analysis. Unmanned operation, as well as non-state conflicts, creates new challenges for these elements of air warfare. It is impossible to point to the norms of positive law in this respect because Additional Protocol I only partially codified the 1923 law of air warfare. It is also important to treat the issues of *ruse de guerre*, perfidy and the use of camouflage by the air force differently in cases where there are significant differences between the regimes of naval and land warfare. The character of an aircraft – as an armament carrier platform – also required the analysis of the rules governing armaments, in particular the rules resulting from the provisions of Articles 35 and 36 of AP I. A separate chapter was devoted to selected elements of aircraft armament in the form of incendiary weapons, considered an aircraft's most destructive.

Nowadays, air warfare is on the verge of a major technological breakthrough. While the unmanned operation of aircraft does not create too many challenges for the regulations of *ius in bello*, its new autonomous operation is completely revolutionary, especially in relation to the conclusions from the Russo-Ukrainian conflict. The key issue of the discussion in this matter is the scope of artificial intelligence control over weapon systems. Exceeding the level of significant control necessitates considerations of whether, in fact, an autonomous combat device is still only a platform carrying armament, or whether it is already a user controlling its activation. Reaching this point, as well as the aspect of so-called ideal autonomy, give rise to new issues. One of them is the definition of a military aircraft, which requires a control link between the aircraft and the crew. It is worth emphasizing that many of the ideas related to the regulation of autonomous weapons systems submitted to the Convention on Prohibitions or Restrictions on the Use

of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 1980 resemble the attempts to regulate air warfare made at the diplomatic conferences in 1899 and 1907. The idea of moratorium proposed by the UN Special Rapporteur in 2013 is, in fact, a reference to the Declarations of 1899 and 1907, which were supposed to temporarily prohibit aerial bombardment. This reveals a surprising fact. Indeed, the international community and the doctrine of international law are stuck at the same point when it comes to autonomous weapon systems as they were almost a hundred years ago. The passivity of states and the short-sightedness of the participants of the international discourse at that time partly led to the collapse of the *ius in bello* authority in 1939–1945. The reasons for this lie in the failure to adopt a solution backed by a treaty. The author hopes that what happened during World War II, when a similar lack of action had severe repercussions in the form of aerial bombings, will not be repeated. However, if no resolutions on the subject of autonomous combat platforms are adopted in the form of positive law (which consists in prohibiting or limiting their use), an entire normative network of international humanitarian law should be considered, which, based on general principles, applies to every means and method of warfare. Even in the most hermetic environments of military conflicts, the principles and rules of international humanitarian law, as well as the detailed norms of the law of air warfare, may be difficult to reconcile with the characteristics of autonomous combat platforms, especially those with a significant level of operational autonomy.

The law of air warfare itself was created on the battlefield, often in a complete legal limbo, forcing lawyers of various periods of history to seek normative solutions that would, on the one hand, allow states to use this exceptionally useful military tool that is military aviation and, on the other hand, limit the scope of permissible harm inflicted upon the enemy. The reliance on reasoning *per analogiam*, which did not take into account the unique nature of aerial operations in relation to other types of warfare, was a serious normative disadvantage of past attempts to regulate air warfare. This particularly concerns the controversial phenomenon of aerial bombardment. Gradually, due to its specificity, the regime regulating air warfare acquired a status equal to the status of principles and rules governing land and naval warfare and has retained this status despite the lack of a comprehensive treaty-based solution. Therefore, is there a need for an international agreement relating to the participation of military aviation during an armed conflict? Leaving aside the slim likelihood of states showing any willingness in this respect, it seems that the structure of the law of air warfare, although highly complex, based on the link between the norms of positive and customary law and combined with the general rules and principles of international humanitarian law, is able to adequately respond to the challenges of the modern battlefield. Many fundamental rules of air warfare law stem from the period preceding the outbreak of World War I and still remain valid despite the progress of technology. The only exception

in this respect seems to be issues related to autonomy, but it should be noted that they pose a challenge on every level of military operations.

Finally, it ought to be mentioned that the first edition of this book was published in 2021. In just four years that separated the first edition from the second, two air campaigns of unprecedented intensity have taken place: over Ukraine (since 2022) and in the Gaza Strip (2023–2024). The air operations that took place in these conflicts emphasized the importance of the practical application of aerial bombardment principles, while at the same time revealing the consequences of not respecting them. It must be concluded with sadness that despite significant progress in the existing positive and customary law, as well as the development of technology that should contribute to reducing losses among the civilian population and civilian goods, casualties among non-combatants are worryingly high. These conflicts have also revealed an emerging breakthrough which stems from the use of operational autonomy, primarily in aviation. Artificial intelligence as well as the mass scale and capabilities of new types of aircraft or aerial armament are giving rise to a new era of warfare in which the role of humans may gradually decline and, perhaps, disappear completely.

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Appendix B. The Bombardment of Fortified Towns, [in:] H.S. Edwards, *The Germans in France. Notes on The Method And Conduct of the Invasion The Relation Between Invaders and Invaded and the Modern Usages of War*, London 1874.

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ABBREVIATIONS

AHRC	–	American Human Rights Convention
AP I	–	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
AP II	–	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
CCW	–	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 10 October 1980
ECHR	–	European Convention of Human Rights
ECtHR	–	European Court of Human Rights
First Geneva Convention	–	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949
Fourth Geneva Convention	–	Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949
HPCR Manual	–	Humanitarian Policy and Conflict Research, Manual on International Law Applicable to Air and Missile Warfare
IACHR	–	Inter-American Court of Human Rights
ICC	–	International Criminal Court
ICJ	–	International Court of Justice
ICRC	–	International Committee of Red Cross
ICTY	–	International Criminal Tribunal for former Yugoslavia
ILA	–	International Law Association
ILC	–	International Law Commission
IMT	–	International Military Tribunal
NATO	–	North Atlantic Treaty Organization
PCIJ	–	Permanent Court of International Justice
RAF	–	Royal Air Force

Second Geneva Convention	–	Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949
Third Geneva Convention	–	Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949
UNGA	–	United Nations General Assembly
UNSC	–	United Nations Security Council
USAAF	–	United States Army Air Forces
USAF	–	United States Air Force
VCLT	–	Vienna Convention on the Law of Treaties (1969)

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Military aviation is a one of most crucial elements of the warfare, both past and present. Yet, the legal ramifications of the air warfare are scattered due to the lack of a treaty comprehensively regulating the conduct of aerial operations during the armed conflicts. This monograph aims to present the history of air warfare, and the corresponding development of the law of air warfare, from the beginnings of the military aviation to the era of unmanned and autonomous aircrafts.

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