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Governing from Above:
A History of Aerial Bombing and International Law

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ABSTRACT

The advent of aircraft in the early twentieth century brought significant changes to human society, from transportation and infrastructure to surveillance and warfare. This technology provided a new way of seeing the world from above – an aerial perspective – with its assumptions and frames of understanding space, peoples and objects. In armed conflict, airplanes facilitated interventions in foreign places and attacks directed at cities and civilians, leading to significant changes to military strategy and to legal and political discourses on how wars should be pursued. This thesis studies how the rise of aerial bombing transformed the central concepts of international law of armed conflict. The focus is on the concepts of aerial territory, civilian population, military objectives, and the principle of proportionality. I argue that these core concepts of the laws of war emerged from or were substantially transformed by the emergence of aerial warfare. The thesis covers the period of 1899 to 1977. It begins with the first considerations by international lawyers of how international law should respond to the introduction airplanes in war and ends with the conclusion of the Additional Protocols to the Geneva Conventions, where the concepts and ideas that had emerged in the preceding decades were codified. I argue that the central debates and paradoxes of the contemporary laws of war can be traced back to the ideological, material and institutional transformations that took place as a result of aerial bombing in the period between 1899-1977. This thesis aims to shed light on the early history of aerial bombing and international law, a period often forgotten or ignored in scholarship on the laws of war. It uncovers the politics and assumptions behind international humanitarian law in its relation to aerial bombing. I challenge the universality and assimilation of the core concepts of international humanitarian law, exposing how legal discourse has played a central role in the legitimation of aerial violence. The thesis explores what alternative views have been articulated in the past and what could be gained from grasping the possibilities and arguments put forward by international lawyers throughout the rise of air power. This historical inquiry has substantial repercussions for current debates on drone warfare, autonomous weapons and new military technologies, which it claims are the culmination of a much longer history of international humanitarian law embracing a view from above.

DECLARATION

I make the following declarations:

i. The thesis comprises only my original work towards the degree of Doctor of Philosophy.

ii. Due acknowledgement has been made in the text of this thesis to all other material used.

iii. The thesis is fewer than 100,000 words in length, exclusive of the bibliography.

Luís Bogliolo

PREFACE AND ACKNOWLEDGEMENTS

This thesis, like every other piece of intellectual production, is the result of an essentially collective process. It would never have been completed without the material and social support of a number of people and institutions who made the lonely nature of writing possible and bearable. And it would have looked incredibly different were it not for the ideas, arguments and debates exchanged and shared with those around me throughout the last four years.

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I recognise that without certain forms of support I simply would not have finished my PhD. I would like to thank all the administrative staff and the librarians at Melbourne University who

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With a final word I want to thank my most loved ones, my partner and my family. This thesis is dedicated to them. My parents Anna and Marcelo have given me much more than I could ever have asked for, and the freedom, love and support I have today would not have existed if not for their efforts. I hope I will one day be able to give back to the world as much as they have given me. My sister Ada and my brother Marcelo have always been my best friends, and I am deeply grateful for their love and support. Being so far from my parents and siblings was one of the hardest parts of my PhD. Finally, my warmest thanks are due to Hannah Barker for being the best partner, the most amazing, caring and thoughtful person I could ask for. Thank you also to Pip, Raven and Lulu for the unknowing moral support and the meows of encouragement.

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1. Introduction

> If Fuller is correct, that a weapon such as the musket eventually made the democrat, then the palm must be accorded to the airplane for destroying the civilian.[1]

1.1 Context

On the 1st of November 1911, a young Italian man named Giulio Gavotti wrote to his father saying he had decided to be the first person to throw bombs from an airplane. Nobody had yet tried anything of this kind. Just a few weeks before, Italy had embarked on its colonial drive in North Africa. A handful of airplanes were brought to help spot enemy movements. On that fateful day, Gavotti took off in his plane and headed for Ain Zara, a small settlement south-east of Tripoli where he had noticed a gathering of Arab fighters on an earlier reconnaissance flight. He had with him four hand grenades. As he approached the oasis, he noticed two Arab camps next to a white house. He took one of the bombs in his right hand while holding the steering wheel with the left, pulled the safety pin with his teeth, and threw it out of the plane. A few moments later he noticed a small dark cloud rising from the smaller camp. He celebrated: 'I had aimed for the larger one, but I was lucky nevertheless; I hit the right target'.[2]

The invention of the airplane in the first years of the twentieth century had captured the West's imagination. After the exploration of the earth, the conquest of the seas and of colonial peoples, there followed the conquest of the air. More than a flying machine, the airplane was seen as a spiritual creation giving rise to utopian hopes and distressing fears. Foreseen by poets, novelists, painters, politicians and lawyers, the arrival of aerial navigation symbolised the West's dynamism and idealism, 'the vanguard of the conquering armies of the New Age'.[3] But as Gavotti would

[1] Richard Shelly Hartigan, *The Forgotten Victim: A History of the Civilian* (Precedent Publishing, 1982) 119.
[2] Translated from the letters made available by Gavotti's grandson in: 'Giulio Gavotti e Il "Manifesto"', *AeroStoria* <https://aerostoria.blogspot.com/2009/11/giulio-gavotti-e-il-manifesto.html>.
[3] Le Corbusier, *Aircraft* (Trefoil Publications, 1935) 6.

demonstrate, it also revealed its disturbing tendencies toward conquest, violence, and self-destruction. From early on, flight had been associated with an attraction toward death, and the first aviators often found an early end to their adventures. The year of 1911 marked the point where this attraction turned out to be not just to the death of aviators themselves, but increasingly to that of people on the ground.[4]

Let's now fast-forward exactly one hundred years to Tripoli, to the 1st of November 2011. The day before, the North Atlantic Treaty Organisation (NATO) had ended its intervention in the war in Libya. From March to October of that year, NATO planes flew over 26,500 sorties, including 9,700 strike sorties, under Operation Unified Protector.[5] During these sorties, bombs were dropped on over 5,900 targets, the bulk of them in and around Tripoli.[6] Although the mission's objective was ostensibly to protect civilians from attack, a later report from the United Kingdom's House of Commons concluded that it 'could not verify actual threats to civilians posed by the Gaddafi regime' and that 'a limited intervention to protect civilians drifted into a policy of regime change by military means'.[7] The air strikes on Libya ended one day short of a century since the very first aerial bombing. Coincidentally, the bombs dropped by NATO planes fell in practically the same places as those of Gavotti one hundred years earlier. The link between these two events invites us to revisit the history of aerial bombing and with it the history of international law and of the laws of war.

I refer specifically to Libya not only because it was the site of the first recorded bombing from an airplane and a recent target of humanitarian intervention, but also because it says something about the spaces and the histories of war and of law. Both the historiography of aerial warfare and of international law have found it difficult to take into account the relevance of colonial bombing for the development of air power and for the legitimation of bombing through international law. Yet the history of aerial bombing is full of this kind of geographical coincidence. From Syria to Yemen in the Middle East, Libya to Somalia in Africa, Afghanistan to Pakistan in Asia, an aerial curtain has descended across a huge swath of the planet.

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[4] Robert Wohl, *A Passion for Wings: Aviation and the Western Imagination, 1908-1918* (Yale University Press, 1994) 3 and 288.

[5] North Atlantic Treaty Organization, 'Operation Unified Protector Final Mission Stats' (2 November 2011) <https://www.nato.int/nato_static/assets/pdf/pdf_2011_11/20111108_111107-factsheet_up_factsfigures_en.pdf>.

[6] Simon Rogers, 'Nato Operations in Libya: Data Journalism Breaks down Which Country Does What', *the Guardian* (22 May 2011) <http://www.theguardian.com/news/datablog/2011/may/22/nato-libya-data-journalism-operations-country>.

[7] House of Commons Foreign Affairs Committee, *Libya: Examination of Intervention and Collapse and the UK's Future Policy Options* (6 September 2016) 39.

Unsurprisingly, most of the territories that are bombed today have been subjected to repeated spells of bombing in the past.

Take Iraq as an example. It was where the idea of air control was developed and effected by the British in the interwar years. Throughout the British mandate, aerial bombing was used to supress rebellions, to secure borders and to enforce tax collection. Over the last thirty years, bombing Iraq has become a recurrent American Presidential ritual. The so-called war on terror has been fought mostly through relentless surveillance and aerial bombing, minimising public outcry in the West, advancing weapons makers' profits, and traumatising populations in targeted territories.

The use of armed drones by the United States has vastly expanded in the past twenty years.[8] The Obama administration not only reinforced this trend but also attempted to give it legal justifications.[9] Since Donald Trump has become President, after claiming that he would end never-ending wars, U.S. bombing has surged not only in Syria and Iraq but in Afghanistan as well.[10] Meanwhile, casualties of aerial bombing continue to be underreported and downplayed by succeeding administrations.

During the past century, a cult of bombing seems to have developed and gained traction in the West. It may seem comical that the American President has contemplated bombing hurricanes,[11] or that when a pandemic breaks out in a Hollywood movie the first solution is to bomb the infected cities.[12] Except these real and fictional incidents are perhaps only the farcical expression of the tragedy that some states have become accustomed to seeking solutions to a number of complex issues by turning to aerial bombing. International law has played an important role in the story of how aerial bombing came to be seen as a solution to complex problems. This thesis

[8] More recently, there are reports that 'civilian deaths skyrocketed in Iraq and Syria after Trump was inaugurated' see Daniel R DePetris, 'Trump's Expanded Drone Wars', *The National Interest* (28 September 2017) <https://nationalinterest.org/feature/trumps-expanded-drone-wars-22524>; see also George Woodhams, *Weapons of Choice? The Expanding Development, Transfer and Use of Armed UAVs* (United Nations Institute for Disarmament Research, 2018) 18; and Dan Gettinger and The Center for the Study of the Drone, *The Drone Databook* (Bard College, 2019) 217–257.

[9] On the Obama administration's legal justifications see: Jameel Jaffer and American Civil Liberties Union (eds), *The Drone Memos: Targeted Killing, Secrecy, and the Law* (The New Press, 2016); For an insightful, deeper and more far reaching perspective on legality and targeted killings see: Markus Gunneflo, *Targeted Killing: A Legal and Political History* (Cambridge University Press, 2016).

[10] 'US Dropped Record Number of Bombs on Afghanistan Last Year | US Military | The Guardian' <https://www.theguardian.com/us-news/2020/jan/28/us-afghanistan-war-bombs-2019>.

[11] '"We Drop a Bomb inside": Trump's Nuclear Option for Hurricane Control', *ABC News* (Text, 26 August 2019) <https://www.abc.net.au/news/2019-08-26/president-donald-trump-nuke-the-hurricane-suggestion/11448664>.

[12] Wolfgang Petersen, *Outbreak* (Warner Bros., Arnold Kopelson Productions, Punch Productions, 1995) It is somewhat bizarre and frightening to recall this as I write in the midst of a real pandemic.

argues that things have not always been this way, and that this story is one of contestation and of competing visions of how international law should regulate aerial bombing and new technologies of war.

Before moving on to explain my research, I want to make one last point about Gavotti's inaugural aerial bombing. Gavotti targeted an oasis south-east of Tripoli and although from what we know his grenades caused no deaths or serious injury, there was something innovative about his chosen target. Ain Zara, as the targeted oasis was called, was not simply a gathering point for Arab fighters, it was a settlement and a social and economic system of its own. By dropping his grenades there, Gavotti did not just hit a target, he actually constituted a new type of target. This was a hybrid target, which indifferently mingled civilian and military objectives and, among the latter, regular and irregular forces.[13] In this way, Gavotti inaugurated a new way of thinking about and of making war. It is the innovative aspect of this event and the reactions of international lawyers to the use of airplanes in war that brought me to inquire into how international law has dealt with aerial bombing and how the laws of war, which predate this event, related to this new way of making war.

The innovative aspect of aerial warfare and its implications for international law was a theme picked up by Carl Schmitt in the last pages of *The Nomos of the Earth*. Schmitt saw land and sea as different spatial orders, each with a respective international law, which regulated the different relations of protection and obedience in these spaces. Aerial warfare drastically challenged this state of affairs, for it ruptured the link between the force applying power and the population to which it is applied. Aerial warfare was not about occupation of territory as war on land, nor was it a war for booty as sea warfare, it was in Schmitt's words 'purely a war of destruction'.[14]

The innovation was such that, when considered from the viewpoint of the spatial order of international law, Schmitt admonished that 'all constructions that work with such concepts, and that are inclined to make air war analogous to land war and partly to sea war in international law, are flawed in principle and useless in practice'.[15] Taking Schmitt with a grain of salt, as we should, my research takes this insight as its starting point, placing aerial warfare at the centre of an investigation about concepts used by international law in the regulation of warfare.

[13] Thomas Hippler, *Governing From the Skies: A Global History of Aerial Bombing*, tr David Fernbach (Verso, 2017) 13.
[14] Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, tr GL Ulmen (Telos Press, 2006) 317.
[15] Ibid 319.

1.2 Aims

The aim of this thesis is to uncover the politics and assumptions behind international humanitarian law (IHL) in its relation to aerial bombing. I question the dominant conception of humanitarian law as a regime that is designed to restrict violence in warfare and whose failures are commonly attributed either to lack of enforcement or to gaps in the law.[16] I challenge the universality and assimilation of central concepts in the law of armed conflict, exposing the different contexts and politics which forged them. My aim is to rethink current debates on drone warfare, autonomous weapons and new technologies by looking back at how international lawyers responded to aerial bombing.

Two research questions guide the thesis. First, I ask how the rise of aerial bombing has changed the nature and central concepts of international law of armed conflict. I examine the legal concepts, techniques, and ideas articulated at particular moments in time as a response to aerial bombing campaigns. Second, I ask what assumptions, conceptions, and political views lay behind the concepts that were codified in the Geneva Conventions and their Additional Protocols which regulate targeting and aerial bombing.

The subject of interrogation is the historical and doctrinal interpretation of concepts in international law. I focus on the concepts of aerial territory, civilian population, military objectives, proportionality, and collateral damage, revealing how they emerged and became naturalised in legal and political discourse about war. I ask what alternative views have been articulated in the past and what could be gained from grasping the possibilities and arguments put forward by international lawyers throughout the rise of air power.

1.3 Argument

The central argument of my thesis is that most debates and paradoxes in contemporary IHL

[16] As is often repeated: 'humanitarian law aims to mitigate the human suffering caused by war, or, as it is sometimes put, to "humanise" war' in F Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (ICRC, 3rd ed, 2001) 12; On a similar note: 'International humanitarian law is one of the greatest achievements of mankind' in Antonio Cassese, 'Current Challenges to International Humanitarian Law' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, First edition, 2014) 3, 3.

can be traced back to the ideological, material and institutional transformations that took place as a result of aerial bombing campaigns in the period between 1899-1977. I argue that the core concepts of humanitarian law developed as a result of, or a reaction to, the emergence of aerial warfare. A corollary argument is that rather than associating IHL with restraint and moderation, we should not be surprised by the coincidence of unacceptable harm to civilians and the subjection of aerial bombing operations to international law.[17] Legal discourse has played a central role in the legitimation of aerial bombing since its inception and continues to normalise and sanction violence dispensed from above.

In answer to my first research question, I argue that the fundamental principles and concepts of contemporary IHL – *civilians, military objectives, proportionality, precaution* – emerged with or were transformed by the advent of aerial warfare. The spatial revolution in warfare led to a conceptual one in international law, where concepts such as zone of military operations and fortified cities gave way to military objectives and civilian objects, proportionality, and collateral damage. With the advent of aerial bombing, area-based military concepts such as front, rear, and flank became less relevant. For the military and not long after for international lawyers, there would henceforth only be targets and non-targets. Controlling territory no longer mattered as much because war was no longer about area as it was about controlling certain points.

As the historian Daniel Immerwahr has recently argued, air power was crucial in the transition of the United States from an empire with colonies to an empire with bases. Today, small dots on the map are the foundation of the American empire. 'Foreign prisons, walled compounds, hidden bases, island colonies, GPS antenna stations, pinpoint strikes, networks, planes, and drones… – this is the shape of power today'.[18] Alongside this transformation in the form of empire, in this thesis I trace the parallel transformations in the laws of war. In this sense, in the period from 1899 to 1977 the law of targeting gained prestige over the law of occupation. The resulting vocabulary, which was ultimately codified in the Additional Protocols of 1977, incorporates in international law what might be called a 'view from above'.

This view from above can be given two meanings. The first is that of international law, and of international lawyers, situated 'above' and looming larger than local events and the world

[17] This argument is made, from a different perspective and covering a later period, in Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (Cambridge University Press, 2015).
[18] Daniel Immerwahr, *How to Hide an Empire: A Short History of the Greater United States* (Bodley Head, 2019) 390.

below.[19] Law assumes a perspective from no point in particular and its concepts are decontextualised and depoliticised over time. It produces a view of IHL as a legal regime which strives to regulate the violence of war by institutionalising and enforcing putatively universal principles and rules which can be logically and mechanically applied. From this perspective, the proper conduct of war requires the rationalisation and optimisation of decision making. Human fallibility and error are the ultimate difficulties, which can be addressed by the professionalisation and formalisation of judgement, as well as by technological evolution.

The view from above is thus closely connected to the role of technology in war, and in particular to the belief in technological progress as a way of overcoming one's imperfections in dispensing violence. It entails, in other words, 'a double elevation: above one's enemy and above oneself'.[20] Through improved technology – smart bombs, surveillance, algorithmic target selection – comes the promise of precision and of increased compliance with international law. Technology and automation would help us achieve higher levels of discrimination in targeting and stricter adherence to rules on precaution and proportionality. What this ultimately amounts to is a vision of war as targeted governance,[21] where technology stands in for the qualities of predictability and certainty that law is assumed to possess.[22]

By examining the early stages of the relation between aerial bombing and international law, this thesis argues that current debates on drone warfare and autonomous weapons are only the culmination of a much longer history of international humanitarian law embracing this view from above. It resists this view, and the process of 'double elevation' that it requires, by historicising and theorising the fundamental concepts of this area of law. Placing conceptual developments in specific places and in certain material contexts, highlighting the political struggles behind legal doctrines, this thesis brings IHL 'back to the ground'.

The second sense in which a view from above is incorporated in international law is that of privileging and naturalising aerial violence.[23] Accordingly, the laws of war have been complicit in making 'dropping bombs on people's heads – just from a very long way away – that bit more

[19] Annelise Riles, 'The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law' (1995) 6(1) *Law and Critique* 39, 48.
[20] Ioannis Kalpouzos, 'Double Elevation: Autonomous Weapons and the Search for an Irreducible Law of War' [2020] *Leiden Journal of International Law* 1, 3.
[21] Mariana Valverde and Michael Mopas, 'Insecurity and the Dream of Targeted Governance' in Wendy Larner and William Walters (eds), *Global Governmentality: Governing International Spaces* (Routledge, 2004) 233, 245.
[22] Kalpouzos (n 20) 14.
[23] Christiane Wilke, 'How International Law Learned to Love the Bomb: Civilians and the Regulation of Aerial Warfare in the 1920s' (2018) 44(1) *Australian Feminist Law Journal* 29.

appetising and conscionable'.[24] Not only have lawyers been increasingly incorporated in the so-called kill-chain,[25] IHL has arguably played a crucial role in rendering aerial bombing an abstract, technical exercise for those who execute it.[26] In one obvious sense, this is the result of the failure of prohibition (of aerial bombing) and of disarmament (of armed airplanes). International law has thus assisted technologically superior states to consolidate the material asymmetry of military power in the international order. But just as importantly, IHL has consolidated the presumed civilisational superiority that comes with killing through modern technologies of war. By treating the calculated cruelties inflicted by aerial bombing as quantifiable, the laws of war have been able to placate our sensibility regarding pain and suffering through a calculation of means to ends – only violence which is *excessive* or disproportional is outlawed.[27] What counts as excessive, however, is inexorably connected to a particular conception of civilisation in which technologically inferior, or underdeveloped nations, are associated with barbarity and cruelty.[28] The civilisation of the technologically advanced party is therefore upheld through international law.[29]

In response, this thesis argues that alternative visions of international law and order rooted in anticolonial worldmaking struggled to restrict aerial bombing and to establish a different relation between international law and new technologies of war. During the decolonisation era, national liberation movements facing technologically superior militaries tried to turn civilisational assumptions about technology and war on their heads by exposing the devastation and brutality of aerial bombing campaigns. Rather than increasing the precision, rationality, and effectiveness of the use of force, anticolonialists exposed how air power, combined with weapons such as napalm, cluster bombs, defoliants and antipersonnel mines, resulted in greater proportions of civilian casualties and long-lasting social and environmental destruction. They invoked international law as a useful vocabulary to oppose aerial bombing, in an attempt to detach IHL from the military culture it had been embedded in. For them, new technologies of war were not

[24] Peter Adey, Mark Whitehead and Alison Williams (eds), *From Above: War, Violence, and Verticality* (Oxford University Press, 2014) 4.
[25] David Kennedy, *Of War and Law* (Princeton University Press, 2006); Dill (n 17).
[26] Derek Gregory, 'Lines of Descent' in Peter Adey, Mark Whitehead and Alison Williams (eds), *From Above: War, Violence, and Verticality* (Oxford University Press, 2014) 41, 41.
[27] Talal Asad, 'On Torture, or Cruel, Inhuman and Degrading Treatment' (1996) 63(4) *Social Research* 1081, 1096–1098.
[28] On discourses of barbarity and savageness in IHL see Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press, 2006) 265; on the idea of civilisation in international law see Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020).
[29] Kalpouzos (n 20) 10; see also Talal Asad, *On Suicide Bombing* (Columbia University Press, 2007) 34.

seen as promises but as threats to the development of international humanitarian law. The failure of these alternative visions in the late 1970s casts a new light on the Additional Protocols and on contemporary IHL. The adoption of its definitions of military objectives, of civilian population and of standards of proportionality might appear today as progressive and perhaps inevitable. But this conceals the highly contested character of these concepts and the promises and ruins of alternative anticolonial visions of the laws of war.

1.4 Terminology

The concepts examined in this thesis are all part of what is now generally referred to as international humanitarian law. Yet for most of the period covered in the thesis this area of international law was known as the laws of war or the *jus in bello*. As Amanda Alexander has compellingly argued, the term 'humanitarian law' appeared in the 1970s as a marginal nomenclature in the discourse of particular actors and human rights organisations committed to reforming and reinterpreting the rules of international law related to conduct in warfare. 'IHL', and the project behind it, only gained traction in international legal circles at the end of the twentieth century, when international lawyers recognised the authority of Additional Protocol I to the Geneva Conventions and declared 'the law of war to be truly humanitarian'.[30]

While today international humanitarian law is still a widely used terminology, the paradigm of humanitarianism which triumphed in the late 1990s has arguably lost its purchase. After almost two decades of the war on terror, and the corresponding expansion of the geographical and temporal limits of war, one can notice how, at least in the legal circles of some of the major military powers, IHL is not the discipline it used to be in the beginning of this century.[31] Moreover, the acceleration of multiple crises in the last few years has left both enthusiasts and critics of liberal internationalism, of which the humanitarian paradigm in the *jus in bello* is a central component, with a sense that it is unravelling. In these circumstances, it seems that the old paradigm of humanitarian law is dying but that no new sensibility has yet decisively taken its place. In the meanwhile, a variety of morbid symptoms of humanitarianism are appearing.

[30] Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26(1) *European Journal of International Law* 109.
[31] Naz K Modirzadeh, 'Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance' (2014) 5 *Harvard National Security Journal* 225, 304.

The choice of terminology to refer to the body of rules that regulates conduct in warfare indicates historical shifts in the prevailing sensibilities of international lawyers as well as their individual ideological and political commitments. In a field that is usually seen as divided almost exclusively between military lawyers and civilians from the world of non-governmental organisations (plus the occasional academic), it is a running joke that you can tell who the former and the latter are by the terms they use to describe the field. Military lawyers prefer the term 'LOAC' - law of armed conflict - while members of non-governmental organisations and most academics prefer 'IHL' - international humanitarian law.[32]

The difference in terminology denotes a deeper cleavage between two visions of the same body of rules. In its most simple form, this cleavage manifests itself in the privileging of either military necessity and the imperatives of winning a war or of considerations of humanity and the need to impose limits on violence. The LOAC vision begins with armed conflict and assigns primacy to the necessities of war; the IHL vision begins with humanitarianism and assigns primacy to the laws of humanity.[33]

Recognising the diverse ideological baggage that each terminology carries, in this thesis I will use the expressions laws of war, law of armed conflict, and international humanitarian law, interchangeably. This choice is guided in part by the fact that I am more concerned with the concepts embedded in this area of law than with the nomenclature of the field. But it also reflects the underlying theory that the dichotomy between the visions of military lawyers and humanitarians is often overrated.[34] Particularly when it comes to aerial bombing and the regulation of new technologies of war, there are strong synergies between humanitarianism and militarism. For instance, the recurring argument that new and better technology will make wars shorter and save lives finds as much approval in one camp as in the other.

This is not to say that terminology does not matter. Rather, it is simply a recognition that neither option – LOAC or IHL –, and the embedded assumptions they carry, appropriately fits my argument. The dichotomy, and the 'two cultures problem' it implies, conceals more than it uncovers. Forced to defend an interpretation of this area of law that starts either from 'military necessity' or from 'considerations of humanity', one is led to overlook more fundamental

[32] David Luban, 'Military Necessity and the Cultures of Military Law' (2013) 26(2) *Leiden Journal of International Law* 315.
[33] Eyal Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians' (2006) 39(2) *Israel Law Review* 81, 82.
[34] This is one of the main arguments made in Kennedy (n 25).

questions such as what is the nature of necessity in law, or who is included and who is excluded from humanity.[35] I therefore find no compelling reason at this conjuncture why one terminology should be favoured over the others.

1.5 Scope

The thesis covers the period of 1899 to 1977. It begins with the first considerations by international lawyers of how international law should respond to the introduction of hot-air balloons and airplanes in war. It ends in 1977 with the conclusion of the Additional Protocols to the Geneva Conventions, where the concepts and ideas that had emerged in the preceding decades were finally codified and incorporated in the laws of war. In this sense, the thesis covers the early history of aerial bombing and international law, a period often forgotten or ignored in current debates. Without belittling the relevance of subsequent events, it argues that most debates in IHL are still living in the shadow of events prior to 1977.

Each chapter focuses on a specific event which grounds the discursive and conceptual developments of certain periods in a material context. This framework allows the thesis to show how concepts and arguments which emerge in specific settings become untethered from these settings when articulated in legal doctrines which are then invoked in new circumstances. Seen together, the chapters are four historical items, each focusing on a particular concept or argument, which stacked together cover the essential points in the relation of international law to aerial bombing.

The materials explored are limited by the location, languages, time, and resources available for the research. The thesis covers literature mostly published in Anglophone and Latin countries in legal journals, books and documents. Archival research was conducted in Australia, the United Kingdom, France, and in international organisations such as the International Committee of the Red Cross and the League of Nations Archive. Yet I draw heavily from the insights and research that scholars have produced in the past century. My main contribution is not archival, bringing to life obscure documents, but perspectival, seeing a familiar history differently.[36]

[35] In other words, it precludes the kind of questions that critical scholars in the field of international law have been asking. See Anne Orford (ed), *International Law and Its Others* (Cambridge University Press, 2006).
[36] I've taken this simple and elegant way of expressing this idea from Immerwahr (n 18) 16.

Libraries have numerous books on the history of international humanitarian law, and perhaps even more on the history of air power. These explore in much more detail the specific events and debates referred to in this thesis. A few have specifically focused on international law and aerial bombing.[37] The problem is not that we lack knowledge, or that there is a so-called gap in the literature. It is that the accumulated knowledge that these hundreds, if not thousands, of books contain does not automatically translate into understandings that attend to present anxieties.[38] This thesis does not uncover new facts or unfamiliar archives but makes 'visible those things that are already visible' in order to (re)arrange 'what we have always known'.[39]

1.6 Methodology

> The past is never dear. It's not even past.[40]

Providing a new perspective which makes visible that which we have always known implies a certain method of researching and writing about law. This method, generally associated with the critical project, draws from the work of Michel Foucault and his investigations on the emergence of the state. For Foucault, while the role of science is to discover that which we cannot see, the role of philosophy is to make visible that which we do see.[41] In order to do that, first one must trace the relations between the different elements of a discourse and analyse the connections between them. By mapping these elements and connections it is then possible to describe transformations that would need to occur for new structures of knowledge to emerge.[42] This thesis makes visible how international humanitarian law relates to aerial bombing by analysing its central concepts and showing how they emerged, in what contexts, and how they relate to each other. It does the work of describing these historical developments so that we can

[37] Some more recent examples include: Natalino Ronzitti and G Venturini (eds), *The Law of Air Warfare: Contemporary Issues* (Eleven, 2006); Toshiyuki Tanaka and Marilyn Blatt Young (eds), *Bombing Civilians: A Twentieth-Century History* (New Press : Distributed by W.W. Norton, 2009); Massimo Annati and Tullio Scovazzi (eds), *Diritto internazionale e bombardamenti aerei* (Giuffrè Editore, 2012); Program on Humanitarian Policy and Conflict Research, *Manual on International Law Applicable to Air and Missile Warfare* (Program on Humanitarian Policy and Conflict Research at Harvard University, 2009); Matthew Evangelista, Henry Shue and Tami Davis Biddle (eds), *The American Way of Bombing: Changing Ethical and Legal Norms, from Flying Fortresses to Drones* (Cornell University Press, 2014); Dill (n 17); see also the book-length article by W Hays Parks, 'Air War and the Law of War' (1990) 32 *Air Force Law Review* 1.
[38] In the more elegant words of Sven Lindqvist: 'You already know enough. So do I. It is not knowledge we lack. What is missing is the courage to understand what we know and to draw conclusions.' in Sven Lindqvist, *Exterminate All the Brutes*, tr Joan Tate (The New Press, 1996) 2.
[39] Anne Orford, 'In Praise of Description' (2012) 25(03) *Leiden Journal of International Law* 609, 617–618.
[40] William Faulkner, *Requiem for a Nun* (Chatto & Windus, 1919) 85.
[41] Michel Foucault, 'La Philosophie Analytique de La Politique' in D Defert and F Ewald (eds), *Dits et Ecrits, 1954-1988* (1994) 534, 540–541.
[42] Orford, 'In Praise of Description' (n 39) 618.

understand which modifications would need to take place for international humanitarian law to develop a new relationship to aerial bombing and, more broadly, to new technologies of war.

I draw from the increasing interest in the last three decades in the historical and theoretical dimensions of international law and from a critical attitude toward the history of international law which refuses to look to history for history's sake.[43] The argument is therefore an effort to articulate the presence of the past in present theories and in present law. This articulation of history and theory has been a fundamental trait of critical scholarship on international law, as in the work of Martti Koskenniemi and in the historiographical turn in the subject.[44] Likewise, the turn to historiography has been vital to the debate about the relationship between imperialism and modern international law, a topic constantly highlighted by scholars belonging to a tradition of third world international legal scholarship (or the more recently coined Third World Approaches to International Law – TWAIL).[45]

The last decade has expanded the historiographical turn in the field. In particular, the emphasis on indeterminacy, complexity, contingency and alternative possibilities associated with critical legal history has been the object of critique by international lawyers who have rejuvenated Marxist approaches to international law.[46] For instance, TWAIL's analysis of the relationship between colonialism, imperialism and international law has been complemented by critiques of capitalism, civilisation and international law,[47] and of the process of international legal reproduction.[48] This thesis draws from these approaches and the revived efforts to combine thick description with analyses of the structural factors built into

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[43] Unlike the work of some historians, as argues Pocock in: John GA Pocock, 'Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi' (1997) 43 *McGill, LJ* 481, 483–484.

[44] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge University Press, 2002); GRB Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law' (2005) 16(3) *European Journal of International Law* 539.

[45] Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' in *Droit International et Nouvelles Approches Sur Le Tiers-Monde: Entre Répétition et Renouveau* (Société de législation comparée, 2013); on the topic of imperialism and international law see the work of Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2005); see also the critique of the idea of imperialism in TWAIL scholarship by Robert Knox, 'A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law' (Doctoral Thesis, London School of Economics and Political Science, 2014).

[46] Christopher Tomlins, 'Marxist Legal History' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press, 2018) 515; Christopher Tomlins, 'After Critical Legal History: Scope, Scale, Structure' (2012) 8(1) *Annual Review of Law and Social Science* 31; Robert Knox, 'Marxist Approaches to International Law' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 306.

[47] Tzouvala (n 28); Robert Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4(1) *London Review of International Law* 81.

[48] Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge University Press, 2019).

international legal frameworks. It therefore sees law neither as wholly contingent on a sequence of historical accidents accumulated at certain points and in certain forms, nor as a pre-determined discourse through which specific outcomes are the inevitable result. Rather, it seeks to understand the how the distribution of violence is patterned in certain ways through international law, such that certain groups constantly find themselves 'at the less comfortable end of social relations'.[49]

By examining how concepts of international humanitarian law emerged, I am interested in recording and exposing the power and violence behind these historical processes – a task of genealogy.[50] As Foucault indicated, 'emergence designates a place of confrontation but not as a closed field offering the spectacle of a struggle among equals'.[51] In this perspective, law appears not as a means to temper violence, but on the contrary as a means to satisfy it: 'law is a calculated and relentless pleasure, delight in the promised blood, which permits the perpetual instigation of new dominations and the staging of meticulously repeated scenes of violence'.[52] For Foucault, however, rules are ultimately 'empty in themselves, violent and unfinalized; they are impersonal and can be bent to any purpose'.[53] It would thus seem that anyone capable of seizing these rules and inverting their interpretation and meaning would be able to overcome those who had initially set them. But here is where one must stop and ask if history were to be written by those on the receiving end of aerial bombing – think of those in Libya one hundred years ago or today – would it ever appear as an assortment of accidents, deviations or reversals?[54]

While this thesis holds on to the value and potential of genealogy as a method of understanding power, violence, and their transformations, it also aims to give a sense of how, from certain perspectives, the experience of international law in its relation to aerial bombing is not just 'a swirl of vivid odds and ends'.[55] Seeing the world (or, in this case, international humanitarian law) as a jigsaw of concepts and interpretations which are constantly being moved and rejiggled is to view it from a specific standpoint. It is a standpoint which depends on enjoying certain privileges, like that of viewing the world contemplatively and of being

[49] S Marks, 'False Contingency' (2009) 62(1) *Current Legal Problems* 1, 14.
[50] Michel Foucault, 'Nietzsche, la généalogie, l'histoire' in *Dits et écrits 1954-1988* (Gallimard, 1994) 136.
[51] Michel Foucault, 'Nietzsche, Genealogy, History' in Donald F Bouchard (ed), Donald F Bouchard and Sherry Simon (trans), *Language, Counter-Memory, Practice* (Cornell University Press, 1977) 139, 150.
[52] Ibid 151.
[53] Ibid.
[54] Parfitt (n 48) 26.
[55] Terry Eagleton, *The English Novel: An Introduction* (Blackwell, 2005) 311.

able to participate in the discourse of international law. Yet for many whose communities have been bombed for refusing to transform their ways of life, for those who have fought for liberation enduring the devastation of their homes and environments, or for those who are currently living under the unremitting buzz of armed drones, the pattern of aerial violence and destruction sanctioned by the laws of war is quite clear.

It is for this reason that this thesis connects the concepts and interpretations of the laws of war to experiences of aerial bombing and descriptions of the events around which legal debates took place. At the same time that it is important to understand the internal logic of law and the connections between legal concepts, we should not lose sight of the broader picture in which legal arguments take place. In practical terms, this means that this thesis does not seek to provide particular solutions, improvements or changes to international humanitarian law – though many can certainly be provided – but to give a sense of how we got to the place we are now to begin with, and of the limitations that will inevitably come up when concepts of international humanitarian law are invoked. After going through the journey of the history of international law and aerial bombing, the reader should view the use of international humanitarian law on its own terms with caution, and understand that disconnected from broader strategic goals and politics there is little that it can achieve.[56]

My approach to history and chronology is based on critiques of linear and continuous time and is largely inspired by Walter Benjamin's philosophy of history. I reflect on the past not as a series of irretrievable events which can be put together by careful historical work and from which we can extract lessons, but as wounds which demand that we take action to transfigure them.[57] Benjamin's work, though cryptic and often obscure, takes issue with how the relationship between past, present and future has been configured in mainstream histories to defuse political change and to silence the history of the downtrodden. His unorthodox historical materialism urges us instead to 'explode the continuum of historical succession' and to recognise and appropriate specific memories as they flash up and crystallise certain moments in constellations which bring together our current era along with specific earlier ones.[58] In other words, while the relation of the present to the past is purely a temporal one, the relation of what-has-been to the

[56] On the necessity of framing legal struggles in terms of broader political strategic goals see: Robert Knox, 'Strategy and Tactics' (2010) 21 *Finnish Yearbook of International Law* 193.
[57] Parfitt (n 48) 27.
[58] Walter Benjamin, *The Arcades Project*, ed Rolf Tiedemann, tr Howard Eiland and Kevin McLaughlin (Harvard University Press, 1999) 475; Walter Benjamin, 'Theses on the Philosophy of History' in Hannah Arendt (ed), Harry Zohn (tran), *Illuminations* (Shocken Books, 1969) 263.

now is dialectical: 'the past, therefore, is not historical automatically and of its own accord'.[59]

International law is perhaps one of the disciplines where blasting specific events out of the continuum of historical succession is part and parcel of its craft. In this sense, my methodology is also profoundly influenced by Anne Orford's defence of an 'international legal method' grounded on the art of making meaning move across time. As past concepts and interpretations are constantly being retrieved as a source or rationalisation of present obligation, international law is, in Anne Orford's words 'necessarily anachronic, because the operation of modern law is not governed solely by a chronological sense of time in which events and texts are confined to their proper place in a historical and linear progression from then to now'.[60] This thesis covers a specific period in time (1899-1977), and the chapters are ordered in a successive way, but they do not convey a linear or sequential history. Rather, each chapter focuses on a specific event and the correlated legal concepts and arguments which flow from such event and which are still present in contemporary debates. Accordingly, some events and dates are closer to others not because there is less time between them, but because they are framed by similar concepts, arguments and ideas. Each chapter is therefore centred around a present concept of international humanitarian law and not just a past event.

Turning to events and using them to frame specific arguments is anything but new in international law.[61] International lawyers refer to events as a matter of reflex when arguing for states, before courts, for a movement or a certain ideology. What is distinct about this thesis is partly 'its reflection upon this very reflex in the course of its re-enactment'.[62] It is also the awareness, going back to the critique of linear and continuous time, that the events narrated in each chapter are not just long gone curiosities but present *demands* for action. As Walter Benjamin wrote in France on the eve of Nazi occupation, 'even the dead will not be safe from the enemy if he is victorious. And this enemy has never ceased to be victorious'.[63] This allows us to conceive of events 'no longer as a spatio-temporal determination but as the opening of the primary dimension in which all spatio-temporal dimensions are based'.[64] Each event

[59] Parfitt (n 48) 30.
[60] Anne Orford, 'On International Legal Method' (2013) 1(1) *London Review of International Law* 166, 175.
[61] See the collection of essays on events in international law: Fleur Johns, Richard Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge, 2011).
[62] Ibid 4.
[63] Walter Benjamin, 'On the Concept of History' in Howard Eiland and Michael W Jennings (eds), Harry John (tran), *Walter Benjamin: Selected Writings, Vol. 4: 1938-1940* (Harvard University Press, 2003) 289, 391; Parfitt (n 48) 27.
[64] Giorgio Agamben, 'Time and History: Critique of the Instant and the Continuum' in *Infancy and History: On the Destruction of Experience* (Verso, 2007) 91, 104.

recounted in each chapter – the first aerial bombing; colonial bombing in the Middle East; the fire-bombing of European and Japanese cities; the devastation of Vietnam, Laos and Cambodia – is thus a part of our present and a call for action.

One way to organise a narrative while attending to Benjamin's call to explode the continuum of historical succession is through the technique of montage, which has been brilliantly used in the field of international law by Rose Parfitt.[65] Montage consists of 'assembling large-scale constructions out of the smallest and most precisely cut components' with the aim of 'discovering in the analysis of the small individual moment the crystal of the total event'.[66] Drawing from this technique, Parfitt put together a methodological framework for a modular history of international law in which different elements are put together in the form of a shadow-box.[67] The shadow-box is a case with a glass-front display containing objects presented in a thematic grouping. The assemblage of the objects and the depth effect created by their relative heights from the backing produces a dramatic visual result. The frame holds the contents together and regulates the way in which the light falls in, thus guiding the gaze of the viewer in certain ways. But the viewer can look at each object placed inside the frame from different angles and in isolation or together with other objects. The angles available to the viewer are both constrained by and opened up by the shape of the box. In this analogy, each chapter in this thesis is an object designed to tell a story of its own. Yet 'when inserted into the box, both on top of and next to its other components, seen within the context of the Frame, each new historical item is designed to alter our perception of the whole, bringing certain elements into relief while rendering others less visible'.[68] At the end, the reader will find no conclusion in the sense of a solution to a problem (eg. how should international law regulate aerial bombing?) but a lid which brings the historical items into contact with current debates on aerial bombing, drone warfare and the regulation of new technologies of war.

1.7 Originality and choices

As a piece of legal history based on a limited number of events, this thesis is not intended to provide an in-depth historical reconstruction of these events. Nor can it be seen as a

[65] Rose Sydney Parfitt, 'The Anti-Neutral Suit: International Legal Futurists, 1914–2017' (2017) 5(1) *London Review of International Law* 87; Parfitt (n 48).
[66] Benjamin, *The Arcades Project* (n 58) 461; Parfitt (n 48) 30.
[67] Parfitt (n 48) 54–55.
[68] Ibid 55.

comprehensive history of international law and aerial bombing, as it will shine light on certain aspects of international humanitarian law while leaving others in the dark. The originality and confines of this thesis rest on this selection.

The events examined in each chapter were chosen taking into consideration two main factors. First, they are events which generated intense legal debate. There were, of course, numerous other aerial bombings in the period covered in this thesis. For instance, there were unfortunately countless examples of colonial bombing during the interwar period and dozens of cities incinerated by fire-bombing during World War II. But many such events were often ignored or hardly noticed in international legal circles and, more importantly, in legal journals and publications. The selection of events in this thesis was therefore limited to those events which either had direct legal repercussions or were useful as an entry point into certain legal arguments.

Second, the choice of events is closely connected to the argument I make in this thesis. I argue that international humanitarian law as it is today fails to restrict aerial bombing not only because it is indeterminate or incomplete, but rather because some of its central concepts developed explicitly as a reflection of the emergence of aerial bombing and of air power doctrines. This is particularly the case in relation to the law of targeting and attack, often acknowledged as the basis of the laws of war. Hence the focus on the concepts of civilians, military objectives and the principle of proportionality. In order to make this argument, I focus on some of the events where this can be seen more clearly. The implication is that each of these historical instances has a larger explanatory value than one might initially assume.

Finally, although it may seem unnecessary, it is worth recalling that this is a history written from a particular perspective and with a particular politics in mind. Considering my aim of seeing a familiar history differently, or marking visible that which was once evident but has over time become concealed, my intention was to write a pre-history, or rather an early history of aerial bombing and international law, a history that shows the making of the concepts and forms that are recognisable in international humanitarian law today.[69] While most accounts of international humanitarian law begin with the Additional Protocols to the Geneva Conventions of 1977, this is the point where my thesis ends. And it ends by viewing the Additional Protocols as a result of the failure of an anticolonial project for the laws of war – a project which could one day be

[69] A very similar methodological approach was used by Andrea Leiter in relation to international investment law: Andrea Leiter-Bockley, 'Making the World Safe for Investment: The Protection of Foreign Property: 1922-1959' (Doctoral Thesis, University of Melbourne and University of Vienna, 2019).

picked up and revived.

1.8 Overview of the thesis

This thesis is composed of six chapters. In the introduction, I set out the scope of the project and its methodological framework. There are four substantial chapters, each one covering a specific event and a central concept of international humanitarian law. The conclusion draws them together and articulates how each chapter prompts us to think differently about the present.

The first substantial chapter narrates the first aerial bombing campaign in history, during the Italo-Turkish war of 1911-1912. It explores the early debates on aerial warfare in the late 19th and early 20th centuries, focusing on the Hague Conferences of 1899 and 1907 and on international law journals and professional circles. I argue that the rise of aerial bombardment was experienced by international lawyers as a technological crisis event that called for an international regulatory response. The legal techniques deployed to face this crisis had substantial implications for subsequent regulation as they respatialised and rescaled warfare, empowering an aerial perspective that came to frame how we know and see targets.

I first trace how international lawyers debated the question of 'who owns the air?'. This question may sound odd today, but in the first decade of the past century aerial sovereignty was debated and for most international lawyers accepted as permeable and divisible. Sovereignty was not only divided horizontally between states, empires, colonies and protectorates, but also vertically. I argue that Italy's invasion of Libya exemplified how the legal creation of aerial territory became a distinct technique through which empires would claim spatial sovereignty beyond their borders. The issue of sovereignty over the air was not simply an intra-European debate over the legal nature of the atmosphere, it was concurrently about the production of aerial imperial formations. In the organisation of airspace through law some spaces were opened up for the exercise of aerial violence even when no war was officially recognised. Legally and spatially constructing aerial territory, international law played an important role in consolidating airspace as an essential locus of international interventions.

In this chapter I also examine the Hague Conferences of 1899 and 1907, where the first debates on how to regulate aerial bombing were held. The focus is on the transition from a position in

favour of banning aerial bombing in 1899 to authorising and regulating it by 1907. Two main arguments played a role in this change of perception. The first was that new technologies such as airplanes were essential to maintaining European domination over other peoples. The second argument which played a major role in changing the perception at The Hague that aerial bombing should be prohibited was a humanitarian one. Captain Crozier of the United States famously convinced other delegates that from a humanitarian standpoint, if balloons and planes could be perfected so that bombing could be more precise that would be a positive development which should be welcomed instead of proscribed. Crozier's humanitarian argument became a common trope in almost every subsequent debate on the regulation of aerial bombing. The idea that new weapons, or better technology, will diminish the evils of war and support humanitarian considerations is a contradiction that runs through the history and the structure of the field we now call international humanitarian law.

Chapter 3 is centred around the bombing of Damascus by the French in 1925 and the practice of 'air control' by the British during the 1920s in the Iraq. It reads interwar attempts at codifying rules on aerial bombardment alongside the practice of aerial bombing as a form of colonial policing and imperial defence. It argues that the genesis of the concept of 'civilian population' coincided with the normalisation of bombing non-combatants in colonised territories. The chapter explores how international oversight, through the work of the Permanent Mandates Commission of the League of Nations, summoned concepts from the laws of war and deployed them as standards in justifying the suppression of rebellions and of anticolonial wars. I emphasise the continuities between colonial bombing during the interwar period and contemporary uses of armed drones.

A focus on the theory and practice of colonial bombing is central to illuminate why international law failed to restrict air power in any meaningful way during the 1920s and 1930s. The practice of colonial bombing had quite an opposite effect, precluding the success of some central ideas proposed by international lawyers and diplomats in that period such as disarmament, the creation of an international air police, and a prohibition of bombing. Bombing in the peripheries of empires also exposed how the idea of distinguishing between combatants and civilians was never just about wearing a uniform, carrying a gun, or being part of the military or of a militia. Bombing in Mesopotamia, Morocco, Afghanistan, Pakistan, Somalia or Sudan was more acceptable and unobjectionable than bombing in London, Berlin or Paris – not because distinction did not apply to the former, but because the racist assumptions, narratives, social and cultural perceptions Europeans crafted about these places and peoples made errors more

tolerable and public perception acquiescent. Understanding this history, we are able to comprehend how air power was presented in the interwar period as a more efficient, cheaper and humane form of warfare, just as armed drones are today marketed as a clean humanitarian weapon that minimises collateral damage.

Chapter 4 examines what concepts were deployed, and which arguments were made in legal and political debates about legitimate targets during the strategic bombing campaigns of the Second World War. The event around which the narrative is constructed is Operation Gomorrah, the code name for the fire-bombing of Hamburg in July 1943. In one of the largest firestorms raised by the Royal Air Force during the war, over forty thousand people were scorched to death and thousands of others left homeless. The chapter argues that in the justifications for the area bombing campaigns over Germany and Japan the distinction between civilians and combatants was qualified by a sense that workers were not only legitimate, but primary targets. I focus specifically on Britain and on the work of James Molony Spaight, who was the most prolific and forceful authors in arguing for the legality of area bombing. In his work it is clear that killing German workers and their dwellings was a deliberate tactic rather than an unintended effect of bombing. The idea of collateral damage which is so prominent today was back then turned on its head. The killing of workers and the destruction of housing was not considered a side effect of bombing factories and communication lines, but damage to industry was the tributary consequence of destroying whole neighbourhoods.

On the other hand, the United States never professed to be targeting workers themselves. Yet they joined the Royal Air Force in directing their attacks to city areas, most notoriously over Berlin and Dresden. At this point, Americans were also carrying out the fire-bombing of Japanese cities and burning to death 100,000 civilians in one night, a campaign that would end with the dropping of the atomic bombs. The main standpoint upon which legal justifications for these bombings were based was the concept of military objectives, as Americans argued that industrial centres fell under this category. Military doctrines of strategic bombing, which argued that air forces should attack centres of production, were easily accommodated in international law through an ever-broadening concept of military objectives. This American justification for area bombing was even turned into an animated movie by Walt Disney called *Victory Through Air Power* which depicted the use of bombers against enemy cities as the key to the United States winning the war. The American argument thus signalled a move from distinction between individuals to one focused on objects and economic resources.

Looking back at the justifications for the strategic bombing campaigns of the Second World War, it is perplexing that they outgrew their origins in total war to become one of the foundations upon which modern international humanitarian law is built. We see in both the British and American justifications of strategic bombing how the idea of distinction and the concept of military objectives, two pillars of the law of armed conflict, were interlaced and used in arguments for vindicating area bombing. This chapter compels us to see how the language of international law can become, in words of Martti Koskenniemi, 'a public and technical discourse for the defence of the killing of the innocent'.[70]

Chapter 5 starts with Operation Linebacker II, the concentrated bombing of North Vietnam at the end of 1972. It focuses on the Vietnam War as the backdrop to the long debates and conferences that led to the conclusion of the Additional Protocols of 1977 to the Geneva Conventions. I argue that the 1960s and early 1970s offered radically different views of the laws of war than those established almost exclusively by Europeans until then. Anticolonialists fighting wars of national liberation both invoked the laws of war to expose the hypocrisy of imperialists who had established them and to call for radical reforms in this area of law.

That period also anticipated and reconfigured our contemporary questions about aerial bombing and collective violence more generally. In retelling this story, I draw attention to how the anticolonial account of the laws of war marked a radical break from the European views about regulating warfare and international violence. It offered a different account of how new weapons and technologies should be regulated and challenged the reigning views about the inevitability and legitimacy of aerial warfare. Rather than asking how to incorporate aerial bombing within the rules of land or sea warfare, anticolonialists denounced the atrocities committed by technologically superior nations to civilians and movements fighting for national liberation.

They called for the ban of weapons such as napalm, cluster bombs and defoliants as well as of methods of bombing that included devastating whole areas or establishing 'free fire zones'. This narrative challenges the view that the laws of war concerning aerial bombing evolved naturally towards a more protective or humanitarian framework as a continuing unfolding of vague humanitarian principles established in the nineteenth century. By focusing on the Vietnam war and the debates that followed it, we can uncover the rise and fall of the most radical challenge

[70] Martti Koskenniemi, 'Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons' [1997] (10) *Leiden Journal of International Law* 137.

to date to international law concerning aerial bombing.

The chapter presents this period as one of the most promising, but ultimately failed, attempts to rewrite the laws of war. A remarkable fact that is often forgotten in current debates about the proportionality of civilian casualties is that in the 1970s the majority of states, led by anticolonialists and socialists, strongly opposed the inclusion of the principle of proportionality or of anything resembling it in the Additional Protocols. Those who had been on the receiving end of bombs were quick to point out that proportionality had been repeatedly invoked to justify the killing of civilians. And yet, unlike the victories won by the anticolonialists concerning the recognition of wars of national liberation and the expansion of the category of combatants, the Additional Protocols incorporated much of what Western, imperialist and technologically superior states had argued for when it came to aerial bombing.

Instead of placing the Vietnam war and the conferences of the 1970s as catalysts for progress in the laws of war, I trace many of the paradoxes and deficiencies of our contemporary international law of armed conflict to the ideological and institutional transformations that began in that period. The failure of more radical changes to the laws of war and the growing dismissal of international institutions marked the closure of a historical moment that had made a vision of anticolonial worldmaking possible. In its place, the appropriation by the United States and Western states of a neoliberal version of human rights discourse in the late 1970s, which permeated and seeped into the laws of war, was as much a technique to critique and discredit the promises of decolonisation as a way of taming the legacy of Vietnam and avoiding a true reckoning.

For the four decades that followed, debates concerning aerial bombing and international law centred around the interpretation and application of the Additional Protocols. The adoption of its definitions of military objectives, civilian population and standards of proportionality might appear today as progressive and perhaps inevitable. But to come to this set of conclusions is to evade reckoning with the highly contested character of these concepts and of the promises and ruins of alternative anticolonial visions of the laws of war. In this sense, revisiting the Vietnam war and the debates that led to the Additional Protocols might serve as a reminder that what appeared to be the moment of closure in a long path towards the codification of rules on aerial warfare was also a staging ground for an anticolonial and egalitarian version of what the laws of war could be.

The conclusion argues that when it comes to aerial bombing and international law we are still living in the shadow of the events leading up to the 1970s: the concepts that were then contested and challenged have become naturalised and depoliticised through the expansion of the discourse of contemporary humanitarian law. Today, the thought of an overhaul of the existing laws of war or of convening a four-year conference to update the Geneva Conventions and their Additional Protocols seems like a far-fetched idea. We live in a world where air power and its regulation are still shaped by the battles won and lost in the 1970s.

In summary, the early history of aerial bombing and international law urges us to rethink some debates on new technologies and war. Why is it that, despite all the precision talk, aerial bombing so regularly proves to be at best a blunt instrument of destruction? How have airplanes come to symbolise the too-big-to-fail militarised cult of technological violence, and why have international law and lawyers been so eager to embrace it?

This thesis is a starting point to answering these questions. It will give readers a sense of how aerial bombing came to signify, symbolise and mythologise a new way of war as governance through targeted legal violence. A new way of war which promises sharpness, precision, a high degree of professionalism and legality, zero casualties for one side and strict adherence to the principles of distinction and proportionality at the other end. Promises which ultimately cannot be kept. History may thus be an antidote to the prevailing technological and legal fetishism which stands in for analysis and judgment and which leads to depoliticization and complacency.

2. Aerial violence and the promises of technology: the first aerial bombing

S'ode nel cielo un sibilo di frombe
Passa nel cielo un pallido avvoltoio
Giulio Gavotti porta le sue bombe

[A whirring of slings is heard in the sky
A pale vulture passes in the heavens
Giulio Gavotti is carrying his bombs][1]

All important changes in history more often than not imply a new perception of space. The true core of the global mutation, political, economic and cultural, lies in it.[2]

This chapter examines the first aerial bombing campaign and the first attempts at regulating aerial warfare. I argue that the rise of aerial bombardment was experienced by international lawyers as a technological crisis event that called for an international regulatory response. This response came in two interrelated forms. First, the invention of the airplane led international lawyers to rethink the question of 'who owns the air?', and in doing so to create the idea of aerial territory. Second, international lawyers had to contend with the issue of whether aerial bombing should be prohibited or regulated, and, in the latter case, whether the then existing concepts of the laws of war could be applied to aerial bombing. These initial debates were put to rest within the first two decades of the twentieth century. International law not only determined that the new technology of aerial bombing could operate extensively but was itself transformed by this new technology.

[1] Gabriele D'Annunzio, *Le Canzioni Della Gesta D'Oltremare* (Fratelli Treves, Seconda Edizione, 1912) 73 La Canzone Della Diana.
[2] Carl Schmitt, *Land and Sea*, tr Simona Draghici (Plutarch Press, 1997) 29.

2.1 An unexpected celestial assault

Fifty years after the unification of Italy, colonial fervour was running high. The pursuit of the status of a great European power required the creation of a vast colonial empire which would serve as an outlet for emigration and attain a Mediterranean balance of power. The stumbling Ottoman empire had already lost control of most of its African possessions and for years Italy had been articulating its interest in having a free hand in the Libyan coast through secret agreements and diplomatic arrangements.[3] Not having acted upon it until then, by 1911 a ferocious press campaign led by the nationalists called for the occupation of the so-called 'fourth shore'.[4] Just as the French had annexed and expanded their domination over Moroccan territory, there was mounting pressure for Italy to assert its interests in North Africa. The colonial drive was met with feeble internal resistance and there were no signs that an eventual campaign would lead to external interference. In late September the *Corriere Mercantile* expressed the general feeling in the country: 'Italy has crossed the Rubicon of indecision and now the beautiful *tricolore* crosses the sea and affirms the supremacy of our power and of our civilisation over barbarous and deceitful Turkey'.[5] In the words of one of the leaders of the colonial drive, Enrico Corradini, 'it was the time for Tripoli'.[6]

The campaign was supposed to be short and decisive. The Italians expected to quickly overrun the Ottoman forces and fantasised that a deep-seated antipathy for the Turks would lead the Arab population to welcome with joy a power that could revive the region.[7] In fact, after the occupation of Tripoli and other coastal towns the Ottomans were joined by several Arab fighters and retreated into the interior. The war would last for over a year and it would take more than two decades before the Italians took full control of the area comprising the territories of Tripolitania, Cyrenaica and Fezzan. In the annals of twentieth-century warfare the Italo-Turkish conflict has become but a footnote to other major conflicts. Yet it is still remembered for one particular accomplishment. As General Carlo Caneva landed with his troops in Tripoli

[3] For a detailed overview of the conflict and particularly the reactions to the Italian invasion in the European press see: William C Askew, *Europe and Italy's Acquisition of Libya, 1911-1912* (Duke University Press, 1942); See also: Luca Micheletta and Andrea Ungari (eds), *The Libyan War 1911-1912* (Cambridge Scholars Publishing, 2013) ix–x.
[4] The image of the Italy's fourth shore in addition to the three other Mediterranean ones (Tyrrhenian, Ionian and Adriatic) comes from D'Annunzio's '*la grande Patria dalle quattro sponde*' see: D'Annunzio (n 1) La Canzone dei Trofei; see also Claudio G Segrè, *Fourth Shore: The Italian Colonization of Libya* (University of Chicago Press, 1974).
[5] Quoted in: Askew (n 3) 60.
[6] Enrico Corradini, *L'Ora Di Tripoli* (Fratelli Treves, 1911).
[7] In Castellini's words, 'between Arabs and Italians there is no hate: both peoples hold each other in high esteem' Gualtiero Castellini, *Tunisi e Tripoli* (Fratelli Bocca Editori, 1911) 31, 194; see also the apologetic Paolo de Vecchi, *Italy's Civilizing Mission in Africa* (Brentano's, 1912); for the opposing point of view see GF Abbott, *The Holy War in Tripoli* (Edward Arnold, 1912) 195–198.

in the beginning of October 1911, he brought with them a handful of aircraft and pilots. In the months following the invasion, these pilots would inaugurate a new chapter in the history of warfare with a long list of firsts: the first flight by a military aircraft over enemy territory; the first use in war of wireless ground-to-air communication; the first wartime use of aerial photography; the first aircraft shot down in war; and the first aerial bombing.[8]

It was in this context that on the 1st of November 1911 a young Italian pilot named Giulio Gavotti wrote to his father saying: 'I decided that today I would try to drop bombs from the airplane. It is the first time something of this kind will be tried and if I succeed I shall be happy to have been the first'. It was not as purely a personal decision as he made it appear. Some days before he had written that 'two boxes full of bombs arrived, we are expected to throw them from our planes…it will be very interesting to try them on the Turks'. On that fateful day he took off in his plane and headed for Ain Zara, a small settlement south-east of Tripoli where he had noticed a gathering of Arab fighters on an earlier reconnaissance flight. He had with him four hand grenades. As he approached the oasis he noticed two Arab camps next to a white house, one with around two hundred people and the other with around fifty. He took one of the bombs in his right hand while holding the steering wheel with the other, pulled the safety pin with his teeth, and threw it out of the plane. A few moments later he noticed a small dark cloud rising from the smaller camp. He celebrated: 'I had aimed for the larger one, but I was lucky nevertheless; I hit the right target'. He then circled back with his plane and dropped another two bombs, but could not observe their effect. The final one he dropped over another oasis near Tripoli. Upon his return to the aerodrome Gavotti was delighted: 'I was very happy with the results as I landed. I went straight to the division and reported to Governor General Caneva. Everyone was very pleased'.[9]

[8] Martin Van Creveld, *The Age of Airpower* (Public Affairs, 2011) 19; for an overview of the use of aircraft by Italy's colonial occupation of Libya see Ferdinando Pedriali, *L'Aeronautica Italiana Nelle Guerre Coloniali: Libia 1911-1936* (Ufficio Storico Aeronautica Militare, 2008); see also Gianluca Pastori, 'The Libyan War and Italian Modernity: A Troublesome Relation' in Luca Micheletta and Andrea Ungari (eds), *Libyan War 1911-1912* (Cambridge Scholars Publishing, 2013) 59; and John Wright, 'Aeroplanes and Airships in Libya, 1911-1912' (1978) 3(10) *The Maghreb Review* 20.

[9] Translated from the letters made available by Gavotti's grandson in 'Giulio Gavotti e Il "Manifesto"', *AeroStoria* <https://aerostoria.blogspot.com/2009/11/giulio-gavotti-e-il-manifesto.html>; see also Alan Johnston, 'The First Ever Air Raid - Libya 1911', *BBC News* (online, 10 May 2011) <https://www.bbc.com/news/world-europe-13294524>; also quoted in Thomas Hippler, *Governing From the Skies: A Global History of Aerial Bombing*, tr David Fernbach (Verso, 2017) Prologue; Robert H Gregory, *Clean Bombs and Dirty Wars: Air Power in Kosovo and Libya* (Potomac Books, 2015) 1–2; and in Thomas Hippler, *Bombing the People: Giulio Douhet and the Foundations of Air-Power Strategy, 1884-1939* (Cambridge, 2013) 1.

[REDACTED IMAGE]

Giulio Gavotti drops the first bomb from a plane
Source: painting by Wilf Hardy (2016)

The news spread quickly and there was considerable media excitement over Gavotti's feat.[10] The headline wired to news services around the world read: 'Aviator Lt. Gavotti throws bomb on enemy camp. Terrorised Turks scatter upon unexpected celestial assault'.[11] On the following day, Italian newspapers celebrated Gavotti's accomplishment. The *Corriere della Sera* claimed that 'for the first time in the world an airplane has attacked the enemy' and that from the dispersal of the group of Arabs attacked it concluded that such method of attack 'could have a decisive influence on the enemy's morale in battle'.[12] Remarkably, from this very first experience of aerial bombing its effect was represented as materially dubious but efficient in upsetting the enemy's morale. It foreshadowed an argumentative pattern that would be recurrently invoked by air power theorists, military strategists, politicians and lawyers when confronted with the lack of evidence for the effectiveness of aerial bombing, or with evidence of its unsatisfactory results. The typical move would be to counter that the effects on morale are more important than the material damage inflicted. Unsurprisingly, the corollary was that it is a lot harder to evaluate the

[10] The use of airplanes during the Italo-Turkish war also inaugurated the genre of aviation films. In 1912 the Neapolitan director Elvira Notari explored the enthusiasm for Italian aviators in *L'eroismo d'un aviatore a Tripoli*, where events were described with exaggeration: 'the rain of bombs, exploding, confused and destroyed the enemy'. See Giuliana Bruno, *Streetwalking on a Ruined Map: Cultural Theory and the City Films of Elvira Notari* (Princeton University Press, 1993) 199.
[11] Quoted in: Gregory (n 9) 2; and in Derek Gregory, 'Episodes in the History of Bombing', *Geographical Imaginations* (1 October 2012) <https://geographicalimaginations.com/tag/giulio-gavotti/>.
[12] Luigi Barzini, 'La Guerra Italo-Turca: il primo lancio di bombe de un aeroplano', *Corriere della Sera* (Milano, 2 November 1911) 7.

impact of bombing on the enemy's morale than it is to assess its material effect.[13] A series of other patterns of arguments concerning aerial bombing can be traced back to this inaugural event.

On a practical level, the Italian experiment confirmed what delegates at The Hague Peace Conferences of 1899 and 1907 had already foreseen, namely the viability of the use of aircraft in war and in particular of aerial bombing. For Marinetti, the founder of the Futurist movement, it was a euphoric moment. He had gone to Libya as a correspondent for the French newspaper *L'Intransigeant* and praised the war as 'hygienic' and 'a moral education'. For him, the pacifists were now buried deep in the caves of their 'ridiculous Palace of The Hague' while the 'grand hour of futurist Italy' had arrived.[14] In the aftermath of Gavotti's raid the governments of France, Germany, Britain, Russia and the United States sent observers to report on the use of aircraft during the conflict. They were not as enthusiastic as their Italian counterparts, but were nonetheless 'profoundly impressed by the skill and coolness of their pilots and firmly convinced of the practical value of aviation in war'.[15] In Britain a divided press oscillated between supporting Italy's invasion and condemning Italy's aggression as one of the most wicked wars in history, in which 'the floodgates of blood and lust' had been opened.[16] If there was one lesson to be learnt, however, it was that by 1912 it was clear that no nation could any longer afford to go to war with a marked inferiority in aerial strength.[17]

2.2 Libya and international law: past and present

In 2019, the area around Tripoli where the first aerial bombing in history took place is the site of protracted fighting between rival militias in the aftermath of the overthrowing and killing of Muammar Qaddafi in October 2011. Ain Zara and Tajoura, the sites where Gavotti dropped his bombs, now host prominent prisons. In the former, loyalists of the former Qaddafi regime were ostensibly detained until fighting in the area resulted in a prison break in late 2018.[18] Both detention centres currently hold hundreds of migrants, including a large number of children, in

[13] Hippler, *Bombing the People: Giulio Douhet and the Foundations of Air-Power Strategy, 1884-1939* (n 9) 65.
[14] FT Marinetti, *La Bataille de Tripoli* (Edizioni Futuriste di Poesia, 1912) Preface.
[15] 'The Italian Army And Aviation', *The Times* (12 August 1912) 5.
[16] Supporting Italy's invasion were conservative newspapers such as the *Morning Post* and the *Daily Telegraph*; condemning the invasion see *The Manchester Guardian* and *The Times*. All quoted in Askew (n 3) 102–103.
[17] 'The Italian Army And Aviation' (n 15).
[18] AFP, 'Hundreds Escape Ain Zara Prison near Libya's Tripoli', *Al Arabiya (English)* (3 September 2018); Richard Spencer, '400 Ain Zara Prisoners Escape amid Militia Clashes in Tripoli', *The Times* (3 September 2018).

overcrowded and unsanitary conditions.[19] The background to this state of affairs is the ongoing Libyan civil war in which three rival governments have fought for control of the country since 2014.[20] This conflict followed the 2011 NATO intervention supported by UN Security Council Resolution 1973 (17 March 2011) in the name of the international community's 'responsibility to protect' civilians in Libya.[21] Remarkably, this resolution excluded the possibility of any foreign occupation forces in Libyan territory, but it authorised air strikes 'to protect civilians and civilian populated areas under threat of attack' and established a no-fly zone.[22] In other words, NATO members acting to enforce UNSC Resolution 1973 were to rely *exclusively* on air power to protect civilians and restore order. A hundred years after the first bombs were dropped from a plane, aerial bombing had become the preferred and primary method of humanitarian intervention – and bombs were still falling in the same places as they had before.[23]

When contrasted with the inaugural aerial bombings of 1911, we might see in contemporary events in Libya nothing more than a geographical coincidence. For the mainstream of international law and its core doctrines, there is no straightforward connection between the colonial war waged by Italy over a century ago and contemporary interventions for the protection of civilians through a system of collective security.[24] Indeed, the 'strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya'[25] reaffirmed in Resolution 1973 and the doctrine of the non-use of force enshrined in article 2(4) of the UN Charter may seem worlds away from Italy's decision to annex Libya in 1911, opening it up to Italian workers and Italian capital. Equally, there seems to be a wide gap between Gavotti's enthusiasm for dropping bombs for the first time from an airplane and the efforts of NATO during Operation Unified Protector to minimise civilian casualties of air

[19] Human Rights Watch, *No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya* (2019) 44–57.
[20] See Mattia Toaldo and Mary Fitzgerald, 'A Quick Guide to Libya's Main Players', *European Council on Foreign Relations* <https://www.ecfr.eu/mena/mapping_libya_conflict>.
[21] See Anne Orford, 'What Kind of Law Is This?', *LRB blog* (29 March 2011); see also Horace Campbell, *Global NATO and the Catastrophic Failure in Libya: Lessons for Africa in the Forging of African Unity* (Monthly Review Press, 2013).
[22] 'Security Council Resolution 1973 (2011), UN Doc S/RES/1973 (2011)' (17 March 2011) paras 4, 6 and 7.
[23] '...we have identified hundreds of likely civilian fatalities in a complex conflict which has seen over 2,600 airstrikes from at least ten belligerents, both foreign and domestic – though none has ever conceded civilian harm from its own actions.' See 'Airwars: All Belligerents in Libya' <https://airwars.org/conflict/all-belligerents-in-libya/>.
[24] The juxtaposition of these chronologically distant but spatially contiguous events is indebted to the insightful work of Rose Parfitt, who uses a materialist and chronotopic approach to explore the relations between fascism, imperialism and international law. See Rose Parfitt, 'Fascism, Imperialism and International Law: An Arch Met a Motorway and the Rest Is History...' (2018) 31(03) *Leiden Journal of International Law* 509.
[25] 'Security Council Resolution 1973 (2011), UN Doc S/RES/1973 (2011)' (n 22) Preamble.

strikes based on contemporary international humanitarian law.[26] Yet instead of assuming that these events are ordered according to a neat chronological progression, I draw upon recent critical scholarship on the history of international law to explore how some of the legal debates that preceded and that immediately followed Italy's use of airplanes in the Italo-Turkish war of 1911-1912 set out some of the argumentative patterns and contradictions of the regulation of warfare and of aerial sovereignty that were summoned at different moments over the following century, and that are still present in current debates. It is a move which reflects the contemporary moment of increasing appreciation in international legal circles that the deeds of the past still rage with silent and devastating force in the present time.

This approach to history and chronology aims to 'stop time' at particular moments in which the past can be seized and in which particular ideas and concepts flash up in an instant where they can be recognised and retrieved.[27] Writing history from specific moments or events is anything but new. But instead of organising events together in an evolutionary narrative, my aim is to explore how certain moments are *contained by* but can also *irrupt* in international law, stressing the possibilities which remain embedded in those moments.[28] I am inspired here by Walter Benjamin's call to 'blast a specific era out of the homogenous course of history'[29] and to accept that 'historical time is infinite in every direction and unfulfilled at every moment'.[30] From this perspective, the servitude of history to an idea of a continuous, linear and infinite time is nothing more than a product of the dominant ideology.[31] I address two main concerns with this approach. The first is with narratives of the history of international law which presume that international law's development will inevitably bring progress and therefore that the more international law we have the better for the world.[32] This form of writing not only obscures the ways in which the discipline produces victims, but, more relevantly, it justifies them and

[26] Marvin R Aaron and David RD Nauta, 'Operational Challenges of the Law on Air Warfare. The Example of Operation Unified Protector' (2013) 52(2) *Military Law and the Law of War Review* 353; *Cf.* see Amnesty International, *Libya: The Forgotten Victims of NATO Strikes* (2012).
[27] 'For every image of the past that is not recognised by the present as one of its own concerns threatens to disappear irretrievably' in Walter Benjamin, 'Theses on the Philosophy of History' in Hannah Arendt (ed), Harry Zohn (tran), *Illuminations* (Shocken Books, 1969) 255.
[28] 'Caught between irruption and containment, events, then seem to confront international law in a contradictory way' in Fleur Johns, Richard John Joyce and Sundhya Pahuja (eds), 'Introduction' in *Events: The Force of International Law* (Routledge, 2011) 1, 4.
[29] Benjamin (n 27) 263.
[30] Quoted in Christopher Tomlins, 'After Critical Legal History: Scope, Scale, Structure' (2012) 8(1) *Annual Review of Law and Social Science* 31, 42.
[31] 'True historical materialism does not pursue an empty image of continuous progress along infinite linear time, but is ready at any moment to stop time...' in Giorgio Agamben, 'Time and History: Critique of the Instant and the Continuum' in *Infancy and History: On the Destruction of Experience* (Verso, 2007) 91, 104–105.
[32] Parfitt, 'Fascism, Imperialism and International Law: An Arch Met a Motorway and the Rest Is History...' (n 24) 513.

therefore reproduces them again and again.[33] My second concern relates to the historicist temporality of contextualist history which in its suspicion of anachronist interpretations of the past challenges the core of the legal method and consequently restrains more explicitly political engagements with the history of international law.[34]

My approach also avoids looking solely or firstly at the traditional sources of international law, codified in article 38(1) of the International Court of Justice (ICJ) Statute, and assumes that there is no single answer as to what international law is or where to find it in the first place.[35] In this chapter I examine the first aerial bombing in history and draw out from that event the legal questions and debates that framed it. From this perspective, we can break down some common distinctions between the (colonial) past and the (post-colonial) present, reading international law as 'something that can (still) be found *embedded in*, and *rebounding from*' the materiality of certain acts and the physicality of certain locations.[36] The resulting history is partly the story of how the invention of airplanes and their use for military purposes changed ideas about law and war, from the question of sovereignty over the air to that of legitimate targets in warfare. It is also, however, a narrative about how lawyers understood the law, how understandings changed over time and how international law responded to technological change.

2.3 Who owns the air?

When the Italians decided to take nine airplanes to Libya in 1911 and to use them for the first time in war, other nations began to wonder what lessons could be drawn from that experience. In Europe, other imperial powers swiftly realised that they could not fall behind in the conquest of the air, which had now acquired a military significance.[37] The fact that airplanes had been

[33] Manuel Reyes Mate, *Midnight in History: Commentary on Walter Benjamin's Theses 'On the Concept of History'*, tr Manuel Boyd and Martin Boyd (Editorial Trotta, Translation of the Introduction of Medianoche en la Historia, 2006) 26.
[34] See section 1.6 of the Introduction; see also Anne Orford, 'On International Legal Method' (2013) 1(1) *London Review of International Law* 166, 172 and 175.
[35] 'As the foundation of a historical methodology, therefore, sources doctrine is profoundly distorting - yet in a way that is far from random or "indeterminate"' in Rose Parfitt, 'The Spectre of Sources' (2014) 25(1) *European Journal of International Law* 297, 304; moreover, as Martti Koskenniemi argues, 'what we study as history of international law depends on what we think "international law" is in the first place; it is only once there is no longer any single hegemonic answer to the latter question, that the histories of international law, too, can be expected to depart from their well-worn paths...' in Martti Koskenniemi, 'A History of International Law Histories' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 943, 970.
[36] Parfitt, 'Fascism, Imperialism and International Law: An Arch Met a Motorway and the Rest Is History...' (n 24) 514.
[37] 'The Tripoli Campaign: Aeronautics and Wireless', *The Times* (6 January 1912) 3.

used in war, and particularly for bombing, would prove critical to a debate that had been raging in international legal circles for the preceding decade. By then, the Wright brothers had already proved to the world that controlled heavier-than-air flight was possible; Alberto Santos-Dumont had delighted Parisians by circling the Eiffel Tower in his dirigible and by earning the first aviation prizes of the Aéro-Club de France; Louis Blériot had crossed the English Channel and aroused the anxiety that Britain was no longer an island; and Jorge Chávez had flown over the alps for the first time, although he had crashed and died a few days later as a result.[38] In those years, every month seemed to bring news of the latest achievement in human flight. With each new triumph, however, a set of legal questions became more pressing: who owned the skies? Were aviators free to fly over someone else's property?[39]

Louis Blériot Crosses the English Channel. in 1909

Source: Wikimedia Commons

In most Western countries, throughout the nineteenth century it was understood that property over land included property of all that was beneath and above it.[40] This principle originated from the well-known Roman maxim *cujus est solum ejus est usque ad coelum et ad inferos*: whoever owns the soil, it is theirs up to heaven and down to hell. While the use of balloons and the

[38] Robert Wohl, *The Spectacle of Flight: Aviation and the Western Imagination, 1920-1950* (Yale University Press, 2005) Chapter 2: French Wings over Dover.
[39] For an in-depth overview of these questions, focusing on the United States, see Stuart Banner, *Who Owns the Sky? The Struggle to Control Airspace from the Wright Brothers On* (Harvard University Press, 2008).
[40] The paradigmatic and extremely influential French *Code Civil* states in article 552: 'Ownership of the ground entails ownership of what is above and below it'.

spread of telegraph and telephone wires had led to (mainly unsuccessful) objections to this principle in domestic legal systems, the invention of airplanes brought a much stronger challenge. Moreover, once the Italians showed the world that airplanes could be used for spying, photographing, surveying, and ultimately for bombing, a prior and more fundamental question demanded an answer: did states have sovereignty over the air? Particularly in Europe, where borders were close to each other and flying across them was already a reality, the question acquired some urgency. Until 1914, France identified itself and was identified by others as the 'winged nation' par excellence and so it was no coincidence that the French were the pioneers in that debate.[41] Paul Fauchille, one of the founders of the *Revue Générale de Droit International Public*, had fired the first salvo in 1901 by framing the problem: 'States have a terrestrial and a maritime territory. Do they also have an aerial territory? Can the column of air above their land be totally or partially appropriated? If they don't have property or sovereignty, do they at least have certain rights?'.[42]

The questions posed by Fauchille may sound odd today given how ingrained in our thoughts is the idea that state sovereignty encompasses the air above each state's territory. In the first decade of the past century, however, they were anything but strange. Aerial sovereignty was debated and for most international lawyers accepted as permeable and divisible. For most of that period, airspace was in fact considered as spatially distinct from the territory below and of a different legal nature. Sovereignty was not only divided horizontally between states, empires, colonies and protectorates, but also vertically.[43] From the point of view of those debates, Italy's deployment of airplanes in Libya in 1911 foreshadowed two interrelated conclusions which would be consolidated by 1919. The first was that with the concrete experience of aerial bombing, the argument for freedom of the air – often based on the analogy of freedom of the seas – would drastically lose its strength. The second, evoking Italy's ambitions in North Africa, was that the legal creation of aerial territory would become a distinct technique through which empires would claim spatial sovereignty beyond their borders.[44] In hindsight, then, perhaps just as remarkable as Gavotti's inaugural bombing was Captain Carlo Piazza's first flight over enemy

[41] By 1910 the French had already launched a specialised journal called *Revue Juridique Internationale de la Locomotion Aérienne* (published from 1910 to 1928). See also Wohl (n 38) 2.
[42] Paul Fauchille, 'Le Domaine Aérien et le régime juridique des aérostats' (1901) 8 *Revue Générale de Droit International Public* 414, 414.
[43] Campbell Munro, 'The Entangled Sovereignties of Air Police: Mapping the Boundary of the International and the Imperial' (2015) 15(2) *Global Jurist* 117, 121.
[44] As Carl Schmitt would later claim, 'every true empire around the world has claimed such a sphere of spatial sovereignty beyond its borders' in Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, tr GL Ulmen (Telos Press, 2006) 281.

territory on the 23rd of October 1911. The Italians could boast that Libyan skies were undisputedly under their control despite the fact that on land they only held positions close to the coast. Vertical space thus became a place where empire and international law have since been intertwined.[45]

2.4 From freedom of the seas to freedom of the air

Before states discussed and settled these issues through diplomacy and in conferences, international lawyers affiliated to the *Institut de Droit International* had already been debating them for years. These mostly European, Protestant, liberal reformists were not simply trying to discover what international law had to say about sovereignty over the air, they were rather arguing about what it *should* say as the embodiment of the 'juridical conscience/consciousness of the civilised world'.[46] As international lawyers typically do, they reached back to earlier debates over governmental power and summoned arguments from the past which could be used by analogy in favour of freedom of the air or sovereignty over the air.[47] Centuries earlier a similar dispute between 'freedom' and 'sovereignty' took place in respect of the ocean.

In the late fifteenth century the seas were a vast resource freshly opened up for appropriation, not unlike airspace in the early twentieth century. As Carl Schmitt argued in *The Nomos of the Earth*, when European navigators 'discovered' the new world, an entirely new problem emerged in the form of the 'spatial ordering of the earth in terms of international law'.[48] The first global lines of division appeared in the form of four papal bulls (1493) and the Treaty of Tordesillas between Spain and Portugal (1494) dividing the oceans and the lands of the new world between them.[49] From that point until the invention of the airplane, Schmitt claimed that world history had been 'the history of the wars waged by maritime powers against land or continental powers'

[45] This argument is taken from Munro, who places this entanglement in the context of drone warfare, see Munro (n 43).
[46] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge University Press, 2002) 47-54. As Martti Koskenniemi sharply puts it, 'what after all was this *conscience* but a set of unanalyzed prejudices about good manners?'.
[47] '...the task of international lawyers is to think about how concepts move across time and space. The past, in other words, may be a source of present obligations' in: Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' in *Droit International et Nouvelles Approches Sur Le Tiers-Monde: Entre Répétition et Renouveau* (Société de législation comparée, 2013).
[48] Schmitt (n 44) 86.
[49] Henry Jones, 'Lines in the Ocean: Thinking with the Sea about Territory and International Law' (2016) 4(2) *London Review of International Law* 307, 312.

– the world was divided between land and sea.[50] The spatial ordering of the earth through international law had led to a crucial development, namely the idea of jurisdiction separate to ownership as 'a divisible form of sovereignty…developed specifically in the context of the sea and then deployed to devastating effect on land by colonial empires'.[51] The separation of ownership and jurisdiction would again be invoked when debates over airspace emerged in the first decade of the twentieth century. If Schmitt later claimed that the conquest of the third element (air) had triggered a new spatial revolution which was 'especially direct, forceful and obvious', it is nonetheless clear that this revolution was informed by and operated through arguments drawn directly from the debates over the appropriation of the oceans.[52]

The paradigmatic debate summoned from the past was the dispute between Dutch lawyer Hugo Grotius, who had argued in *Mare Liberum* that the ocean could not be subject to exclusive rights by any state, and English lawyer John Selden, who responded to Grotius in *Mare Clausum* that states could have ownership over the sea just like they did over land.[53] Grotius' argument for freedom of the seas came in the form of a chapter from his *De Jure Praedae*, written to assist the Dutch East India Company in justifying their activities against Portuguese claims of ownership and control of sea routes. He argued that the sea, unlike land, was vast and fluid and therefore incapable of being occupied by individuals. Because it could not and had never been occupied, it was not susceptible of becoming private property. Moreover, because sovereignty arises out of the occupation of nations in the same way as private property emerged from the occupation of individuals, no nation could establish ownership over the sea itself.[54] It was in that context that Grotius developed the distinction between jurisdiction and sovereignty, arguing that the exercise of jurisdiction could extend to areas which could not be owned. Grotius' arguments in *Mare Liberum* were the object of a number of responses, from the Scottish William Welwood to the Portuguese Serafim de Freitas, but it was the later and more sophisticated response from John Selden that would be more often remembered.[55] Selden was writing an official statement for the English government at a time when the presence of Dutch fishermen in allegedly English

[50] Schmitt (n 2) 5.
[51] Jones (n 49) 332.
[52] Schmitt (n 2) 57; Schmitt claimed that 'a new, third dimension - airspace - has become the force-field of human power and activity. Today, many believe that the whole world, our planet, is now only a landing field or an airport, a storehouse of raw materials, and a mother ship for travel in outer space' in Schmitt (n 44) 354.
[53] Banner (n 39) 46.
[54] Hugo Grotius, *The Freedom of the Seas*, ed James Brown Scott, tr Ralph van Deman Magoffin (Oxford University Press, 1916) 37.
[55] Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, 1999) 114–115; Monica Brito Vieira, 'Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas' (2003) 64(3) *Journal of the History of Ideas* 361, 365–366.

waters had become an issue of concern. His main argument in *Mare Clausum* was that the whole world had always been communally owned by everyone and that 'there was thus never a time when every bit of the earth's surface was not owned by someone'.[56] Given that original ownership was a positive community, any derogation from communal ownership had to be made by formal agreement between the owners. In this sense, Selden argued that the sea could be owned just as the land.[57]

Despite the complexities of their arguments and the large literature dedicated to the Grotius-Selden debate, it was an inevitably simplified and stylised version of that controversy that was familiar to lawyers of the early twentieth century. For them, Grotius was invoked as a proponent of absolute freedom of navigation while Selden was summoned in defence of exclusive national control.[58] Unsurprisingly, then, when the matter of whether the air was capable of appropriation by states emerged, it was initially played out between defenders of freedom of the air and advocates of sovereignty over the air. There was no doubt that Grotius was seen as having won the earlier argument. International law extended sovereignty only to a small strip of the sea in the immediate vicinity to the coast and in the remaining part freedom had been established as the rule. Fauchille, who had started the debate with respect to the air, followed in Grotius' steps and reasoned that 'it is appropriation, and not the possibility of appropriation, that constitutes property'.[59] In that sense, land could be occupied and appropriated, the air could not. So in the first few years of the twentieth century the dominant view was that the regulation of airspace should mirror that of the ocean and that both should be generally free for navigation.

The debates that took place in the *Institut de Droit International* would confirm this view. At the Institute's 1900 session in Neuchâtel, Fauchille and Belgian international lawyer Ernst Nys were both appointed to report on the subject of the juridical position of aerostats in international law.[60] Two years later, at the ensuing session in Brussels, Fauchille presented a long report on the subject which included a draft project regulating a range of issues concerning the use of balloons in times of peace and in war.[61] He was writing at a moment just before the invention of airplanes, when balloons were the only means of navigating on air. Following the argument he had started a year before in the *Revue Générale*, Fauchille claimed that the air is naturally

[56] Tuck (n 55) 117.
[57] Ibid.
[58] Banner (n 39) 47.
[59] Fauchille (n 42) 416.
[60] Aerostats are lighter than air aircraft which use buoyant gases; they include unpowered balloons and dirigible airships.
[61] *Annuaire de l'Institut de Droit International*, vol 19 Session de Bruxelles (Pedone, 1902) 19–86.

incapable of being appropriated, since it cannot be continually or permanently occupied. Flying *through* the air was not the same as *occupying* the air. For Fauchille land could be enclosed and occupied, possessed in its entirety, the air could not.[62] Hence, states could not have either property or sovereignty over the air.[63] He then proceeded to claim that it would be undesirable if balloons were completely outlawed, but that it would be equally unacceptable if they had absolute freedom in the air, given the danger that would pose to states' security. The only possible solution was to 'mark in space, both vertically and horizontally, *a certain number of zones* in which aerostats would be subject to different treatment, in which they would be permitted to circulate or where they would be excluded'.[64] Suggesting how fast opinion was changing in this matter, in 1901 Fauchille had proposed a zone of 300 metres in height below which aerial navigation could be prohibited.[65] The measure was based on the Eiffel Tower, then the tallest building in the world. One year later in his report to the Institute he had already changed that height to 1,500 metres and declared in article 8 of his project that aerial navigation was prohibited below that altitude save for a few exceptions.[66] For his part, Ernst Nys gave his full support for Fauchille's project, but he presciently questioned whether there was some exaggeration in setting the illicit zone for flying at 1,500 metres. For Nys, setting such a standard could limit freedom of the air to a miniscule proportion.[67]

No provision of Fauchille's project provoked more controversy than article 7. It unambiguously stated: 'the air is free. States only have over it, in times of peace and in times of war, the rights necessary to their preservation'. In the project, the rights of preservation referred to repressing espionage, enforcing customs rules and sanitary regulations, and to 'the necessities of defence'.[68] Whether one agreed with Fauchille or not, his draft project became the centrepiece of the debate that followed. A major sticking point was that no one seemed to agree on what precisely a state's right of preservation would entail. The confrontation of freedom of the air and sovereignty over the air thus became more nuanced. Advocates of freedom of the air divided themselves between those who were for freedom without any restrictions and those who accepted that the underlying state would have some limited authority up to a certain height, in an analogy with the territorial sea. Among the former were the American Henry Wheaton, the Swiss Johann

[62] Banner (n 39) 49.
[63] Fauchille (n 42) 426; *Annuaire de l'Institut de Droit International* (n 61) 32.
[64] *Annuaire de l'Institut de Droit International* (n 61) 19 (emphasis added).
[65] Fauchille (n 42) 416.
[66] *Annuaire de l'Institut de Droit International* (n 61) 34.
[67] Ibid 87 and 108.
[68] Ibid 32.

Bluntschli, French Paul Pradier-Fodéré, and the Belgian Ernst Nys.[69] They all generally agreed that the air is by its nature incapable of belonging to any state. The latter group included those partisans of freedom of the air who defended the institution of a territorial atmosphere. Fauchille, as we have already noted, had proposed a layer of up to 1,500 metres where aerial navigation would be prohibited in principle. His proposal of dividing the atmosphere in a territorial lower layer and a free upper one was supported by fellow Frenchmen Louis Rolland, Gaston Bonnefoy, and Alexandre Mérignhac, as well as by the German émigré in Britain Lassa Oppenheim.[70] For Rolland, it was simply a matter of extending the international legal maritime regime to the aerial domain. He thus projected different layers of the atmosphere: the first going up to 330 metres was considered part of a state's territory, since buildings and structures could generally be built up to that height; the second, above the first, should be free for aerial navigation and states could only exercise the rights necessary to safeguard their security and independence; the third layer was that beyond the point where any human activity could take place, and therefore it posed no interest for international regulation.[71]

Proponents of freedom of the air did not limit themselves to making analogies to the sea or to analysing the legal nature of air.[72] They also contended that there were good reasons why international law should refrain from regulating airspace. Even if it were possible for the air to be appropriated, argued Fauchille, states should not be able to own it: 'to allow a state to appropriate the air, if it were possible, would be to give it, even on land, supremacy over the others…it would be putting all peoples under the dependence of a single state'.[73] A common underlying theme in that line of argumentation was that allowing states to shut down their airspace would hinder the development of commerce and travel - 'it would render all navigators victims of formalism, intransigence, and government stupidity' claimed the French lawyer Édouard d'Hooghe.[74] In those first years of the century, the conquest of the air came to be seen as more than just a technological leap. One could even say that invention of the airplane was

[69] Henry Wheaton, *Elements of International Law* (Stevens & Sons, by J. Beresford Atlay, 1904) 292; Johann Caspar Bluntschli, *Das moderne völkerrecht der civilisirten staaten als rechtsbuch* (Nördlingen, 1868) 25; P Pradier-Fodéré, *Traité de Droit International Public*, vol II (Pedone, 1885) 431; *Annuaire de l'Institut de Droit International* (n 61) 108.
[70] Louis Rolland, 'La Telegraphie sans Fil et Le Droit Des Gens' (1906) 13 *Revue Générale de Droit International Public* 58, 65; Gaston Bonnefoy, *Le Code de l'air, l'aéronautique et l'aviation En Droit Français et En Droit International* (M. Rivière, 1909); Alexandre Mérignhac, *Les Lois et Coutumes de La Guerre Sur Terre* (A. Chevalier-Maresco & Cie, 1903) 196; Lassa Oppenheim, *International Law: A Treatise*, vol 1 Peace (Longmans, Green and Co., 1905) 223.
[71] Rolland (n 70) 64–68.
[72] Banner (n 39) 51–52.
[73] Fauchille (n 42) 416–417.
[74] Édouard d'Hooghe, *Droit Aérien* (Librarie Administrative Paul Dupont, 1912) 8; quoted in Banner (n 39) 52.

initially perceived as an *aesthetic* event.[75] The airplane was more than a machine: flying would revolutionise culture and society, change ideas about space and time and it would finally free humanity from its terrestrial boundedness, paving the way for a new Nietzschean age.[76] For a number of Western authors, artists and, of course, lawyers, the flying machine was the next logical step for a civilisation that had subjugated nature and extended its dominion throughout the globe by imperialist expansion and annexation:

The conquest of the air followed naturally from the conquest of colonial peoples, the exploration of the earth, and the penetration of the seas by submarines. The urge to dominate, to master, to conquer, was the motivation that drove men to fly. Speed was the divinity of the new century, to be worshipped at any cost. The cult of movement required victims. In its service, no sacrifice was too great. Aviators were the new aristocracy. Power and primacy would come to those peoples who dominated the air.[77]

The famous architect and urban planner Le Corbusier would recall the European spring of 1909, when a series of dramatic flights captivated the attention of sceptical Parisians, as a period when 'everything was prodigiously accelerated'. He remembered one sunny afternoon when his colleague Auguste Perret burst into their atelier shouting: 'Blériot has crossed the Channel! Wars are finished: no more wars are possible! There are no longer any frontiers!'.[78] He was not alone in thinking that airplanes would promote international peace by bringing peoples from different lands closer together, or perhaps by policing troublesome peoples from the air.[79] In this sense, the view of international law as imposing regulation on what was previously free and open to exploration came to be seen by some as a potential barrier for these developments. If there was any role for international law, it would be mainly to refrain from interfering in the development of airplanes and of aerial navigation. For international lawyers who accepted this view, the whole debate on sovereignty over the air appeared misguided. By 1911, however, if there was no consensus on the issue there was at least still a convincing majority at the Institute in favour of the principle of freedom of the air. In 1906 the Institute had approved Fauchille's project on the regulation of wireless telegraphy, which stated that the air was free; five years later a

[75] Wohl (n 38) 1.
[76] Ibid 288.
[77] Ibid.
[78] Le Corbusier, *Aircraft* (Trefoil Publications, 1935) 7.
[79] Rudyard Kipling fantasised of an international air force bent on keeping global peace in his short stories "As Easy as A.B.C." (1912) and "With the Night Mail" (1905). They portrayed the use of airships by a benign but coercive international "Aerial Board of Control" to keep the peace through rapid response and intimidation. See Rudyard Kipling, *With the Night Mail & As Easy As A.B.C.*, ed Marcus L Rowland (Forgotten Futures, 2013); see also Roger A Beaumont, *Right Backed by Might: The International Air Force Concept* (Praeger, 2001) 9.

resolution on the juridical regime of aerostats was adopted which included the principle that 'international aerial circulation is free'.[80]

2.5 The invention of aerial territory

For their part, proponents of sovereignty over the air were divided between those who argued for absolute sovereignty and those who, starting from sovereignty, admitted some restrictions either in height or in the form of servitudes of free passage. The renowned English international lawyer John Westlake argued that states had sovereignty over the air to an unlimited height, but that nevertheless it would be qualified by a right of innocent passage for aerial navigation. Supporting Westlake against Fauchille, the Italian Alexandre Corsi claimed that freedom of the air could not be thought of on exactly the same terms as freedom of the seas. For him, any freedom of aerial navigation would only be admissible if it did not pose any inconvenience to the underlying state, which should not only be able to guarantee its security but also to realise any economic advantage from controlling the airspace above its territory.[81] A position that was in effect closer to those who started from the principle of freedom of the air was that of the German international lawyer Franz von Holtzendorff. For him, states had sovereignty over the air, but only up to a certain altitude, which he put at 1,000 metres from the highest point of the land.[82] Similarly, French lawyer François Pietri argued that states' sovereignty over the air extended as far as it could be exercised. In other words, aerial territory would go up to where the force of arms (the reach of guns) could be felt.[83] At this point, arguments for freedom of the air combined with a right of self-preservation became hard to distinguish from arguments for sovereignty over the air limited to a certain height. As the Dutch international lawyer Johanna Lycklama observed, there was little difference between the majority of authors from the two camps. In fact, she reasoned, expressions such as 'the air is free' gave the false impression that absolute freedom is being asked when what was really sought was passage.[84]

By 1910 the tide seemed to be changing. Lycklama had written a whole monograph on the subject of air sovereignty where she criticised Fauchille's project, which had been the focus of

[80] *Annuaire de l'Institut de Droit International*, vol 21 Session de Ghent (Pedone, 1906) 305; *Annuaire de l'Institut de Droit International*, vol 24 Session de Madrid (Pedone, 1911) 346.
[81] *Annuaire de l'Institut de Droit International* (n 80) 299–300.
[82] Franz von Holtzendorff, *Handbuch Des Völkerrechts*, vol II (Verlag von J. F. Richter, 1887) 230.
[83] François Pietri, *Étude Critique Sur La Fiction d'exterritorialité* (Arthur Rousseau, 1895) 16.
[84] Johanna F Lycklama à Nijeholt, *Air Sovereignty* (Springer, 1910) 16.

so much attention, for being obsolete from its inception. She sharply noted that his project was not a sound basis for discussion since it had been made at a time when aerial navigation was uncertain and infrequent, and hence needed no rules.[85] Once airplanes had become a reality and air travel was rapidly advancing, the question had changed from *whether* to *how much* authority must states have in the air? Crucially, Lycklama argued that it was time to move on from the repetition of the *mare liberum vs mare clausum* debate. For her, the relation between airspace and the underlying territory was of a completely different nature than the relation between sea and land: 'above the land' means something different than 'at the side of the land'.[86] If the territorial sea was not strictly necessary for the existence of the state, airspace certainly was. There was no question even of a right of free passage for airplanes by analogy to the right of passage through territorial waters. Neither was dividing the atmosphere in layers a satisfactory solution, 'everything in the air being a possible danger to the underlying land'.[87] Gavotti and his bombs would soon prove her right.

As aerial bombing came of age only a few years after the invention of the airplane, international lawyers' views on aerial territory rapidly shifted. In 1912 the French lawyer Jean Bellenger attributed the early dominance of the doctrine of freedom of the air to 'a moment when spirits turned more and more towards a dream of universal peace…hence no more wars; no more espionage to be feared…all that was left was to regulate this circulation in such way as not to affect legitimate private interests'.[88] He was writing at the precise moment when European newspapers were reporting on the exploits of Italian aviators in Tripoli. In such context, Bellenger claimed that freedom of the air could no longer exist for 'states have seen in the new means of transportation a weapon destined to guarantee their supremacy in future wars'.[89] Fauchille himself had by then renounced his 1902 project and presented a new one at the Institute's 1910 session in Paris. Although he had not personally changed his mind on the question of freedom of the air, he argued that it was necessary to take a more practical approach to the subject and consequently to put aside the theoretical problem of whether the air could be the object of sovereignty. In the new version, Fauchille contented himself in claiming solely the freedom of 'aerial circulation', restricted by 'the rights of underlying states necessary to their preservation, that is to their security and that of the persons and goods of their inhabitants'.[90]

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[85] Ibid 3.
[86] Ibid 24.
[87] Ibid 33.
[88] Jean Bellenger, *La Guerre Aérienne et Le Droit International* (Pedone, 1912) 24.
[89] Ibid.
[90] *Annuaire de l'Institut de Droit International*, vol 23 Session de Paris (Pedone, 1910) 298 and 307.

At that point, states had begun entering into agreements regulating the new technology of wireless telegraphy – agreements that assumed that states had authority over the air above their territory.[91] They soon moved toward the question of regulating aerial navigation. At the International Conference on Aerial Navigation in Paris in 1910, France submitted Fauchille's updated project to representatives of almost every European state. After many sessions, however, the delegates failed to reach any agreement. Although most states' representatives seemed to favour the principle of free circulation, Germany proposed a rule whereby states could decide whether to allow or not allow aircraft to fly over their territories as long as they did not discriminate between foreign and domestic aviators.[92] Yet the conference's failure was mostly blamed on Britain, who 'sent the sword of sovereignty clanging into the scales'.[93] British representatives wished to retain the right to close their airspace to airships of any nationality without having to justify such action.[94] By the end of the conference the doctrine of freedom of the air had become known as the French theory and the opposing doctrine of sovereignty over the air as the English and German theory.[95] Despite these differences, if states could not agree on how much authority over the airspace they should have, they all seemed to concur that at least some control was needed.[96]

Unable to reach an international agreement, European states started issuing domestic regulations to assert control over their airspace. Only twenty days after the first bombs were thrown out of an airplane on the Libyan desert, a French Presidential Decree prohibited the circulation *in France* of foreign military aircraft.[97] Two subsequent regulations in 1913 gave the government wider powers to prohibit the circulation of any airplane or airship over the whole national territory.[98] In that same year, Britain prohibited foreign aircraft from flying over its territory or territorial waters without invitation or permission.[99] For aviation enthusiasts who defended freedom of circulation the closing of the air frontiers generated much concern. The French *Ligue Nationale Aérienne* unsurprisingly blamed the English: 'England has begun it, Russia,

[91] Banner (n 39) 53.
[92] Ibid 62.
[93] JM Spaight, *Aircraft in Peace and the Law* (MacMillan and Co, 1919) 5.
[94] Bellenger (n 88) 31; See also: Enrico Catellani, *Il Diritto Aereo* (Fratelli Bocca, 1911) 64–65.
[95] Lage FW Staël von Holstein, *La Réglementation de La Guerre Des Airs* (Martinus Nijhoff, 1911) 65.
[96] John Cobb Cooper, 'The International Air Navigation Conference, Paris 1910' (1952) 19 *Journal of Air Law and Commerce* 127; quoted in Banner (n 39) 62.
[97] Spaight (n 93) 8.
[98] Emile Lebon, *De La Guerre Aérienne Dans Ses Rapports Avec Le Droit International (La Leçon Des Faits)* (Gérardmer, 1923) 56.
[99] Wilmot E Ellis, 'Aerial-Land and Aerial-Maritime Warfare' (1914) 8(2) *The American Journal of International Law* 256, 266.

Italy, Austria have followed, then France has been obliged to conform…if this continues, soon all the frontiers will be closed to aerial navigation'.[100] As states started to ban foreign aircraft from flying over their territory or parts thereof, France and Germany reached a bilateral agreement which allowed private planes from each country to fly over the other subject to a number of restrictions.[101] The American lawyer Arthur Kuhn saw this as a positive development and argued that 'the endeavour to work out a limitation of sovereignty impedes, rather than promotes, the cause of free navigation'.[102] Whichever way lawyers and aviators saw it, there was no question that the action of states indicated that they were assuming complete sovereignty over the airspace.

By 1914, as the guns of August approached and Europe braced for war,[103] there was little remaining support for the idea that the air should be free. As the British lawyer James Spaight put it, 'the moment war came the air frontiers closed with a Janus-like clang'.[104] Armies had been using military airplanes in their annual manoeuvres for four years and the Italians had introduced them to combat at Tripoli. Moreover, long before the Western Front witnessed aerial warfare airplanes had figured prominently in the Balkan wars, during which several mercenary pilots offered their services to the warring parties.[105] France and Spain had tested their new military aircraft in Morocco by bombing insurgents. In the Americas, Pancho Villa had hired pilots to fly for his celebrated División del Norte during the Mexican Revolution, and aviators had engaged in combat for both sides of the conflict. Aerial warfare was swiftly spreading around the globe.[106] In just over a decade, the questions posed by Fauchille in the first year of the century appeared to have been settled: states did have an *aerial territory* over their land, and they exercised authority over it. The impending war only reiterated this outcome. Fearing conflict could start at any moment, France prohibited aerial navigation over Algeria, Tunisia and its colonies. Holland, Switzerland and Italy forbade the entry of foreign airplanes over their countries. There was no more question of using the ocean analogy in respect of the atmosphere.

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100 Quoted in Spaight (n 93) 7.
101 Ellis (n 99) 266; Banner (n 39) 62.
102 Arthur K Kuhn, 'The Beginnings of an Aerial Law' (1910) 4(1) *The American Journal of International Law* 109, 116.
103 The reference is taken from Barbara W Tuchman, *The Guns of August* (Ballantine, 1994).
104 Spaight (n 93) 8.
105 As Richard Overy begins one of his major works, 'the modern aerial bomb, with its distinctive elongated shape, stabilizing fins, and nose-fitted detonator, is a Bulgarian invention. In the Balkan War of 1912, waged by Bulgaria, Greece, Serbia, and Montenegro (the Balkan League) against Turkey, a Bulgarian army captain, Simeon Petrov, adapted and enlarged a number of grenades for use from an air-plane' in RJ Overy, *The Bombers and the Bombed: Allied Air War over Europe 1940-1945* (Viking, 2013) 1.
106 Richard Hallion, *Taking Flight: Inventing the Aerial Age from Antiquity through the First World War* (Oxford University Press, 2003) 312–315; see also Lawrence D Taylor, 'Pancho Villa's Aerial Corps: Foreign Aviators in the División Del Norte 1914-1915' (1996) 43(3) *Air Power History* 30.

The air was being treated like the land, as a space closed to foreigners and belligerents. States had sovereignty over the air, they had an aerial territory.

2.6 Empire, policing and airspace

When the war was over and the Paris Peace Conference convened in January 1919, a commission was created to deal with the issue of international aerial navigation. The resulting Convention Relating to the Regulation of International Aerial Navigation was signed by twenty-seven states. It stated in article 1 that 'every Power has complete and exclusive sovereignty over the air space above its territory'. Article 2 recognised a right of innocent passage in times of peace, subject to certain conditions.[107] The Convention broadly sanctioned the principle proposed at the 1906 session of the Institute by Westlake, who at that time could only muster three votes in his support.[108] The same Convention created a new organisation called the International Commission for Air Navigation which was placed under the direction of the League of Nations. It would be in charge of overseeing the application of the Convention, mostly acting as a central point for information between states about regulations and acts taken in relation to international air travel.[109] As the decade came to a close, the American Arthur Kuhn was pleased that 'this *quaestio famosissima*' of sovereignty over the air was finally solved 'in a manner which will probably be satisfactory to all'. In his view, English and American lawyers and the practical developments of the war had defeated the French theory of freedom of the air.[110] Sovereignty stretched upward to the sky and states could prohibit foreign aircraft from flying above their land, although they agreed to commonly waive this right so that international flights could happen. But that was not the end of the story.

[107] *Convention Relating to the Regulation of Aerial Navigation, Signed in Paris on 13 October 1919*.
[108] *Annuaire de l'Institut de Droit International* (n 80) 305.
[109] *Convention Relating to the Regulation of Aerial Navigation, Signed in Paris on 13 October 1919* (n 107) article 34; Arthur K Kuhn, 'International Aerial Navigation and the Peace Conference' (1920) 14(3) *The American Journal of International Law* 369, 378.
[110] Kuhn (n 109) 372.

[REDACTED IMAGE]

Signature of the Convention Relating to the Regulation of Aerial Navigation in the Salon de l'Horloge at the Quai d'Orsay (1919)

Source: International Civil Aviation Organization (ICAO)[111]

If we return to Libya, the Italo-Turkish war had ended with a peace treaty in which the Ottomans agreed to recall their officers and troops from Tripoli and Cyrenaica and the Italians from the occupied Dodecanese islands in the Aegean Sea. There was no formal recognition of any change in territorial sovereignty in the treaty.[112] Furthermore, Italy never left the islands as it had pledged and the ensuing Fascist regime formally annexed them in 1923. For approximately a decade Italy would control only coastal areas in Libya while fighting a protracted war against anti-colonial rebels. The 'pacification of Libya' provided a splendid training ground where Gavotti's initial experiments with using airplanes for surveying and bombing would be further refined and extended. The brutal campaign involved the deportation of whole communities to concentration camps, the deliberate bombing of civilians, the throwing of prisoners alive from airplanes and the bombing of villages and of cattle with mustard gas.[113] During one operation, 'an Italian squadron dropped hundreds of tons of mustard gas on an encampment destroying tents, animals, and food, thereby rendering the entire site uninhabitable'.[114] In the protracted conflict during which Italy colonised and subdued the rebellious Arab population, estimates indicate that three-quarters of the nomadic population of

[111] 'The Postal History of ICAO' <https://applications.icao.int/postalhistory/1919_the_paris_convention.htm>.
[112] 'Treaty of Peace Between Italy and Turkey' (1913) 7(1) *The American Journal of International Law* 58, Article 2.
[113] Geoff Simons, *Libya: The Struggle for Survival* (Palgrave Macmillan, 1993) 129.
[114] Frederick H Dotolo, 'A Long Small War: Italian Counterrevolutionary Warfare in Libya, 1911 to 1932' (2015) 26(1) *Small Wars & Insurgencies* 158 Although useful for its use of some archival sources, this is an apologetic article which bizarrely takes the Libyan war as a somewhat positive experience in fighting insurgencies.

Libya was killed.[115] In this material context we can grasp that the issue of sovereignty over the air was not simply an intra-European debate over the legal nature of the atmosphere. It was concurrently about the production of aerial imperial formations, of 'the vertical as a locus for the entanglement of international and imperial law'.[116]

At the Paris Peace Conference, and for the decades that followed, imperial powers established sovereignty over their airspace while claiming aerial jurisdiction beyond their borders. From the outset, the legal notion of territory was split between land, sea, and now the air. *Aerial territory* was different from and more far-reaching than telluric territory. It was codified as a fundamentally imperial space. After affirming that each state had 'complete and exclusive sovereignty' over the airspace above its territory, article 1 of the 1919 Convention specified in its second paragraph that '[f]or the purpose of the present Convention the territory of a State shall be understood as including the national territory; *both that of the mother country and of the colonies*, and the territorial waters adjacent thereto'.[117] Libyan airspace had thus become Italian territory. In this sense, the question of who owned the skies was not just about whether states would have sovereignty over the air or not. In the organisation of airspace through law some spaces were opened up for the exercise of aerial violence even when no war was officially recognised. Legally and spatially constructing aerial territory, international law played an important role in consolidating airspace as an essential locus of international interventions – military then, humanitarian now.

The Italo-Turkish war had ended, but for the decades that followed Italy continued bombing Libyan communities in order to impose order, securing Italian property and capital. The appropriation of Libyan airspace, consolidated in the Paris Convention, signalled the emerging link between the use of air power, the legal creation of aerial territory, and the logic of police applied at the international level. If domestically cities were the emblematic space of policing, internationally the air became such space.[118] The new technology of air power from its inception proved to be an ideal fit for the logic of international police. In the 1910s and 1920s this occurred most notably in the form of the 'pacification of Libya' and of other peripheral

[115] David E Omissi, *Air Power and Colonial Control: The Royal Air Force 1919-1939* (Manchester University Press, 1990) 199–201.
[116] Munro (n 43) 124.
[117] *Convention Relating to the Regulation of Aerial Navigation, Signed in Paris on 13 October 1919* (n 107) (emphasis added); a similar provision was codified in article 2 of the 1944 Convention which succeeded it: 'For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State'. See *Convention on International Civil Aviation, Signed in Chicago on 7 December 1944*.
[118] Mark Neocleous, *War Power, Police Power* (Edinburgh University Press, 2014) 165.

spaces.[119] More recently, however, the same logic can be observed in the establishment of the no-fly zone and the subsequent aerial interventions in Libya.[120] It is worth recalling at this stage that despite the ostensibly defensive or humanitarian character of the no-fly zone, as the US Secretary of Defence during the intervention in Libya clarified, 'let's call a spade a spade; a no-fly zone begins with an attack on Libya to destroy the air defences'.[121] In other words, establishing a no-fly zone starts with a bombing campaign. It is designed not only to control airspace but also to constrain action on the ground. Accordingly, the no-fly zone may be understood as a contemporary manifestation of the technique, developed in the first decades of the twentieth century, of legally partitioning the atmosphere and of claiming aerial jurisdiction beyond the borders of a state.

Approaching international legality from the perspective of the act of aerial bombing, what emerges is that despite the almost one hundred years that stand between the first aerial bombing and NATO's 'Operation Unified Protector', international law continues its practices of territorialisation and deterritorialisation of the air. As a result, it (re)produces spaces of divisible sovereignty subject to aerial violence structured in the same patterns as the colonial and imperial systems of the early twentieth century.[122] Libya is in this sense haunted by this past of splintered sovereignty in which its skies have been open to foreign interventions over the past century. Gavotti's maiden bombing raid and the discourses and practices that accompanied it cling to the particular places where they occurred, still resonating in them in the present.[123] Through the legal construction of aerial territory and the fractured forms of aerial sovereignty imposed on it as a space located on imperial frontiers, Libya was fabricated as a 'target zone' for aerial violence.[124] Notwithstanding the contingencies of each situation, it is no coincidence that present aerial interventions in and around Tripoli 'are pushed and pulled around by many of the

[119] Iraq during the British mandate was certainly the most prominent place where 'air policing' was exercised, though the same idea was applied in a range of less well-known cases, as in the Italian colonisation of Libya. See Chapter 3.
[120] 'Security Council Resolution 1973 (2011), UN Doc S/RES/1973 (2011)' (n 22).
[121] Quoted in: Neocleous (n 118) 172.
[122] 'To the extent that it makes sense to talk of Bodinian or Hobbesian sovereignty as an animating principle of order in the European political system, it makes equal sense to describe the structure of relationships in the colonial and imperial systems beyond Europe in terms of the Grotian idea of divisible sovereignty.' in Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge University Press, 2002) 95.
[123] Campbell AO Munro, 'Mapping the Vertical Battlespace: Towards a Legal Cartography of Aerial Sovereignty' (2014) 2(2) *London Review of International Law* 233, 242; the sociological concept of haunting is taken from Avery Gordon and used by Campbell Munro in the context of the lingering fractured sovereignty of the imperial periphery. See Avery Gordon, *Ghostly Matters: Haunting and the Sociological Imagination* (University of Minnesota Press, 2008).
[124] Munro (n 123) 261.

same forces which pushed and pulled those who came before us'.[125]

2.7 A new kind of target

Besides the matter of who owned the air or who had sovereignty or jurisdiction over airspace, Gavotti's inaugural act of throwing bombs from an airplane elicited debate over a closely related set of questions concerning the laws of war. Given that there were different conventions regulating war on land and war on sea, which set of rules applied to aerial bombing – if any? And what, or who, could be legally bombed from the air? When the Italians conducted the first aerial raids in 1911, could they invoke international law in defence of their actions? In order to answer these questions we need to go at least as far back as 1899, when twenty-six mostly European states convened in The Hague on the invitation of Tsar Nicholas II to debate arms control, the rules and customs of war, and the pacific settlement of international disputes. It was the first time that the idea of aerial bombardment was discussed as a topic of relevance for international law. But before we go back to those early developments in the history of international law related to aerial bombing, let us recapitulate what happened on that fateful day when Gavotti threw four hand grenades over Ain Zara and Tajoura. Arguably, what he did was more than try out a new method of launching bombs. In the Libyan skies, Gavotti began a revolution in warfare.[126]

Having noticed a gathering of Arab fighters at the Ain Zara oasis on an earlier reconnaissance flight, Gavotti decided he would drop his bombs over them. As he approached, he aimed for the larger of two groups gathered beside a building but instead hit the smaller one. Besides the fact that Gavotti was in an airplane, it seems as if this was an ordinary attack on enemy forces. It can be argued that there is not much difference between his attempt and other acts of warfare such as artillery fire or naval bombardment. Yet a closer look swiftly dissipates this resemblance. Firstly, and as already noted, the Italians could fly over Tripoli and the surrounding areas without being disrupted. The Ottoman army in Libya had no aircraft at its disposal. Since Tripoli had been taken, the Ottomans had purposefully adopted guerrilla tactics against the more numerous Italian forces. In this sense, the first aerial bombing was noticeably an act of asymmetrical war

[125] Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge University Press, 2019) 446.
[126] Hippler, *Governing From the Skies: A Global History of Aerial Bombing* (n 9) 12.

situated in the context of colonial and guerrilla warfare.[127]

Secondly, and crucially, the fighters targeted by Gavotti were not engaged in battle, let alone expecting an attack. Ain Zara was more than just a meeting point for Arab fighters and Ottoman forces. It was a community, a social and economic system of its own. By dropping his bombs, 'Gavotti did not just hit a target, he actually constituted a new type of target. A hybrid target, which indifferently mingled civilian and military objectives and, among the latter, regular and irregular forces'.[128] This was the most distinctive and ground-breaking aspect of Gavotti's raid: flying had made it possible to strike at an entire socioeconomic system and not only at the enemy's armed forces.[129] This practical experience proved decisive in the thought of perhaps the most influential theorist of air power of the last century. In 1912, a report about the significance of the Libyan war for the future employment of aircraft was ordered by the Italian General Staff. The task fell upon Major Giulio Douhet, an early enthusiast of aircraft and aerial bombing. The Tripoli campaign offered him the opportunity to connect his theories to practice, and he made the most of it. At a time when most commentators concluded that the primary role of aircraft in war was reconnaissance, Douhet's report insisted that 'others' took the view that high altitude bombing would be their most effective use.[130] The experience in Libya and the ensuing report paved the way for Douhet to later write *Command of the Air*, where he developed the arguments for the use of aircraft as an essentially offensive weapon in their most radical form.[131]

Thirdly, from the very first aerial bombing the question of its effects was intimately connected to the role of public opinion and to the conscious use of propaganda. At the same time as headlines around Europe exaggeratedly claimed that 'terrorised Turks' scattered upon an 'unexpected celestial assault', the Ottoman response was perhaps just as overblown. They claimed that the Italian aviators had hit a hospital, causing great loss of life, and violating the Geneva Convention (of 1906). In fact, Gavotti's grenades caused little or no damage, failing to injure anyone.[132] And far from being terrorised, the Turks and Arabs had reacted to the Italian planes by firing at them with their rifles, eventually managing to hit a pilot and to bring a plane

[127] Hippler, *Bombing the People: Giulio Douhet and the Foundations of Air-Power Strategy, 1884-1939* (n 9) 59.
[128] Hippler, *Governing From the Skies: A Global History of Aerial Bombing* (n 9) 13.
[129] Ibid.
[130] Phillip S Meilinger, 'Giulio Douhet and the Origins of Airpower Theory' in Phillip S Meilinger (ed), *The Paths of Heaven: The Evolution of Airpower Theory* (Air University Press, 1997) 1, 3.
[131] Walter J Boyne, *The Influence of Air Power upon History* (Pelican, 2003) 36.
[132] Gregory (n 9) 2.

down.[133] That did not stop both sides of the conflict claiming that major damages resulted from this new kind of attack. Moreover, from early in the conflict the Italians started dropping propaganda leaflets aimed at convincing the Arab population in Tripoli to abandon support for the Turks. Aerial bombing was thus from its inception a public relations issue.[134] As such, arguments about the legality of air strikes have since played a fundamental role in enabling, facilitating, and at times inhibiting the use of airplanes as weapons.

2.8 Those infernal machines which seem to fall from the sky

If we have to pin down a moment when international law and aerial bombing cross paths for the first time it would have to be at the first Hague Peace Conference of 1899. It was, in a sense, the culmination of a period marked by the confluence of modern wars, new destructive technologies, war-time journalism, rising humanitarianism and the establishment of modern international law.[135] The conference had been called by Tsar Nicholas II in 1898 with the initial goal of curbing the increase in armaments. By early 1899, however, when the Russian Minister of Foreign Affairs, Count Muraviev, issued a second circular to prospective attendees of the conference, the emphasis had already shifted from disarmament to arbitration and to reviewing and consolidating the laws of war. This shift was due in no small part to the involvement of the renowned Russian international lawyer Fyodor Fyodorovich Martens in setting the agenda. Martens wanted to head off the scepticism of other European powers regarding Russia's intentions in proposing a peace conference.[136] He thus obfuscated the original ambition for disarmament, framing it instead as 'the non-augmentation, for a term to be agreed upon' of present forces,[137] and instead stressed the focus on means of peaceful dispute settlement and on revising the 1874 Brussels Declaration on the laws and customs of war – an unratified code based on a document Martens himself had drafted. He saw The Hague conference as an opportunity to settle decade-old discussions on the regulation of warfare rather than an occasion

133 Boyne (n 131) 35–36.
134 The connection between aviation, the press and the public is central in: Wohl (n 38); Hippler, *Bombing the People: Giulio Douhet and the Foundations of Air-Power Strategy, 1884-1939* (n 9) 59–60.
135 For a general survey of the period in relation to war, law and humanitarianism see: James Crossland, *War, Law and Humanity: The Campaign to Control Warfare, 1853-1914* (Bloomsbury Academic, 2018).
136 While Britain and France suspected Russia could be biding its time to prepare for a war it was then unprepared to wage, Kaiser Wilhelm II thought the conference call was a cunning move by Nicholas II and an affront to his divine right to wage war, see ibid 176–177.
137 Russian Circular Note, January 11, 1899. In: James Brown Scott, The Hague Conventions and Declarations of 1899 and 1907 (Oxford University Press, 1915) xvii.

to set out a new age of peace.[138] Caught between the original idea of limiting the development of new weapons and the turn to consolidating old rules of the laws of war, the question of aerial bombing first emerged in a jumbled form in Count Muraviev's circular setting a program for the conference. The third point of the proposed program read: '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'.[139]

Before international lawyers confronted the question behind the propaganda campaign that followed Gavotti's raids – of what could be legitimately bombed from the air – they first debated whether throwing bombs from above could ever be legal. The Conference's President posed the following question to delegates: 'Should there be a prohibition of the discharge of either projectiles or explosives from balloons or by any other similar method?'.[140] Since the French revolutionary wars balloons had been used by armies in a range of conflicts for communication and reconnaissance. Although the question of whether they could be effective in combat was still an open one, and despite the fact that airplanes had not been invented yet, by 1899 the military representatives at the Hague recognised that 'launching projectiles from balloons [was] an existing fact' since several countries were studying this prospect.[141] Intriguingly, for most of those gathered in The Hague aerial bombing was seen as unnecessary and cruel. The rapporteur of the discussions, Dutch General den Beer Poortugael, expressed his support for the Russian proposition arguing that 'to permit the use of such infernal machines, which seem to fall from the sky, exceeds the limit'.[142] For him, the hurling of projectiles from balloons resembled perfidy and should therefore be strictly proscribed. Colonel Gilinsky of Russia added that 'the different ways of injuring the enemy used at present are quite sufficient'.[143] The proposition of a permanent ban on aerial bombing received almost unanimous support in the subcommission where it was debated, the exception being the opposition of Britain and a reservation from Romania.[144]

In the original Russian program, the issue of aerial bombing came together with the topic of the use of explosives 'of a formidable power'. The two topics were discussed in the same

17/12/2020 15:29:00[138] Crossland (n 135) 124, 177.
[139] Scott, *The Proceedings of the Hague Peace Conferences* (n 137) 1.
[140] James Brown Scott (ed), *The Proceedings of the Hague Peace Conferences*, vol The Conference of 1899 (Oxford University Press, 1920) 274.
[141] Ibid 86.
[142] Ibid 287.
[143] Ibid 288.
[144] Ibid 342.

subcommission, the common underlying theme being that of the development of new technologies of war and their regulation or prohibition. In this context, it was not surprising that Britain was opposed to the Russian proposal. Admiral Fisher, the British naval delegate, had gone to the conference with the intention of rejecting anything which might restrict British military (and especially naval) power. He defended that countries should be able to use the best weapons they can procure, reminding the other delegates that 'any restriction placed on the freedom of action in this regard would place civilised peoples in a dangerous situation in case of war with less civilised nations or savage tribes'.[145] These arguments reinforced those of his fellow delegate, the military technical adviser John Ardagh, who demanded 'the liberty of employing projectiles of sufficient efficacy against savage races'.[146] Ardagh explained this demand in a passage which superbly illustrates the long history of the laws of war as a discourse of 'civilisation' set against a simultaneously constituted 'savagery':[147]

> In civilized war a soldier penetrated by a small projectile is wounded, withdraws to the ambulance, and does not advance any further. It is very different with a savage. Even though pierced two or three times, he does not cease to march forward, does not call upon the hospital attendants, but continues on, and before anyone has time to explain to him that he is flagrantly violating the decisions of The Hague Conference, he cuts off your head.[148]

The impression that innovative technologies of war such as new explosives or aerial bombing were reprehensible was thus gradually chipped away. Two main arguments played a role in this change of perception. The first, just mentioned, was that new technologies were essential to maintaining European domination over other peoples. Accordingly, a similar argument to John Ardagh's diatribe concerning expanding bullets could be made in relation to the use of balloons, and later airplanes, for bombing. Indeed, when Gavotti and his fellow aviators used airplanes for bombing in the Tripoli war, international lawyers found a defence for this type of action in the civilising mission of the technologically superior Italians.[149] The Italian lawyer Gennaro Tambaro, writing in the most prestigious German journal of international law of the time, argued that the Ottoman empire was not a 'fully civilised' nation and consequently the rules

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[145] Ibid 360.
[146] Ibid 287.
[147] Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press, 2006) 265, 314.
[148] Scott, *The Proceedings of the Hague Peace Conferences* (n 140) 343.
[149] Sven Lindqvist, *A History of Bombing*, tr Linda Haverty Rugg (Granta Books, 2001) 48; for a critique of the 'civilising mission' of international law see Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2005).

applicable to the conflict were 'more of a colonial than of an international nature'.[150] For him, the technologically superior Italians had a duty to bring civilisation to the barbarians in Tripoli, a view which echoed the official Italian claim that 'as Turkey had done nothing to improve the territory it was right that Italy should be allowed to do so'.[151] In Libya we see for the first time aerial bombing as a means of civilisation. For those who considered themselves already civilised, aerial bombing in Tripoli was not a cause of concern but rather the latest weapon, the legality of which was still disputed, tested and employed in the peripheries of empires.[152]

It did not take long for Europeans to realise that the new weapon unleashed against 'some raging lunatics' in the African desert could eventually fall on Paris or Rome. A few months after the first aerial bombing, a fictional account of the Italo-Turkish war was written by the Swedish author Gustaf Janson. His novel, tellingly named '*The Lies: Tales of the War*' (but translated as *Pride of War*) was an international success. Each of the chapters narrates the conflict from the point of view of an individual, the last one being that of an Italian aviator – no doubt inspired by Gavotti.[153] The aviator 'was striving not only for the respect of his comrades and the praise of his superior officers, he was flying through the air so as to testify to the unquestionable superiority of the white races. The proofs were there, in the shape of seven powerful bombs'.[154] Janson was one of the first to reflect on how the colonial imperative, invoked in The Hague against the prohibition of new weapons, would eventually turn inward. In the last pages of the novel, as the Italian general celebrates his aviator's achievement he can already foresee a European war where airplanes would be used to turn cities into ruins: 'The distance between Metz and Paris can be covered in a few hours. The three hundred aeroplanes which Germany possesses at this moment… could throw down ten thousand kilos of dynamite on to the metropolis of the world in less than half an hour'. Realising the drastic implications of this possibility, he adds: 'this is a positively gigantic thought!'.[155]

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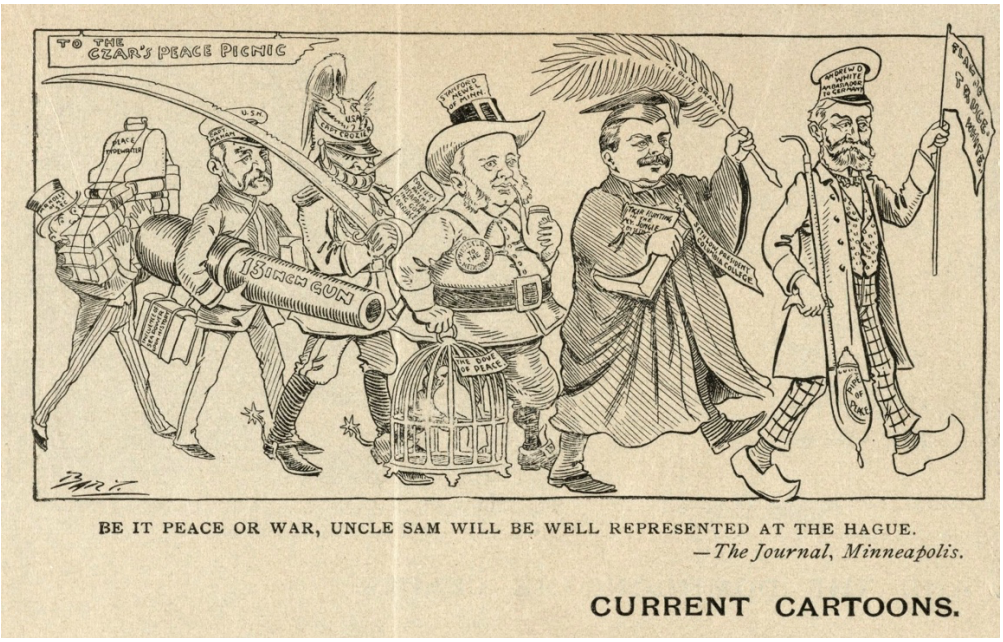
[150] Gennaro Tambaro, 'Das Recht, Krieg Zu Führen' (1914) 24 *Niemeyers Zeitschrift für Internationales Recht* 41, 70; quoted in Jochen von Bernstorff, 'The Use of Force in International Law before World War I: On Imperial Ordering and the Ontology of the Nation-State' (2018) 29(1) *European Journal of International Law* 233, 253.
[151] 'Editorial Comment: Mediation in the Turko-Italian War' (1912) 6(2) *American Journal of International Law* 463, 465.
[152] Lindqvist (n 149) 48; Jochen von Bernstorff, 'Drone Strikes, Terrorism and the Zombie: On the Construction of an Administrative Law of Transnational Executions' (2016) 5(7) *ESIL Reflections* 4.
[153] Lindqvist (n 149) 48.
[154] Gustaf Janson, *Pride of War* (Little, Brown and Company, 1912) 342.
[155] Ibid 349.

2.9 Crozier's amendment

The second argument which played a major role in changing the perception at The Hague that aerial bombing should be prohibited was a humanitarian one. One week after the almost unanimous vote in the subcomission for a perpetual prohibition of the discharge of projectiles from balloons or by similar means, Captain Crozier of the United States proposed to reopen the discussion on the topic. He reasoned that the conference had thus far decided not to impose any limits on the development of artillery, explosive materials, powders and muskets, while prohibiting the use of expanding bullets and the hurling of explosives from balloons. For him, the logic behind these decisions had been that the delegates wished to safeguard the *efficacy* of new weapons. The restrictions on expanding bullets came 'exclusively from a humanitarian sentiment' and therefore he supposed the same sentiment was behind the prohibition of aerial bombing.[156] Crucially, Crozier questioned whether, from a humanitarian standpoint, a permanent prohibition was justifiable. His point was that until then there had been little experience in the use of balloons for bombing, and that it was understandable that existing balloons might injure inoffensive populations as well as combatants. However, he argued that perfected balloons might 'make its use possible at a critical point on the field of battle, at a critical moment of the conflict, under conditions so defined and concentrated that it would decide the victory'.[157] In other words, if balloons could be perfected so that bombing could be more precise that would be a positive development which should be welcomed instead of proscribed.

[156] Scott, *The Proceedings of the Hague Peace Conferences* (n 140) 354.
[157] Ibid.



Cartoon of the American delegation at the Hague Peace Conference, 1899, featuring Captain Crozier, third from left

Source: Wikimedia Commons / Houghton Library

Crozier's humanitarian argument became a common trope in almost every subsequent debate on the regulation of aerial bombing. The idea that new weapons, or better technology, will diminish the evils of war and support humanitarian considerations is a contradiction that runs through the history and the structure of the field we now call international humanitarian law. It was present in article 29 of the well-known Lieber Code, written as a code of conduct for the Union Army during the civil war in the United States: 'the more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief'.[158] At The Hague, Crozier claimed that it was not desirable to shut the door, at an incomplete stage of development, to the possibility of 'more efficient and thus humanitarian' machines.[159] He proposed that the prohibition should be temporary and not permanent, setting a limit of five years. The representatives of France and Britain supported his argument. Colonel Gilinsky tried to extend the prohibition to ten years, but by then the commission had been persuaded by Crozier. Crozier's amendment was unanimously adopted. Aerial bombing had been banned, but only for a period of five years.[160]

[158] Francis Lieber, 'Instructions for the Government of Armies of the United States in the Field' in *The Laws of Armed Conflicts* (Martinus Nijhoff, 1988) 3, article 29.
[159] Scott, *The Proceedings of the Hague Peace Conferences* (n 140) 354.
[160] William Isaac Hull, *The Two Hague Conferences and Their Contributions to International Law* (International School of Peace, Ginn & Company, 1908) 78–79; Scott, *The Proceedings of the Hague Peace Conferences* (n 140) 280–281.

2.10 The bowels of the earth are the only refuge of peace

In 1899 the debate on aerial bombing revolved around whether it should be prohibited permanently or temporarily. The resulting temporary ban only lasted until 1905. By 1907, when states reconvened for the second Hague Peace Conference, the debate had mostly shifted from prohibition to regulation through the laws of war. Important developments had happened in the interim. Delegates were still talking about balloons, but by then the Wright brothers in the United States and Alberto Santos-Dumont in France had shown the world that heavier-than-air controlled flight was possible. The airplane had been invented. Countries' and peoples' attitudes to flying were rapidly changing. Britain found its naval dominance threatened by aerial warfare and so changed its stance of opposition to one of support for a prohibition on bombing. Russia had lost most of its navy in the war of 1904-05 with Japan. Determined to make up for this loss, it now opposed a prohibition despite having proposed it in the preceding conference. France and Germany had made considerable progress in the development of dirigible aircraft and were reluctant to give them up.[161] It is striking that many states which in 1899 signed the declaration on the prohibition of aerial bombing declined to do so in 1907.[162]

The 1899 Declaration having expired, the delegation of Belgium presented to the conference a text restating it in the same terms, proposing a ban on the throwing of projectiles and explosives from balloons or methods of a similar nature for another five years.[163] At this point the conference split in two camps, one supporting the Belgian proposal and the other preferring a new approach to the topic of aerial bombing, namely absorption by the rules of land and naval warfare instead of prohibition. The Belgian delegate, Jules Van den Heuvel, contesting the cynicism of those who thought the previous declaration was only adopted because it had no real effect, boldly claimed that 'bombardment by balloons calls for stricter and more restrictive regulation than that by land or sea forces; it occurs under other conditions; it could cause very much more damage to peaceful non-combatants'. He was supported by the Austro-Hungarian delegate, who added that 'the new method of warfare mentioned in the Declaration is *not indispensable*'. In the camp in favour of renewing the ban one also found manifestations from the

161 Kuhn (n 102) 119.
162 James W Garner, 'Some Questions of International Law in the European War' (1915) 9 *The American Journal of International Law* 72.
163 James Brown Scott (ed), *The Proceedings of the Hague Peace Conferences*, vol III The Conference of 1907 (Oxford University Press, 1921) 145.

Ottoman empire, Greece, China and Portugal.[164] But ironically it was Lord Reay, the British delegate, who most fervently defended the ban and who received applauses for his speech. He asked if it was 'not enough to have two elements in which the nations may give free scope to their animosities and settle their quarrels without adding a third?' and concluded that the conference would 'render a great service to humanity and the cause of peace…in holding the people back from this fatal precipice'.[165] The Belgian proposal was approved by 28 votes against 6 in the subcommission. When the issue came up in the plenary session of the conference, the other British delegate, Edward Fry, suggested that instead of five years the declaration should extend until the meeting of the next peace conference, since the previous one had lapsed before the start of the second conference. The amended declaration was approved with 28 votes in favour and 8 against.[166]

Despite the majority's support for an extension of the ban on aerial bombing, the French and the Russians led the charge in pushing for a different approach. Initially offering a subsidiary amendment to the Belgian proposition, the Russian delegate, Mr. Tcharykow, argued that it was still premature to guess how useful balloons and aircraft would be in war but that 'we could extract from the proposed prohibition one which might be permanently adopted'. Instead of a temporary total ban, he argued for 'a [permanent] prohibition against throwing projectiles or explosives from balloons, etc, upon towns, villages, dwellings or buildings that are not defended'.[167] According to this view, the specific declaration on balloons could be replaced by a short amendment to article 25 of the Regulations respecting the laws and customs of war on land, which already forbade the bombardment of undefended places by canon.[168] All that was needed was to elucidate that this provision also applied to aerial bombardment. Louis Renault, the French delegate, concurred: 'the method of discharging the projectiles makes little difference. It is lawful to try to destroy an arsenal or barracks whether the projectiles used for this purpose comes from a cannon or from a balloon; it is unlawful to try to destroy a hospital by either method'.[169] The move from the incipient attempt to prohibit aerial warfare to its incorporation in the laws of war, effectively legalising it before having been experienced, was

[164] Ibid 147–148.
[165] Ibid 148.
[166] James Brown Scott (ed), *The Proceedings of the Hague Peace Conferences*, vol I The Conference of 1907 (Oxford University Press, 1920) 85–86.
[167] Scott, *The Proceedings of the Hague Peace Conferences* (n 163) 146.
[168] Article 25 stated: 'The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited' in: *Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.* ('*Convention (IV) 1907*').
[169] Scott, *The Proceedings of the Hague Peace Conferences* (n 163) 147.

well on its way. Italy, being the first country to conduct an aerial bombing, already in 1907 sided with the Russians and the French in this approach. Brigadier General Mario Nicolis di Robilant took Crozier's line of argument about the uncertainties of the development of technology and the appropriate legal responses a step further:

> Progress has no limits and what today seems to us astonishing and extraordinary will tomorrow seem natural and even banal. Under these conditions, in case it is not possible to forbid absolutely, although for a limited time, the use of balloons for certain acts of war, it is better to restrict and regulate their use for all time. […] I understand very well how terrifying to the popular mind is the idea that some fine day there may fall out of the sky without any warning some sort of bomb which will blow up its houses and desolate its crops; but considering the matter coolly one will be easily convinced that this new engine of war is no more terrible than those already in use. […] If it is taken into consideration military balloons will no longer have, it is true, an exceptional status for a given period, but neither will they have absolute freedom the remainder of the time; if military balloons are no longer to be outside of the law we will at least make them subject to law.[170]

Both Italy and Russia proposed amendments to the effect of regulating aerial bombing without completely forbidding it. Realising they had the same design and that the ultimate effect was to equate the restrictions to aerial warfare to those accepted for land and naval warfare, the French delegation convinced them to withdraw their amendments in favour of the insertion of the words '*by any means whatever*' after 'to attack or bombard' in article 25. The final wording of article 25 read: 'It is forbidden to attack or bombard by any means whatever towns, villages, dwellings or buildings that are not defended'.[171] The French amendment was unanimously adopted, and despite the lack of unanimity so was the Belgian proposal to renew the Declaration of 1899.

For those who had come to The Hague with the expectation that progress would be made in restricting new means of warfare, there was little to celebrate. In 1907, the United States had taken no part in the discussion of the question of aerial warfare. Germany, which had voted in favour of the Belgian declaration in the subcommission, cast a negative vote in the plenary since there had been no unanimity – and particularly because France had strongly opposed it.[172] The 1907 Declaration was only signed by about half the states present at the conference. Major powers like France, Germany, Russia, Japan, Mexico, Italy and Spain did not sign it. Due to the 'solidarity clause', which stated that the declaration ceased to be binding in a war if one of the belligerents is joined by a non-contracting state, there was little to no prospect of it ever being applied.[173] That this would be case had already been noted by the Japanese delegate, Keiroku

[170] Ibid 150–151.
[171] Scott, *The Proceedings of the Hague Peace Conferences* (n 166) 104.
[172] Hull (n 160) 82.
[173] James W Garner, 'Proposed Rules for the Regulation of Aerial Warfare' (1924) 18 *The American Journal of International Law* 56.

Tsudzuki, who reasoned that 'Japan sees no advantage to be gained by pledging itself to several Powers, while with regard to others it would be forced to continue to study and improve this means of warfare'.[174] A year later, the American international lawyer James Brown Scott, who had been part of the United States delegation, gave a series of lectures at Johns Hopkins University on The Hague Peace Conferences. When he came to the topic of aerial warfare Scott lamented that 'the slaughter of our kind proceeds by land and sea and the Conference opened up a new element, the air, so that the bowels of the earth – unless infected by mines – are the only refuge of peace'.[175]

2.11 An illogical and impractical test

At The Hague in 1907 the two competing approaches of prohibition and of regulation coexisted, albeit the former had begun to wane. A few years later aerial bombing had become a reality in and around Tripoli. For the first time international lawyers had to grapple with the question of whether a particular act of aerial bombing was legal. The editors of the *American Journal of International Law* had been following the events in Tripoli with apprehension. They did not want to delve too deeply into the causes of the war or to condemn Italy for the invasion, limiting themselves to stating that Italy failed to try an arbitration to settle its disputes with the Ottomans: 'in its eagerness to possess itself of Tripoli and Cyrenaica, Italy has unfortunately violated the spirit, if not the letter, of those sections of the convention dealing with good offices and arbitration'.[176] As the war progressed and the use of airplanes and balloons for bombing had been broadcast around the world, the editors reported on whether the Italian forces had a legal basis for dropping explosives from balloons. They recalled that Turkey had signed the 1907 Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons but that Italy had not. Italy was therefore free to employ balloons and airplanes and to drop projectiles from them in any way not forbidden by the laws of war.[177]

The relevant provision of the laws of war was the aforementioned article 25 of the 1907

[174] Scott, *The Proceedings of the Hague Peace Conferences* (n 166) 85.
[175] James Brown Scott, *The Hague Peace Conferences of 1899 and 1907*, vol I (The Johns Hopkins Press, 1909) 654.
[176] 'It is not the purpose of the present comment to enter into a detailed discussion of the causes of the war or its method of prosecution, but to call attention to the haste with which hostilities were begun, without, apparently, exhausting the peaceful methods available for the settlement of the dispute...' in 'Editorial Comment: Tripoli' (1912) 6(1) *American Journal of International Law* 149, 153–154.
[177] 'Editorial Comment: The Use of Balloons in the War between Italy and Turkey' (1912) 6(2) *American Journal of International Law* 485, 486.

Regulations concerning the Laws and Customs of War on Land, which had been amended with the express intent of prohibiting the bombarding of undefended places by balloons or aircraft. Both Italy and Turkey had signed the convention to which the regulations were attached and had made no reservations.[178] Yet even even if article 25 was binding, there was little consensus on what the term 'undefended' meant. On land warfare a place was presumed to be defended when it offered resistance to an invading force. If military occupation went unopposed, there was no legal reason why a city or a building should be bombarded. The transposition of the same standard to aerial bombing, however, only generated subsequent confusion while failing to restrict in any meaningful way the path of air warfare.[179] How could one know from above whether a place was defended or not?

The first difficulty, noted by the Swedish author Lage Staël von Holstein in 1911, was the 'impossibility to discern from above the character of places or objects over which bombs and projectiles are thrown'.[180] He was hinting at an emerging regime of sight and visibility or of 'knowledge-vision' in international law according to which visual distinguishability became the operational test for discriminating between a legal and an illegal target.[181] Article 27 of the same regulations provided that 'all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes'. But its second paragraph imposed 'the duty of the besieged to indicate the presence of such buildings or places *by distinctive and visible signs*, which shall be notified to the enemy beforehand'.[182] In this sense, from the moment that aerial bombing was incorporated in the laws of war it was recognised as a practice with a shared responsibility where those on the ground are in charge of making sure they and their dwellings are visible and distinguishable, while those above must take 'all necessary steps' to 'spare as far as possible' protected places which have been properly marked.[183]

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178 The editors of the *American Journal of International Law* thus concluded that they were both bound by article 25. Yet according to the ICRC treaty database, the 1907 Convention IV was never ratified by either Italy or Turkey, so it was not binding when the Italians dropped bombs from airplanes and balloons in 1911.

179 Tami Davis Biddle, 'Strategic Bombardment: Expectation, Theory, and Practice in the Early Twentieth Century' in Matthew Evangelista, Henry Shue and Tami Davis Biddle (eds), *The American Way of Bombing: Changing Ethical and Legal Norms, from Flying Fortresses to Drones* (Cornell University Press, 2014) 27, 30.

180 Staël von Holstein (n 95) 40 (Translated by the author).

181 Amin Parsa, 'Knowing and Seeing the Combatant: War, Counterinsurgency and Targeting in International Law' (Doctoral Thesis, Lund University, 2017) 209–210.

182 *Convention (IV) 1907* (n 168) (emphasis added).

183 Christiane Wilke, 'How International Law Learned to Love the Bomb: Civilians and the Regulation of Aerial Warfare in the 1920s' (2018) 44(1) *Australian Feminist Law Journal* 29, 43.

A second difficulty found in applying The Hague Regulations to aerial bombing was that, even if one could discern objects from above, there was no agreement as to when a place could be considered defended or not. The Turks and Arabs wasted little time in pointing their guns and shooting at the Italian airplanes, but as they flew over Tripoli and nearby settlements how could they know whether they were defended or not when nobody was shooting? Did the mere presence of some fighters undermine the claim that an entire city was undefended? Or had the Turks also possessed airplanes in nearby aerodromes, could the Italians claim that the whole territory was defended? There were no clear answers to these questions. If anything, lawyers began to notice that a conceptual revolution in international law would be needed to accompany the technological revolution in warfare. The American James Garner claimed that the distinction between defended and undefended places was illogical and impracticable, and that 'if the test of what is a "defended" place in land and maritime warfare is applied to aerial bombardment it will lead to absurd results'.[184] The Hague Conventions of 1907 had left many questions unanswered. A few months before Gavotti dropped his bombs, the members of the Institute for International Law met in Madrid to try to answer these questions.

2.12 How international lawyers learned to love the bomb

Again, it was Paul Fauchille who led the debate at the Institute with a report and a draft project on the regime of aerostats in times of war. He claimed that aerial warfare had a special character, but one which more closely resembled naval warfare rather than land warfare. This was partly due to his perception that similarly to commercial ships, private aerostats would be requisitioned and employed for military purposes at the start of hostilities or in the course of a war. Furthermore, if they could be used for surveillance and communication, he found no good reason why they could not also be used for bombing. After all, the enemy would certainly be allowed to fire against an enemy aerostat and so they should be allowed to fire back. Following this argument, Fauchille rejected a prohibition of aerial bombing and The Hague Declaration which had incorporated it.[185] His draft project took the path of regulation and incorporated the test of whether a place was defended or not as the rule for distinguishing between a legal and

[184] Garner (n 173)., 57.
[185] *Annuaire de l'Institut de Droit International* (n 80) 24–25.

an illegal aerial bombing.[186]

At the Institute's 1911 meeting in Madrid, Fauchille's views proved highly contentious and a counter-project was presented by the German international lawyer Carl Ludwig von Bar. According to von Bar, the Institute had to choose between two systems: one in which aerostats would be regulated as means of destruction, the other where they would only be seen as means of communication and surveillance. Article 1 of von Bar's project stated that 'it is forbidden to use aerostats, balloons or airplanes as means of destruction or combat'.[187] Two drastically opposed projects were thus on the table. The debate that followed was as much about the role of international law (and of lawyers) as it was about what to make of The Hague Conventions and the regulation of aerial warfare.

Arguing in favour of prohibition, John Westlake doubted whether the damage caused by aerial bombing could ever be controlled. He understood that the members of the Institute could not expect States to renounce aerial warfare, but he nevertheless wanted the Institute 'to assert its responsibility, from the scientific point of view, by expressing the wish that aerial warfare be limited to observation'.[188] This wish would serve as a principle which could be subsequently developed. Westlake was joined by the Belgian international lawyer Albéric Rolin, who forcefully argued that if it was necessary to choose between two absolute systems, his preference was without a doubt for a system of absolute prohibition. For him it was not appropriate to look at the issue 'in a purely abstract way, without taking into account the *esprit* that animated the Institute':

> It is certain that, every time new particularly disastrous means of warfare appear, this *esprit* should not prioritise its use but rather its restriction. It is not a matter of knowing whether, in the absence of an international convention, the use of aerostats as means of warfare is legitimate or not. It is a question of knowing whether there is a real social and humanitarian interest in prohibiting it through an international convention. The Institute would seem faithful to its mission in our opinion by recommending such a convention.[189]

Albéric's nephew, Edouard Rolin, had another view of the Institute's role. Acknowledging that the humanitarian considerations which inspired Westlake and his uncle Albéric should be taken into consideration, he nonetheless argued that 'the Institute should not forget it is an assembly of jurists; it should examine the question submitted to it from a juridical point of view'.[190] What

[186] Article 7 of Fauchille's draft rules stated: 'It is prohibited to bomb, with aerial forces, cities, villages, dwellings or buildings that are not defended'. See: Ibid 29.
[187] Ibid 132.
[188] Ibid 335.
[189] Ibid 339–340.
[190] Ibid 341.

he meant by a 'juridical point of view' was that the question of aerial bombing should be analysed from the premise that the essential principle of the laws of war is that all unnecessary cruelty is forbidden. If it could not be proven that aerostats were unnecessarily cruel, aerial warfare should be permitted.[191] Fauchille weighed in on Edouard Rolin's side claiming that in many ways aerial warfare was infinitely less blind than naval warfare, which accepted the use of underwater mines.[192] At this point in the debate a majority was forming around the legitimacy of aerial warfare. Another Belgian lawyer, Paul Errera, stated that the Institute's task was not to proscribe innovations, but to regulate them. In his opinion, aerial warfare would allow weaker states to compete with stronger ones, acting as an equalising force.[193] As the discussions came to a close, a series of votes were taken over different declarations concerning aerial warfare. The most restrictive one, prohibiting any hostile acts from the air, including observation, exploration or communication, was defeated by 17 votes to 5. A subsequent amendment, allowing the aforementioned acts but forbidding bombing, was also defeated, this time by 15 votes to 9. In the end, the declaration proposed by Lapradelle, with the support of the rapporteur Fauchille, was adopted by 14 votes against 7. It stated: 'Aerial warfare is permitted on the condition that it does not expose persons or property of the peaceful population to greater dangers than land or naval warfare'.[194]

When Gavotti inaugurated aerial bombing in November 1911, the Italians could thus refer to international law in their defence. The principle adopted by the Institute of International Law had the effect that the more violence committed by the army or the navy, the more would have to be accepted, for consistency's sake, from aerial bombing.[195] By then the Italian navy had bombarded Tripoli and the army had occupied the city. In retaliation to a Turkish attack which caught the Italian army unprepared as they were marching through the Mechiya oasis, the Italians massacred the local population, killing some four thousand locals as they moved systematically through homes, farms and gardens. A British officer accompanying the Turkish forces witnessed several hundred women, men and children killed in a mosque. The *Times* reported: 'the floodgates of blood and lust were opened…one hardly knows to what limits the elasticity of the phrase "military exigencies" will be stretched in the 20th century'.[196] Compared

[191] Ibid.
[192] Ibid 341–342.
[193] Interestingly, the argument that aerial warfare would allow weaker states to defend themselves against stronger states was supported by a number of other international lawyers, most notably the French Albert de Lapradelle and the Greek Nicolas Politis. See ibid 337.
[194] Ibid 343–345.
[195] Lindqvist (n 149) 47.
[196] Quoted in GL Simons, *Libya and the West: From Independence to Lockerbie* (Palgrave Macmillan, 2003) 7.

to this massacre, it was difficult to argue that the grenades thrown by Italian pilots exposed the population to greater dangers than the army or the navy. Even those who defended the legitimacy of aerial bombing could invoke pacifist sentiments for doing so. Paul Fauchille, who for the first decade of the century was a central figure on the topic, paradoxically proclaimed that 'it is desirable, in the interests of peace, that aerial warfare be declared legitimate: thanks to the terrors it inspires in popular imagination its possibility will do more than its prohibition for the triumph of pacifist ideas'.[197] Aerial bombing was still in its infancy, yet international lawyers had already accepted it and found ways to justify it.

2.13 Conclusion

Before airplanes had been invented, and before the first aerial bombing in history took place, for more than a decade international lawyers had enthusiastically discussed who owned the air, if bombs and explosives could be thrown from above and what or who could be targeted. From an initial aversion to the idea of aerial bombing it soon came to be accepted and normalised in international law. The idea that the air would be free and open to navigation also quickly gave way to the formation of aerial territory and to practices of territorialisation and deterritorialisation of the air. Approaching those debates within the context of the first aerial bombing in history gives us a concrete setting in which we can make sense of them. It also helps us connect them with present practices and to the physicality of certain locations.

In this chapter I highlighted how many arguments and recurrent themes in international law related to aerial bombing emerged in the first ten years of the twentieth century, preceding and immediately following the invention of airplanes and their use in warfare. What emerges from this frame is a story about how aerial bombing changed the way sovereignty (over the air) was understood, from early analogies to the sea and the repetition of old debates about freedom of navigation to the production of new aerial imperial formations. It is also a story about how colonialism and humanitarianism are embedded in international legal discourse about technological change and its use in warfare. This is evident in the persistence of the argument that new technologies are needed to pacify or maintain domination over certain peoples or localities, or in the claim that new, better, or more precise weapons will make wars shorter or less violent. What makes the invention of aerial bombing a decisive moment for international

[197] *Annuaire de l'Institut de Droit International* (n 80) 59.

law is the that it brought these arguments to the fore and exposed their ultimate contradictions. With airplanes, warfare and conflict were not necessarily more or less violent, shorter or longer, but Gavotti's inaugural bombing showed that there was certainly something different happening.

Aerial bombing provoked a spatial and conceptual disturbance in international law in the beginning of the twentieth century. States had declared sovereignty over their airspace, but aerial territory was divisible and porous, it was less a refuge into which states retreated than a reservoir from which aerial violence flooded out. The laws of war were extended to aerial bombing once prohibition had been dropped, and international lawyers learned to love the bomb and to give it a humanitarian justification. An incipient regime of sight and visibility for distinguishing targets was emerging, one in which the view from above would lead to further conceptual change as the old test of whether a place was defended or not began to lose its purchase. In the midst of these developments a new kind of target was fabricated, one which combined civilian and military objects and persons as well as regular and irregular forces; and a number of localities, Libya being one prominent example, were opened to foreign aerial interventions.

3. Distinction: bombing civilians in the peripheries of empire

> Defenceless villages are bombarded from the air, the inhabitants driven out into the countryside, the cattle machine-gunned, the huts set on fire with incendiary bullets: this is called pacification.[1]
>
> The term 'civilian population' has a very different meaning in Iraq from what it has in Europe . . . the whole of its male population are potential fighters as the tribes are heavily armed.[2]

This chapter argues that the principle of distinction in the laws of war was transformed by the development of aerial warfare. Rather than conceiving of distinction as a timeless and universal principle, I argue that the concept of civilians is a peculiar way of conceptualising non-combatants that emerged in parallel with the advent of aerial bombing and was strongly influenced by military doctrines of air power. It was only once the civilian population was established as a target for aerial bombing in military doctrine that international lawyers described it as a group deserving legal protection or a group that was already protected by law. Even then, international law during the interwar period did little to protect civilians from aerial bombing. At a time when European powers had made a routine of bombing civilians in the colonies and mandated territories, aerial bombing was presented as a more efficient, cheaper and humane form of warfare – entirely compatible with the principle of distinction and the laws of war. This material experience and its legal repercussions explain the readiness with which aerial bombing came to be accepted by international lawyers. Bombing in the peripheries of empires also exposed the instability of the category of civilians. The narratives created by Europeans about other peoples and places as well as about the benefits and limitations of aviation technology

[1] George Orwell, 'Politics and the English Language' in Sonia Orwell and Ian Angus (eds), *The Collected Essays, Journalism and Letters of George Orwell, Vol. IV* (Secker & Warburg, 1968) 136.
[2] F.H. Humphreys, head of British colonial administration in Iraq, 1932. Quoted in Priya Satia, 'The Defense of Inhumanity: Air Control and the British Idea of Arabia' (2006) 111(1) *The American Historical Review* 16, 38.

played a crucial role in how the idea of civilians materialised in different contexts.

3.1 Introduction

Although the international regulation of aerial warfare and the practice of bombing have as a starting point the early twentieth century, their main developments can be seen in the 1920s and 1930s. This period was marked by attempts to restrict the bombing of civilians between European powers and by the use of air power in 'small wars' and as a tool of colonial policing in the peripheries of empires. Examining how aerial warfare developed in the interwar period, paying special attention to deliberations about the principle of distinction in different territories and concerning different peoples, is crucial for grasping current debates on bombing, drone warfare, civilian casualties and the role of international law.

The period that followed the First World War saw the creation and development of air forces in the major imperial powers, as well as the elaboration of air power theories and doctrines by military thinkers, political leaders and international lawyers. Within the European context, the interwar period that is often seen as a prelude to the Second World War.[3] In this chapter, instead of focusing on intra-European debates, I examine the practice of colonial bombing and the development of the idea of 'air control'. Highlighting this specific context, I stress that 'small wars', as most colonial conflicts were called,[4] were not as different in character from 'real' European conflicts as commonly assumed. I pay special attention to practice and to military culture as particularly relevant for the development of norms which became part of international law. I argue that the paradoxes and difficulties in the idea of distinction in the laws of war developed through a systematisation of the practice of bombing in the peripheries of empires rather than through the development of explicit norms.[5]

While it is frequently said that the use of airplanes in the mandated territories or in the colonies

[3] See Amanda Alexander, 'The "Good War": Preparations for a War against Civilians' [2016] (first published online on May 31, 2016) *Law, Culture and the Humanities* 1.
[4] The term 'small wars' was disseminated by Colonel CE Callwell, *Small Wars Their Principles and Practice* (Book Jungle, 3rd edition, 2009); United States Marine Corps, *Small Wars Manual* (Skyhorse Publishing, 2009). According to Callwell, 'the main points of difference between small wars and regular campaigns in this respect are that, in the former, the beating of the hostile armies is not necessarily the main object even if such armies exist, that moral effect is often far more important than material success, and that the operations are sometimes limited to committing havoc which the laws of regular warfare do not sanction.' (at 42).
[5] Isabel V Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Cornell University Press, 2005); for a particularly insightful examination of the relation of practices to norms in international law, see Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

had little influence over the development of air power doctrines and of European air forces in the interwar period,[6] I argue that this point of view ignores the continuities between colonial and European warfare. It is particularly hard to sustain when the most relevant characters in the development of air power were intimately connected to colonial administration and would later be responsible for the strategic bombing campaigns of the Second World War. A slightly diverse point of view would look at the continuities between colonial and European bombing as 'Europeans learning evil lessons in the colonies and then applying them at home (though many an evil lesson was doubtless learned)'.[7] Instead, I illustrate how decaying imperial powers, like the United Kingdom and France, approached bombing in the colonies and the mandated territories from inside the frameworks of air power theory and military culture as developed in Europe since the beginning of the twentieth century. In this sense, the peripheries provided the opportunity to put into practice what the prophets of air power and military theorists had argued would be the reality of aerial warfare. This accumulated practice in turn provided the context in which international lawyers of the period debated aerial warfare and the principle of distinction, shaping a particularly troublesome concept of civilian population.

A focus on the theory and practice of colonial bombing is therefore central to illuminating why international law failed to restrict air power in any meaningful way during the 1920s and 1930s. The practice of colonial bombing had quite an opposite effect, precluding the success of some central ideas proposed by international lawyers and diplomats in that period: disarmament; the creation of an international air police;[8] and a prohibition of bombing.[9] Bombing in the peripheries of empires also exposed how the idea of distinguishing between combatants and civilians was never just about wearing a uniform or carrying a gun, or being part of the military or of a militia.[10] Bombing in Mesopotamia, Morocco, Afghanistan, Pakistan, Somalia or Sudan was more acceptable and unobjectionable than bombing in London, Berlin or Paris – not because distinction did not apply to the former, but because the racist assumptions, narratives,

[6] Defending this point of view: Malcolm Smith, *British Air Strategy between the Wars* (Oxford University Press, 1984); David E Omissi, *Air Power and Colonial Control: The Royal Air Force 1919-1939* (Manchester University Press, 1990); John Buckley, *Air Power in the Age of Total War* (UCL Press, 1999).
[7] Hull (n 5) 3.
[8] On the concept of an international air force see: On the concept of an international air force see Roger A Beaumont, *Right Backed by Might: The International Air Force Concept* (Praeger, 2001).
[9] Phillip S Meilinger, 'Clipping the Bomber's Wings: The Geneva Disarmament Conference and the Royal Air Force, 1932-1934' (1999) 6(3) *War in History* 306; NC Fleming, 'Cabinet Government, British Imperial Security, and the World Disarmament Conference, 1932-1934' (2011) 18(1) *War in History* 62.
[10] On the founding ambiguities and exclusions of the laws of war, see Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press, 2006) 265.

social and cultural perceptions Europeans crafted about these places and peoples made errors more tolerable and public perception acquiescent.[11]

Recent critical scholarship on war and law has tended to see the rise of air power as a clear challenge to the idea of distinction and perhaps as its demise.[12] Others have highlighted how the concept of civilians is beleaguered by gendered assumptions,[13] and by discourses based on innocence and civilisation.[14] In this chapter, by examining the early developments of air power and linking them with the idea of distinction, I argue that distinction, like other concepts integral to international law, is not a perennial ahistorical idea that has always existed as we know it today.[15] Distinction has relied on discourses about gender, civilisation and innocence, but also on geography,[16] locality and on constructed knowledge about places and peoples.[17] Examining how bombing in the mandated territories and in the colonies was justified and practiced in the interwar period gives us a broader understanding of how the idea of distinction was forged and used in legal and political discourse, allowing us to trace the continuities with today's drone wars and uses of air power.

3.2 The First World War and the Rise of Air Power

The changes in the character of warfare that became evident in the First World War and that would subsequently frame military thinking about air power were fruits of developments in Western society throughout the nineteenth century. On the one hand, 'private individuals' or 'unarmed citizens', as alternatively referred to by the Lieber Code,[18] were increasingly mobilised

[11] Satia, 'The Defense of Inhumanity: Air Control and the British Idea of Arabia' (n 2).
[12] Mark Neocleous, *War Power, Police Power* (Edinburgh University Press, 2014); Mark Neocleous, 'Air Power as Police Power' in Jan Bachmann, Colleen Bell and Caroline Holmqvist (eds), *War, Police and Assemblages of Intervention* (Routledge, 2015) 164; Derek Gregory, 'The Death of the Civilian?' (2006) 24(5) *Environment and Planning D: Society and Space* 633.
[13] Judith Gail Gardam, 'Gender and Non-Combatant Immunity' [1993] (3) *Transnational Law and Contemporary Problems* 345.
[14] Helen Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press, 2011).
[15] See Amanda Alexander, 'The Idea of the Civilian in International Law' (Doctoral Thesis, Australian National University, 2013); Amanda Alexander, 'The Genesis of the Civilian' (2007) 20(02) *Leiden Journal of International Law* 359.
[16] Campbell AO Munro, 'Mapping the Vertical Battlespace: Towards a Legal Cartography of Aerial Sovereignty' (2014) 2(2) *London Review of International Law* 233; Derek Gregory, 'The Everywhere War' (2011) 177(3) *The Geographical Journal* 238.
[17] Priya Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (Oxford University Press, 2008) Chapter 8 'Air Control'.
[18] Francis Lieber, 'Instructions for the Government of Armies of the United States in the Field' in *The Laws of Armed Conflicts* (Martinus Nijhoff, 1988) 3, articles 22 and 23.

for service through conscription and became of crucial importance for wars as the industrial production of armaments brought military forces and the nation closer. On the other hand, the bombing of cities became an increasingly attractive method of war as it could potentially paralyse production in the enemy nation.

To be fair, before becoming a fundamental aspect of air power, the bombing of cities was a matter of naval warfare and air power theorists owe much to their naval power predecessors.[19] French strategic thought in the late nineteenth century, drawing from the practice of colonial warfare, anticipated strategies of naval war based on deliberate attacks on undefended cities and on the civilian population.[20] So did the renowned American naval theorist Alfred Thayer Mahan, who noted that the tactic of using bombardment against towns intended 'to bring the war home to the experience of the people… in order to impress popular consciousness with the sense of an irresistible and ubiquitous power… inclining those subject to it to desire peace'.[21] Before aerial warfare had become a reality, the issues surrounding the new technology were therefore already widely discussed in military circles, in literature and in international law.[22]

Nevertheless, the rise of air power during the First World War did mark a turning point in the history of warfare. Not only was it a watershed moment in the technological improvement of airplanes, their numbers also increased dramatically. Having started the war with only around a hundred warplanes, by November 1918 Britain had amassed thousands of them.[23] For military thinkers and strategists, it was at this time that the idea of strategic bombing[24] began to take hold and that arguments about the moral effect of aerial bombing on civilians reached intra-European war. The two decades that followed would consequently prove crucial for the development of concepts and ideas that shaped the early years of the first air forces. Two related occurrences during those decades were central to the development of ideas about distinguishing legitimate targets for bombing: the doctrines formulated by air power theorists – or 'prophets'

[19] Thomas Hippler, *Bombing the People: Giulio Douhet and the Foundations of Air-Power Strategy, 1884-1939* (Cambridge, 2013) 9.
[20] This was defended by the Jeune École, see ibid 18.
[21] Alfred Thayer Mahan, *Sea Power in Its Relations to the War of 1812*, vol II (Sampson Low, Marston & Co, 1905) 331–332.
[22] See the previous chapter. For a particularly horrifying example in literature, in which English-speaking people defeat 'inferior races' showering them with incendiary bombs and imposing the English language upon them, see SW Odell, *The Last War or The Triumph of the English Tongue* (Charles H. Kerr & Company, 1898).
[23] Yuki Tanaka, 'British "Humane Bombing" in Iraq During the Interwar Era' in Yuki Tanaka and Marilyn B Young (eds), *Bombing Civilians: A Twentieth-Century History* (New Press, 2009) 8, 12.
[24] 'Strategic' as opposed to 'tactical' bombing means the use of the air force independently of surface forces, as a force capable of winning a war on its own. See Smith (n 6) 2.

of air power as some would rather call them –[25] and the practice of bombing in the colonies and mandated territories. Let us first look at the thoughts articulated by the theorists of air power.

3.3 Air Power Theorists and Military Thought

The 1920s have been somewhat misleadingly referred to as the 'age of prophecy' in aerial warfare – as if it was something that would only happen in the future.[26] According to this view, the major developments of the period occurred not in the practice of aerial bombing but in the development of ideas and doctrines about future uses of air power. Air power theorists were called prophets because they were supposedly predicting something that would only happen at a later time. I argue that one can only see the period as an age of prophecy if one forgets about the extended use of aerial bombardment in the peripheries of empires during that period, a practice that was fundamental for the development of ideas about aerial warfare and distinction.

The so-called prophets articulated the doctrines of the moral effect of bombing and of strategic air power, publicising the notion that air forces alone could be decisive in wars. They were not so much prophets as developers and diffusers of ideas drawn from earlier military thinkers such as Clement Ader in France and Frederick Lanchester in Britain.[27] The latter, who was one of the most significant early air power theorists, was a firm believer in the notion of the 'knockout blow', arguing that 'it is futile to attempt to disguise the self-evident fact that a serious attack on the capital city of an enemy… cannot be regarded other than as a legitimate act of warfare' and commenting that 'no international agreement or convention can make it otherwise'.[28] It was only in the 1920s, however, with the publication of aeronautical journals such as the French *Revue de L'Aeronautique Militaire* (1921) and the Italian *Rivista Aeronautica* (1925) that air power discussions really took off. It was from this latter journal that the much-debated doctrines of Giulio Douhet gained notoriety.[29]

Together with Hugh Trenchard, Frederick Sykes and Basil H. Liddell Hart in Britain, William

[25] Claudio S Serge, 'Giulio Douhet: Strategist, Theorist, Prophet?' (1992) 3(15) *Journal of Strategic Studies* 352.
[26] See eg. Michael S Sherry, *The Rise of American Air Power: The Creation of Armageddon* (Yale University Press, 1987) 22–46.
[27] Clement Ader, *Aviation Militaire* (Ader, 1909); FW Lanchester, *Aircraft in Warfare: The Dawn of the Fourth Arm* (Constable and Company, 1916); for a broad history of strategic bombing see Lee B Kennett, *A History of Strategic Bombing* (Scribner, 1982).
[28] Lanchester (n 27) 192.
[29] Buckley (n 6) 74.

Mitchell and Alexander Seversky in the United States, Giulio Douhet was undoubtedly one of the most important air power theorists and was perhaps the first to develop a coherent doctrine of strategic air power.[30] Intriguingly, until about 1910 Douhet was mostly a pacifist and maintained both that an international conference should ban aerial warfare and that strategic bombardment of non-military targets were neither useful nor permissible.[31] It was during the interwar period, however, amongst modernist fascination with the airplane in Italian proto-fascist culture – epitomised by Marinetti's 'futurist' movement –[32] that Douhet wrote *The Command of the Air*, first published in 1921 and in an expanded and more strident form in 1927, which is still one of the main references of air power theory and strategic bombardment.[33]

[REDACTED IMAGE]

Bombardamento Notturno [Night Bombing] (1931)

Source: painting by Tullio Crali[34]

[30] Hippler (n 19) 27.
[31] Ibid 28.
[32] Marinetti's 'Manifesto of Futurism' published on 20 February 1909 in Le Figaro, stated in its ninth point: 'We will glorify war – the world's only hygiene – militarism, patriotism, the destructive gesture of freedom-bringers, beautiful ideas worth dying for, and scorn for women'. On modernism, fascism and aviation see Fernando Esposito, *Fascism, Aviation and Mythical Modernity* (2015); see also Robert Wohl, *A Passion for Wings: Aviation and the Western Imagination, 1908-1918* (Yale University Press, 1994).
[33] The influence of Douhet's book on his contemporaries is still a matter of debate. While some argue that his influence is mostly read and acknowledged retrospectively, others contend that 'translation dates of his books are misleading in this respect' as his earlier works and ideas were already often cited in military and aeronautical journals. According to Azar Gat, 'the fact remains that from the late 1920s in France, Germany, the Soviet Union and even before then in the United States, his name and work increasingly came to symbolise the idea of a war-winning strategic air force'. See Azar Gat, 'Fascist and Liberal Visions of War' in *A History of Military Thought: From the Enlightenment to the Cold War* (Oxford University Press, 2001) 519, 519; for a deeper analysis of Douhet's influence, see Hippler (n 19) 135–138.
[34] Tullio Crali was a prominent member of the Futurist movement and of *Aeropittura* (aero-painting), an expression of Futurism's second wave which saw the airplane as the height of technological advancement and exalted Italy's air forces. Crali used Douhet's air power theories as inspiration to many of his disturbing paintings.

Douhet believed that airplanes were the key to future wars and that air power was the ultimate offensive weapon. The nation that won command of the air would thus be able quickly to bring war to an end by obliterating with relative ease the enemy nation's centres of transportation, production and government. Of particular importance in his doctrine was the attack on the enemy's morale – an euphemism for bombing civilians, 'for which he was quite willing to advocate the use of poison gas'.[35] In arguing for the moral effect of bombing, perhaps one of the reasons that Douhet became so well-known was for bluntly stating that with the rise of air power the legal distinction made between combatants and non-combatants was a thing of the past.[36] In his own words, 'any distinction between belligerents and non-belligerents is no longer admissible today either in fact or theory… and it begins to look now as though the safest place may be the trenches'.[37] Because airplanes could reach behind the enemy lines without first breaking through them, he claimed 'there will be no distinction any longer between soldiers and civilians'.[38]

Despite Douhet's contested influence over his contemporaries, his ideas about the effacement of the distinction between combatants and civilians were similar in content, though conceivably more extreme than those of other air power advocates. British military thought on air power during the interwar period developed separately as a mostly home-grown affair, resulting from the creation of the world's first air force in 1918.[39] The British school of air power never fully accepted the concept of 'command of the air' and did not generally conceive the Royal Air Force (RAF) as an independent war winner.[40] Nonetheless, Britain did not need Douhet to adopt ideas related to strategic bombing and to crushing civilian morale.[41] In *The Reformation of War* (1923), J. F. C. Fuller reasoned that the aerial bombing of cities and the use of gas would be one of the main aspects of future warfare,[42] an argument picked up by Liddell Hart in *Paris,*

[35] Buckley (n 6) 75.
[36] Giulio Douhet, *The Command of the Air*, tr Dino Ferrari (Air Force History and Museums Program, New Imprint. Originally published by Coward-McCann in 1942, 1998) 9.
[37] Ibid 196.
[38] Ibid 10.
[39] RJ Overy, *The Birth of the RAF, 1918: The World's First Air Force* (Allen Lane, 2018).
[40] Smith (n 6) 45–46; 66.
[41] Gat (n 33) 593.
[42] JFC Fuller, *The Reformation of War* (Hutchinson, 1923) xiii To be fair, Fuller was critical of indiscriminate bombing for policing the empire, arguing that 'in the air human-touch is lacking' and criticising the air force for advocating obliteration instead of pacification. Although according to him in small wars 'against peoples possessing a low civilisation, war must be more brutal in type', war on land should predominate over war in the air, which he calls 'moral warfare' (at 191-192 and 208).

or the Future of War (1925). Using the analogy of Achilles's weak point, Hart argued that to restore decisiveness in war it was necessary to strike directly at the enemy's will and policy by targeting government, industry and the people.[43] Hugh Trenchard, a major figure of British air power theory and policy, was also an ardent defender of the moral effect of bombing.[44] Through Trenchard, the British Air Staff came to hold as a central belief that 'the ultimate objective of air attack is largely achieved by influencing the morale of the enemy population'.[45]

On the other side of the Atlantic, ideas about strategic bombing and air power were brought to the United States by Billy Mitchell, regarded as the father of the United States Air Force. Mitchell had served during the First World War as a military observer to the Allies' air forces. During that period, he came into contact with Trenchard, then the RAF commander in France, and was later radicalised by the ideas of Douhet and the Italians.[46] Following his European counterparts, Mitchell proclaimed that the future would undoubtedly hold 'an attack on the great centres of population' and that this was 'a distinct move for the betterment of civilization, because wars will be decided quickly and not drag on for years'.[47] Rather inconsistently, he claimed that 'air forces will attack centres of production… not so much the people themselves'.[48] Mitchell's thoughts would later inspire Alexander Seversky, whose *Victory Through Air Power* (1942) became a best-seller in the United States and in 1943 was adapted by Walt Disney into an homonymous animated propaganda movie which depicted the use of bombers against enemy cities as the key to the United States winning the war.[49]

[43] BH Liddell Hart, *Paris, or the Future of War* (E. P. Dutton, 1925) 42 Curiously, during the Second World War both Fuller and Liddell Hart would become strong critics of strategic bombing. Noting that bombs did not make wars shorter or deliver knockout blows as they had expected, they would later argue that bombing civilians is not only barbaric, but stupid; see Sven Lindqvist, *A History of Bombing* (New Press, 2001) 68.
[44] Smith (n 6) 61.
[45] Ibid 62.
[46] Gat (n 33) 589–590.
[47] William Mitchell, *Winged Defense: The Development and Possibilities of Modern Air Power* (G. P. Putnam's Sons, 1925) 16.
[48] Ibid; Sherry (n 26) 16.
[49] Alexander P de Seversky, *Victory through Air Power* (Simon and Schuster, 1942).

[REDACTED IMAGE]

Publicity poster for Disney's Victory Through Air Power (1943)
Source: Internet Movie Database

Occasionally, a layman would rival air power theorists in his prognostics. In his popular book *The Next War: An Appeal to Common Sense* (1921), Will Irwin anticipated that the next conflict between great powers would see bombers launching gas attacks on major cities, so that 'Paris, Rome or London could in one night be changed from a metropolis to a necropolis'.[50] For Irwin, even if the military would have a professional dislike of killing civilians, the thought of what the enemy might do with airplanes would likely override that aversion.[51]

The theorists of air power generally argued that there was no or little protection against attack from the air.[52] The moral case for aerial bombardment thus rested on the assertion that it would make wars sharper and shorter – 'the 'knockout blow' was offset by the revulsion for trench warfare left by the First World War.[53] In this sense, theorists of air power contributed to a narrative of the First World War that was strongly antagonistic towards civilians.[54] They were not alone in constructing that narrative. Diplomats held back from proscribing aerial warfare partly on the thought that it meant the return to the slaughter in the trenches, and a Harvard international law professor defended the use of gas by reminding his audience:

> a new world war may be decided by some quick and overpowering blow…[and] however "inhuman" the methods used… such a solution might well be preferable to its alternative

[50] Will Irwin, *'The Next War': An Appeal to Common Sense* (E. P. Dutton, 1921) 46.
[51] Ibid.
[52] Robert Donington and Barbara Donington, *The Citizen Faces War* (Victor Gollancz Ltd, 1936).
[53] Sherry (n 26) 27.
[54] Alexander, 'The "Good War": Preparations for a War against Civilians' (n 3) 3.

> – a long war of mud, vermin, disease and nameless agony, a war of starvation, exhaustion, lying, brutalization and madness.[55]

Air power theorists of the interwar period became one of the most ardent supporters of targeting civilian populations. The ideas of strategic bombing and of the moral effect of air attacks that they developed may be linked to a totalitarian vision of warfare, in which it is the nation as a whole that goes to war, not just the armed forces.[56] To the extent that the civilian population and the armed forces tended to merge, targeting became indifferent and distinction a somewhat obsolete concept. Civilians were not only seen as legitimate targets, but strategically regarded as preferable objects of aerial bombardment. This belief was founded both on a taboo against a repeat trench warfare and on the assumption of the fragility of the war-weary urban masses. Air power theorists were not so much concerned about the home front in general as about an alienated working class.[57] Their misgivings about the failings of capitalism and the fragile social fabric of European societies were rendered apparent in their fear of factory workers abandoning their work as soon as bombs started falling. In Britain, for instance, the fear that a revolution might be triggered by bombing was evident in talk about a 'Bolshevik upheaval', as 'the red scare could so easily be tied to the air scare'.[58] Not coincidentally, there was a strong link in the interwar years between fascist politics and aviation. In Britain, a high proportion of members of the British Union of Fascists were aviators,[59] while in Italy Mussolini and his followers – Douhet included – reserved for the airplane their most impassioned imagery, unveiling the nature of fascism as the aesthetisation of politics and war.[60]

It would be a mistake, however, to see air power theorists' disdain for distinction and acceptance of bombing civilians as something exclusively related to fascist commitments.[61] Douhet is once again exemplary. Until 1915-16, Douhet explicitly rejected the idea of targeting civilian

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[55] NF Hall, Z Chafee and MO Hudson, *The Next War, Three Addresses Delivered at a Symposium at Harvard University, November 18, 1924* (Harvard Alumni Bulletin Press, 1925) 37.
[56] Hippler (n 19) 113; Alexander, 'The "Good War": Preparations for a War against Civilians' (n 3) 22.
[57] This argument is developed in the following chapter. See Sherry (n 26) 26.
[58] Barry D Powers, *Strategy without Slide-Rule: British Air Strategy, 1914-1939* (Croom Helm, 1976) 125–126; Sherry (n 26) 26.
[59] David Edgerton, *England and the Aeroplane: An Essay on a Militant and Technological Nation* (Macmillan, 1991) 47–49.
[60] Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' in Harry Zohn (tran), *Illuminations* (Shocken Books, 1969) 243–244; for a fascinating cultural history of aviation, emphasising the links between aviation and Italian fascism, see Robert Wohl, *The Spectacle of Flight: Aviation and the Western Imagination, 1920-1950* (Yale University Press, 2005).
[61] Alexander, 'The "Good War": Preparations for a War against Civilians' (n 3) 11; Alexander argues that Liddell Hart, a purported liberal – unlike the fascists Douhet and Fuller – sustained the same arguments about aerial warfare, noting that the harm of war could no longer be limited to the 'paid gladiators'. See Liddell Hart (n 43) 43–44.

populations. He condemned the German use of Zeppelins over London and Paris in 1915, arguing that 'it is not and cannot be an instrument of war, since it is incapable of fighting against the belligerents'.[62] Before embracing extremist arguments about bombing the people for which he would become famous, his first justifications of bombing relied instead on humanist and pacifist views that were integral to his conception of international justice.[63] In a little known paper from 1917 entitled *Sottomarini ed Aeroplani* ('Submarines and Airplanes'), Douhet argues that airplanes would soon be able to destroy any large city in a single night, thus leading to 'an intolerable state, a total absence of security' which could only be prevented by the abolition of war through the creation of an international parliament. This 'parliament of humanity' would need means of coercion at its disposal, and so Douhet insinuates the creation of an international air force that would carry out 'punitive expeditions' against countries that might violate the international order.[64] It is in this earlier defence of a form of democratic pacifism that Douhet begins to abandon his condemnation of the use of aircraft and the vindication of distinction as relevant to war.[65] In other words, before developing the concept of 'command of the air', Douhet's first justifications for aerial bombing were presented in a liberal framework and in the form of an international air force entrusted with punishing violators of the international order.[66] In this scenario, as a prominent international law professor of that period cautioned, 'when society sends out a policeman to clean up a gang of crooks, it is not over-meticulous as to the method which he uses', so that in the next war 'whole populations [would] be combatants'.[67]

Whether based on fascist imaginaries of the airplane as the decisive technological development which would bring war to the people or on liberal visions of an international aerial gendarmerie, the air power theorists and strategists of the 1920s and 1930s formulated a discourse which accepted aerial bombardment as legitimate, if not inevitable. The bombing of civilians was well prepared for both ethically and strategically – as well as legally as we will see below – so that a war against the people could even be presented as a 'good war'.[68] This explanation is certainly

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62 Giulio Douhet, *Scritti Inediti*, ed A Monti (Scuola di Guerra Aerea, 1951) 460; Hippler (n 19) 102.
63 Hippler (n 19) 100.
64 Giulio Douhet, 'Sottomarini Ed Aeroplani' in A Monti (ed), *Scritti Inediti* (Scuola di Guerra Aerea, 1951) 154; cited in Hippler (n 19) 99–100.
65 Hippler (n 19) 102.
66 Similar ideas abounded in the interwar period. They were in fact incorporated in the UN Charter in article 45, which states: 'In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action'. See Beaumont (n 8).
67 Manley O Hudson, 'The Stacking of the Cards' in *The Next War, Three Addresses Delivered at a Symposium at Harvard University, November 18, 1924* (Harvard Alumni Bulletin Press, 1925) 69, 69; 93; 106.
68 Alexander, 'The "Good War": Preparations for a War against Civilians' (n 3) 25.

useful and necessary to understand how aerial warfare and ideas about distinction were deployed in the interwar period, shaping legal and political discourse. It is, nonetheless, incomplete. Aerial warfare was not merely discussed and debated by air power theorists having in mind a future European conflict, it was actively practiced in the colonies and in the mandated territories. While military strategists debated the merits of different uses of aircraft, many of them were intimately involved in bombing campaigns in the Middle East, Africa and Asia. This accumulated experience in the peripheries of empires, though often overlooked, is fundamental to comprehending how bombing civilians became normalised in international law. Paying attention to it is also a way to deal with the predominant eurocentrism in both history and law by exploring the extent to which international law is a result of the colonial encounter.[69]

3.4 Colonial Bombing and Air Control

Aerial bombardment was from its inception a colonial enterprise. Before European states started using airplanes against each other, they were already using them to conquer and maintain domination over colonies in Africa, Asia and the Middle East.[70] As discussed in Chapter 2, the first known occasion of an aerial bombardment took place on the 1st of November 1911 in Libya. Giulio Gavotti's inaugural bombardment from an airplane stirred up controversy about the morality of aerial bombing when the Turks alleged that the bombs had hit a hospital.[71] Evaluating the use of airplanes during the Italo-Turkish war of 1911-12, the Italian High Command considered that bombing had not caused considerable damage but had 'a wonderful moral effect'.[72] This observation would set the tone of colonial bombing in the first half of the twentieth century, although how this moral effect was achieved varied in time and space.

The initial Italian experiment did not go unnoticed by Douhet, notwithstanding his early

[69] There is a wide literature that questions Eurocentrism in international law, see CH Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Clarendon Press, 1967); TO Elias, *Africa and the Development of International Law* (AW Sitjhoff, 1972); RP Anand, *New States and International Law* (Vikas, 1972); Georges Abi-Saab, 'Wars of National Liberation and the Laws of War' (1972) 3 *Annales d'études internationales* 93; Mohammed Bedjaoui, *Towards a New International Economic Order* (Homes and Meier, 1979); Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2005); Martti Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' (2011) 19 *Rechtsgeschichte-Legal History* 152; Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge University Press, 2014).
[70] Matthew Evangelista, 'Introduction: The American Way of Bombing' in Matthew Evangelista, Henry Shue and Tami Davis Biddle (eds), *The American Way of Bombing: Changing Ethical and Legal Norms, from Flying Fortresses to Drones* (Cornell University Press, 2014) 1, 8.
[71] Kennett (n 27) 59.
[72] Omissi (n 6) 5.

pacifism. Not long after he criticised the use of airplanes against non-combatants, he was swift to praise the glory of aerial warfare over Libya. In a lecture at the Polytechnic University of Turin in 1913, he celebrated the use of airplanes, recalling how 'the delicate machines were reset on the new homeland of Italy… like new human eagles they rose against the enemy, the very first ones in the world, amazing all'.[73] His involvement in the Italo-Turkish war of 1911-12 was also essential for his study on the organisation and use of aviation in war[74] published in 1913 as *Rules for the Use of Aircraft in War*, the world's first manual for the use of air power.[75]

The Italians were soon followed by other colonial powers. France, then one of the leaders in aviation technology, was quick to deploy aircraft in its African colonies, firstly for reconnaissance missions and soon after for 'pacification' campaigns. Already between 1912-14 the French were using aircraft against rebels in their occupied part of Morocco, being the first to use incendiary bombs in the spring of 1913.[76] These early experiments in bombing dispelled any illusion that it could be used only against lawbreakers or insurgents, distinguishing the innocent from the culpable or combatants from non-combatants. The French pilots flying over Morocco in 1912 chose large targets such as villages, markets and grazing herds in order to make their bombing effective.[77] The Spanish learned the same lesson, having used airplanes sporadically and ineffectively at first in 'their' part of Morocco, later resorting to the use of poison gas and devising the systematic bombing of villages, crops and livestock.[78] Morocco would again be the object of Spanish and French air power during the War of the Riff (1921-26), and the French would recurrently have recourse to aerial bombardment in Syria during the Great Syrian Revolt (1925-27). The United States, a latecomer to aerial warfare, would nevertheless test its fledging air power during the 1920s in their interventions in Central America and the Caribbean. American aircraft and pilots were for instance used to bomb Mexican rebels in 1923 and to support the Nicaraguan regime during the Sandino rebellion between 1927 and 1933.[79]

But perhaps nowhere was air power as important during the interwar period as in Britain and

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[73] Quoted in Gat (n 33) 574.
[74] Julien Grand, 'Giulio Douhet, Chantre Du Bombardement Stratégique' [2008] *Revue Militaire Suisse* 24, 25.
[75] *'Norme per l'impiego degli aeroplani in guerra'* as quoted in Justin D Murphy and Matthew A McNiece, *Military Aircraft, 1919-1945: An Illustrated History of Their Impact* (ABC-CLIO, 2009) 3; James Hamilton-Paterson, *Marked for Death: The First War in the Air* (Head of Zeus, 2015); Arduino Paniccia and Ennio Savi, *Reshaping the Future: Handbook for a New Strategy* (ML, 2014) Chapter 4, 16.
[76] Jeremy Black, *Air Power: A Global History* (Rowman & Littlefield, 2016) 18.
[77] Lindqvist (n 43) 31.
[78] Buckley (n 6) 104.
[79] Black (n 76) 52.; Buckley (n 6) 105.

its extensive empire, and in this context no figure was as significant as that of Hugh Trenchard, Chief of the Air Staff from 1919 to 1929, commonly known as the father of the Royal Air Force.[80] Throughout the First World War the British were already using airplanes to supress rebellions by 'restless natives' in regions such as Sudan, East Africa, Egypt and in the Indian Frontier.[81] By the end of the war, having been the first national air force to acquire independence from the army and the navy, the RAF needed to justify its continuing existence as a separate service. It found its justification in imperial policing and defence in the peripheries of empire. In 1919, the eruption of the Third Anglo-Afghan War provided a perfect opportunity for the RAF to conduct raids on Kabul, Jalalabad and Dakka. The following year, a successful bombing campaign against the so-called 'Mad Mullah' in Somaliland was exploited to justify the effectiveness of the RAF in imperial defence and to propose a system of air control over Mesopotamia, which was finally approved and inaugurated in October 1922.[82] The argument was put forward by Trenchard and embraced by then Secretary of State for War and Air, and later Colonial Secretary, Winston Churchill, that the vast expanses of desert in the Middle East could be controlled by the air, thereby replacing ground troops and maintaining order for a fraction of the cost.[83]

It was thus in the British mandated part of the Middle East that a system of 'air control' based on a series of defended air bases from which aerial forces could be operated was effectively set up. This form of 'control without occupation' was designed for territories which were '(a) administered rather than colonised, (b) markedly underdeveloped, (c) so marginal to British public perceptions that exemplary violence was politically tolerable'.[84] It was justified by Churchill as especially suited to desert lands where 'the speed and range of aircraft makes it practicable to keep a whole country under more or less constant surveillance'.[85] Offering a cheap alternative to military occupation, air control was at once the salvation of the RAF and 'the midwife of modern Iraq'.[86] More than that, however, when more overt colonial rule had been replaced by the League of Nations system of mandates, it 'created a space in the air for empire

[80] Russell Miller, *Boom: The Life of Viscount Trenchard - Father of the Royal Air Force* (Weidenfeld & Nicolson, 2016); Hubert Raymond Allen, *The Legacy of Lord Trenchard* (Cassell, 1972).
[81] David Killingray, '"A Swift Agent of Government": Air Power in British Colonial Africa, 1916–1939' (1984) 25(04) *The Journal of African History* 429, 429; Omissi (n 6) 6.
[82] For a detailed account of the history of air control over Iraq and the survival of the RAF see Omissi (n 6); see also Smith (n 6) 28.
[83] Charles Townshend, 'Civilization and "Frightfulness": Air Control in the Middle East Between the Wars' in Chris Wrigley (ed), *Warfare, Diplomacy, and Politics: Essays in Honour of A.J.P. Taylor* (H. Hamilton, 1986) 142, 142.
[84] Ibid 145.
[85] Ibid 146.
[86] Omissi (n 6) 37.

at a time when imperialism was no longer at home in the world'.[87]

[REDACTED IMAGE]

Publicity poster for the RAF Pageant in Hendon (1922), with the theme of 'an Eastern drama, depicting the attack and destruction of a desert stronghold'[88]

Source: Airminded blog, by Brett Holman

Whether for defending the borders from incursions by foreign fighters, for putting down internal uprisings, supressing rebellions, punishing recalcitrant natives or coercing the payment of taxes, it was in Iraq that the British would extensively exercise – if never perfect – the practice of bombardment as a method of war and of colonial administration.[89] This practice would also provide the opportunity for theorising the value of air power as an independent arm of the military and for political and legal debate on the merits and limits of aerial bombardment. The protagonists of these conversations more often than not were at various moments, if not simultaneously, theorists of air power, military strategists, politicians, international negotiators and colonial administrators. Men like Trenchard, Churchill, John Salmond, Frederick Sykes, Arthur Harris and T. E. Lawrence played crucial roles in proposing, defending, justifying and

[87] Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (n 17) 262.
[88] Brett Holman, 'Ending Hendon — I: 1920-1922', *Airminded* <https://airminded.org/2011/11/09/ending-hendon-i-1920-1922/>.
[89] Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (n 17) 240.

carrying out bombing in the British administrated Middle East. On a more practical level, Iraq served as 'a splendid training ground' for bombing, providing RAF pilots most of their experience under war conditions. In fact, during most of the 1920s, on average two and a half times as many pilots per squadron served in Iraq as in other parts of the British empire.[90] By 1929, the practice of bombing in the Middle East was so established that the Air Staff was at ease to declare that 'the use of air power as an instrument in the control of semi-civilized countries… became a permanent feature of our system of imperial defence'[91] and to propose the extension of 'air control and substitution' to the northwest frontier of India, the Persian Gulf and to British colonies in Africa.[92] It would therefore seem central to any narrative of aerial warfare, as well as of the relation between international law and empire in the twentieth century, that this vastly detailed experience be taken into account.

3.5 The defence of inhumanity, or from 'civilisation' to 'frightfulness'

In practice, air control was never as simple and straightforward as was initially assumed. The idea of using airplanes to surveil and to pacify the natives immediately faced interrelated technical and political challenges. Technically, the distance between the pilot and the target implied that killing and destruction had become more impersonal – as J. F. C. Fuller assessed, 'in the air human-touch is lacking'.[93] Politically, this impersonality hastily slipped into 'indiscriminate' and 'inhuman' so that the RAF had to respond to the criticism that 'air control consisted solely of indiscriminate bombing'.[94] Responses came mostly in the form of two shifting and contradictory arguments. Either it was argued that the indiscriminate character of aerial bombardment was countered by other advantages of air power or that it was rather a more selective weapon.[95]

The first kind of argument can be seen in the air force's rejoinder to the Colonial Office's admission that 'the RAF could not conduct policing operations except by methods that are

[90] Jafna L Cox, 'A Splendid Training Ground: The Importance to the Royal Air Force of Its Role in Iraq, 1919–32' (1985) 13(2) *The Journal of Imperial and Commonwealth History* 157, 175–176.
[91] *'Air Control in Undeveloped Countries', Air Staff Memorandum No. 41, AIR 20/674, The National Archives, Kew*, Memorandum, 1 January 1929.
[92] Hugh Trenchard, *The Fuller Employment of Air Power in Imperial Defence, CP 332 (29), CAB 24/207/23, The National Archives, Kew*, Memorandum, November 1929.
[93] Fuller (n 42) 207.
[94] John Slessor, *The Central Blue* (Cassel and Co., 1956) 63.
[95] Omissi (n 6) 166.

necessarily somewhat indiscriminate'[96] or the War Office's accusation that if punitive measures had to be taken, 'the only means at the disposal of the air force, and the means in fact used now, are the bombing of the women and children in the villages'.[97] Countering these allegations, the RAF could point out that its actions were crude but effective. They did not cause any greater suffering than military punitive columns that shelled villages and were in any case much cheaper and much less prone to suffering any casualties. The Air Ministry reasoned that air control was not exceptional in flouting the distinction between combatants and civilians. 'All war is not only brutal but indiscriminate in its brutality', affirmed the Air Staff, referring to the damage caused by artillery shelling and naval bombardment and remembering 'that at least the lives of the attackers were protected in air operations'.[98] Proving that the RAF could hit without suffering retaliation was nonetheless much easier than demonstrating it could bomb without causing excessive damage and without killing the 'innocent'.[99]

Interservice as well as political rivalry in Britain ensured that the bombing of near-defenceless populations in Iraq, both in warfare and for tax collection purposes, did not go unnoticed. Occasionally, reports from air squadrons would describe their attacks in uncensored fashion: 'the tribesmen and their families were put in confusion, many of whom ran into the lake making a good target for the machine guns'.[100] This kind of blatant admission (often more than the act itself) of the indiscriminate use of aerial attacks prompted outrage from Churchill about the disgrace of firing wilfully on 'women and children taking refuge in a lake' and reinforced criticism of government policy from the opposition. For instance, a Labour MP referred in 1923 to the Air Minister and his department 'as the lineal descendants of the Huns'.[101] Yet in 1924, when the issue of 'heavy casualties caused by air policing' was raised again in Parliament, the first Labour government in British history was forced to admit it had not changed the preceding policy.[102] In a report entitled *Note on the Method of Employment of the Air Arm in Iraq* submitted to Parliament on August 1924, the government claimed that 'bombing is only resorted to in answer to open and armed defiance… after explicit notice [has been] issued that air action will be taken' and that the use of bombing is based 'more on the damage to morale and on the interruption

[96] Ibid.
[97] Charles Townshend, *Britain's Civil Wars: Counterinsurgency in the Twentieth Century* (Faber and Faber, 1986) 97.
[98] Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (n 17) 247.
[99] Townshend (n 83) 147.
[100] Quoted in Cox (n 90) 171.
[101] Ibid 171–173.
[102] Tanaka (n 23) 24–25.

of normal life of the tribes than upon the number of actual casualties'.[103] Practice, however, was far from what the report sustained. Actual procedure was in fact often the reverse of that officially claimed: villages would be bombed and later ordered to surrender.[104]

The focus on morale as a justification for bombing civilians was a common trope in the works of the 'prophets' and was recurrently preached by Trenchard as well as by John Salmond, then Air Officer Commanding in Iraq. Still, the doctrine of the moral effect of bombing was inherently problematic. Like many air power theorists of the interwar period, Trenchard and Salmond assumed that aircraft by their very nature had this effect. Countering the argument that during the First World War soldiers had learnt how to shelter from air attack, Trenchard simply declared he had 'no fear the Arabs will get accustomed to bombing [as] the troops in France did not get accustomed to it – in fact they felt it more and the moral effect increased as the war went on'.[105] Here was the proviso of his doctrine of the moral effect of bombing: for it to have full effect, bombing had to go on and on. In his own words, 'punishment must be severe, continuous, and even prolonged', though he added that 'such severity was not to be misconstrued as "frightfulness"'.[106] At this point, however, it begins to be hard to grasp how the doctrine of the moral effect of bombing can coexist with discrimination and restraint – having to install real fear of air attack, it cannot rely solely on dropping leaflets.[107]

Moreover, while moral effect was originally associated more directly with human casualties, from 1924 onwards it gradually came to signify a policy of indefinite disruption of everyday life. John Salmond described that in practice this meant interfering with ploughing and harvesting, knocking the roofs of huts in winter, bombing fuel piles, attacking livestock, contaminating water supplies with crude oil, and using delayed-action bombs to keep villagers out of their settlements by night.[108] This form of economic warfare which was alleged to bring great pressure to bear upon the people of a village without attacking humans directly became known by the RAF as 'air blockade', and by the 1930s it had become so prominent that it was conflated with the general idea of air control. Ultimately, there was nevertheless little change in the way the British bombed civilians in Iraq. Destroying the subsistence of a village was to condemn its members to slow and painful deaths; it was starving the people into submission.[109] As the RAF's

[103] Ibid 26.
[104] Ibid.
[105] Townshend (n 83) 149–150.
[106] Andrew Boyle, *Trenchard: Man of Vision* (Collins, 1962) 390.
[107] Townshend (n 83) 150.
[108] Ibid 149–151; Omissi (n 6) 156.
[109] Omissi (n 6) 155–156.

efforts to dispel the critique of the inhumanity of its methods grew increasingly Sisyphean, it 'candidly accepted – at least internally – that the key to the moral ascendancy of aircraft would be "frightfulness"', there being no sign of discomfort at the adoption in colonial air control of methods that had led the Germans to be branded as barbarians.[110] Salmond would eventually acknowledge the stigma attached to air power, the 'cruel necessity of killing not only non-combatants but people innocent of any complicity', though he still maintained that air action, because it was sharp and short, was at the end of the day the most merciful method.[111]

The contrasting argument that aerial bombardment was a precise instrument was fraught with practical difficulties, or demonstrably fabulous. The Air Staff's suggestion in 1928 that the air force could destroy certain houses in a village while not damaging the surrounding settlements was far from the reality.[112] In fact, not only was technology not sufficiently developed for such precision, but even to the extent of locating targets airplanes depended on reliable and accurate intelligence on the ground – an aspect just as relevant today as it was in that time.[113] As a result, an indispensable part of the air control scheme was the employment of intelligence personnel called Special Service Officers, who would become familiar with their assigned areas and guide aircraft to hostile villages or encampments.[114] Furthermore, it was not until the 1930s that the air force really began to consider the difficulties of locating and then hitting a target, often even one as large as a city.[115]

Acknowledging that bombing in the Middle East was imprecise and indiscriminate and that 'terror' was an underlying principle of the moral effect of bombing, what is it that made it acceptable? In a sense, why such methods could be used in Iraq without the condemnation they would bring in Europe is partly a result of racist notions of who was a civilian, but also of deeply held convictions and ideas about Arabia as a place that was 'somehow exempt from this worldliness that constrained human activity elsewhere'.[116] The Orientalist constructions that circulated in Britain about Arabia, through characters like T. E. Lawrence – the 'Lawrence of Arabia' – made it into a world of honour and bravery, where the individual was 'free from bourgeois convention', 'violence was entirely personal' and 'life perennial conflict', which

[110] Townshend (n 83) 150–151; 157.
[111] Townshend (n 97) 98.
[112] Omissi (n 6) 166.
[113] Ibid 167.
[114] Cox (n 90) 167; Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (n 17) 255–258.
[115] Buckley (n 6) 78.
[116] Satia, 'The Defense of Inhumanity: Air Control and the British Idea of Arabia' (n 2) 41.

produced 'tragedies, romances, widows and orphans'.[117] Aerial warfare was the seamless complement to 'a place in which indiscriminate violence did not matter', as all news and information emerging from it was fallible and uncertain.[118] In such context, once it was established that nothing could be really known in Arabia, the British colonial administration could caution against limiting the role of the RAF because 'the term *civilian population has a very different meaning in Iraq from what it has in Europe*…the whole of its male population are potential fighters as the tribes are heavily armed'.[119] When it came to reporting the number of casualties from aerial operations, Trenchard was adamant that in Iraq 'combatants and non-combatants and even the sexes could not be distinguished by visual markers' so 'casualties had to be reported in "bulk numbers" without details as to sex or age'.[120]

A different form of justification for indiscriminate bombing was the suggestion that punishing only the guilty was unnecessary, as tribal justice operated on the basis of collective responsibility.[121] This was sometimes taken to the extreme of justifying bombing by emphasizing the savageness of the natives, by suggesting that most victims were cannibals or even, as Trenchard argued in his maiden speech at the House of Lords in 1930, that 'the natives of these tribes love fighting for fighting's sake… they have no objection to being killed'.[122] The perception of Iraqis constructed by the advocates of air power justified overlooking distinction by turning it upside down: it was pointless to distinguish civilians in a land where there were none. As Arnold Wilson, the British civil commissioner in Baghdad, put it, Iraqis 'were used to a state of constant warfare, expected justice without kid gloves, [and] had no patience for sentimental distinctions between combatants and non-combatants'.[123] Similarly, the killing of women in Afghanistan could be justified by the conviction that women were of little value for Afghans as they were considered 'a piece of property somewhere between a rifle and a cow'.[124] Lawrence would add, referring to Iraqi women and children, that the sheiks did not seem to resent their killing by bombs, as they were 'negligible' casualties compared to those of 'the really

[117] Ibid 37; the story of 'Lawrence of Arabia' usually stops before his mysterious second career in the 1920s, when he joined the RAF and later the Royal Tank Corps under the pseudonyms 'Aircraftman Ross' and 'Private Shaw'. Like the Italian Futurists, Lawrence saw airplane pilots as heroes and pioneers of a new age, see Gat (n 33) 594.
[118] Satia, 'The Defense of Inhumanity: Air Control and the British Idea of Arabia' (n 2) 33–34.
[119] Ibid 38.
[120] Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (n 17) 33–34.
[121] Omissi (n 6) 167.
[122] Ibid 170.
[123] Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (n 17) 248.
[124] Lindqvist (n 43) 45.

important men'.[125] At the end of the day, despite the British taste for ethnographic distinctions, the idea of Arabia itself as a vast expanse of flat desert betrayed the extent to which officials had become used to referring to the objects of air control generally as 'Arabs' or 'semicivilised tribes'.[126]

In the long run, notwithstanding its cruelty, the ideas disseminated about Arabia and its people and the arguments put forward by air power theorists and military strategists alike ensured that the British experiment of bombing civilians in the Middle East would last the entire interwar period. It would open the door to broader uses of aerial bombardment, though for that time, a quarter of a century after the first aerial bombing, 'it was still Africans, Arabs or Chinese who were bombed, while we Europeans could still look up at the airplanes in the sky with certain knowledge that nothing bad would happen to us'.[127] Yet as early as in 1921, aware of the criticisms it would eventually face, the Air Staff concluded that

> it may be thought better, in view of the allegations of 'barbarity' of air attacks, to preserve appearances by formulating milder rules and by still nominally confining bombardment to targets which are strictly military in character… to avoid emphasizing the truth that air warfare has made such restrictions obsolete and impossible. It may be some time until another war occurs and meanwhile the public may become educated as to the meaning of air power.[128]

The bombing of civilians in so-called 'small wars' and in the employment of air control throughout the 1920s presaged the large-scale bombing of cities that would take place in the 1930s and eventually the colossal strategic bombing campaigns of the Second World War. The Italians would take bombing non-Europeans to new proportions in the Italian-Ethiopian war of 1935-36, conducting intensive aerial bombardment and using poison gas to kill and terrorise the local population.[129] Bruno Mussolini, son of Benito and a pilot during the war, boasted repugnantly of Italy's accomplishments in newspapers articles describing bombed Ethiopians 'bursting open like a rose' which he thought was 'most amusing'.[130] Likewise, the Japanese would throughout the 1930s exploit the bombing of Chinese cities in their imperial expansion, as in the notorious bombing of Shanghai in 1932. Eventually, bombing civilians would return to Europe during the Spanish Civil War, when Hitler had the opportunity to bomb one Spanish

[125] Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (n 17) 249.
[126] Ibid 392.
[127] Lindqvist (n 43) 45.
[128] As quoted in Townshend (n 83) 159.
[129] See the famous Appeal to the League of Nations by Haile Selassie in June 1936. See also Tanaka (n 23) 29; Lindqvist (n 43) 33; Buckley (n 6) 105.
[130] George Orwell, 'As I Please', *Tribune* (14 July 1944).

city after another – Guernica in 1937 having become the most renowned instance.[131]

Undeniably, these later events all played a part in the story of how bombing civilians became a part of this world. Yet it is striking how colonial bombing and air control preceded later terrors and paved the way for totalitarian ideas of war that enclosed the imagination of air power theorists, politicians and international lawyers of that period. As Sven Lindqvist has argued, 'two events need not be identical for one of them to facilitate the other'.[132] Keeping this in mind, it is striking that Ludendorff's famous book *Der Totale Krieg* (1935) was inspired by colonial warfare;[133] that Douhet and his ideas about bombing the people, grounded in a comparable notion of *guerra integrale*, began to sprout from his appreciation of Italy's inaugural aerial bombardments in Libya; that Arthur 'Bomber' Harris, who as head of the British Bomber Command in the Second World War would play a leading role in the incineration of German cities,[134] was both influenced by Douhet[135] and 'later traced his faith in the heavy bomber as the only salvation against Germany to his experience in the Middle East';[136] and that like others, Trenchard, Salmond and Churchill were all involved both in the development of air power and in bombing civilians in the Middle East.

3.6 International Law and Colonial Bombing in the Interwar Period

What did international law and international lawyers of the interwar period have to say about aerial warfare and the idea of distinction between combatants and non-combatants? How did the practice of colonial bombing and the moral and political debates about legitimate targets or targetable persons influence international law? In asking those questions, I am subscribing to a

131 Interestingly, while Guernica has become widely known for the 1937 bombing, the foundation of such an event can be traced back to 1925 and the Moroccan town of Chechaouen. At Chechaouen, American volunteers flying with the French Flying corps bombed the city when every male inhabitant was known to be absent, thus breaking the taboo against using foreign air forces to bomb one's own territory. See Lindqvist (n 43) 65–66.
132 Sven Lindqvist, *Exterminate All the Brutes*, tr Joan Tate (The New Press, 1996) x.
133 Lindqvist (n 43) 68; Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (n 17) 393.
134 See Chapter 4 of this thesis. See also Jörg Friedrich, *The Fire: The Bombing of Germany 1940-1945*, tr Allison Brown (Columbia University Press, 2006) 70.
135 Robert Saundby, *Air Bombardment: The Story of Its Development* (Harper & Brothers, 1961) 34–35.
136 In March 1924, when Arthur Harris was the Officer Commanding of a Squadron in Iraq, he (in)famously reported an operation by his unit by remarking that 'where the Arab and the Kurd had just begun to realise that if they could stand a little noise, they could stand bombing, and still argue; they now know what real bombing means, in casualties and damage; they now know that within 45 minutes a full sized village can be practically wiped out and a third of its inhabitants killed or injured by four or five machines which offer them no real target, no opportunity for glory as warriors, no effective means of escape', quoted in Omissi (n 6) 154.

project of historicising the idea of distinction and the concept of the civilian, a task that has been skilfully pursued by Amanda Alexander. Her account of the interwar period highlights cultural narratives about warfare and disciplinary conventions of the international legal profession that considered the bombing of civilians as a legitimate and perhaps even a good way of waging war.[137] While the interwar period could generally be seen as a time of renewed enthusiasm and of revitalisation for international law, this optimism certainly did not extend to the protection of civilians.[138]

The main attempt of the period to regulate aerial warfare – the 1923 Hague Rules of Aerial Warfare –[139] marked a shift from The Hague Regulations' distinction between defended and undefended places to the concepts of military objectives and the emerging notion of a civilian population. The notion of a vulnerable civilian population, historically protected by law and by 'the conscience of mankind'[140] was inscribed in article 22, which prohibited aerial bombardment 'for the purpose of terrorising the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants'.[141] Article 24 turned out to be the crucial provision in the Rules, stating that aerial bombardment is only legitimate when directed at a military objective and defining such objective as 'an object of which the destruction or injury would constitute a distinct military advantage'.[142] Some commentators thought the prohibitions were too drastic and that the class of military objectives should be broadened.[143] Others later concluded that the enumeration of military objectives failed to restrict bombardment in any meaningful way as almost anything, and everything that is useful to warfare, could be included in the definition.[144]

While consolidating the distinction between military objectives and the civilian population, it can be said that the Rules afforded little protection to the latter. Rather, the 1923 Hague Rules demanded that civilians make themselves and their dwellings visible from above in order to be

137 Alexander, 'The "Good War": Preparations for a War against Civilians' (n 3) 25.
138 Ibid 14.
139 The Hague draft rules were never adopted or ratified by any of the six states who sent jurists and military advisors to the Commission which met in The Hague between December 1922 and February 1923. See 'General Report of the Commission of Jurists at the Hague' (1923) 17(4) *AJIL Supplement: Official Documents* 242.
140 Article 24(2) of the 1923 Hague Rules, Ibid.
141 Ibid 250.
142 Ibid.
143 Paul Whitcomb Williams, 'Legitimate Targets in Aerial Bombardment' (1929) 23(3) *The American Journal of International Law* 570, 579.
144 Commenting on the Hague Rules and referring to them to analyse bombing during the Spanish Civil War, Le Goff claimed '*pas de notion plus ample, plus extensible que celle d'objectif militaire*', see M Le Goff, 'Les Bombardements Aériens Dans La Guerre Civile Espagnole' (1938) 45 *Revue Générale de Droit International Public* 581, 586.

protected. They inaugurated a familiar mode of argument that allocates responsibility to civilians – in particular to those running hospitals or other services in war zones – for not distinguishing themselves from military objectives.[145] In other words, the 1923 Rules introduced 'built-in victim blaming' into international legal discourse on air strikes.[146]

The paradoxical characteristics of the civilian as a military aid and a protected victim were made clear, in the European context, by the acceptance that arms factories and munitions workers were legitimate military targets.[147] As James Molony Spaight, one of the most prolific writers on aerial warfare of the period,[148] would later question, the protection of civilians was the object of numerous proposals after the war, but 'no one stopped to ask who the "civilians" were about whom so much concern was shown'.[149] Spaight's point was that aerial warfare had made it possible to strike not only at the *users* of armaments but at the *makers* as well. The new reality meant that civilians had 'now to be split up, differentiated, categorised'.[150] Spaight himself reasserted the value of the distinction between combatants and non-combatants: 'try to break down that great rule, and you cut at the root of all civilised war'.[151] Nonetheless, he held that it was fully in accord with this principle to recognise that workers in arms and munitions factories were not immune from attack; such workers 'must be assimilated to the combatant class'.[152]

Even if most international lawyers of the period tried to hold on at least in theory to the idea of distinction and the immunity of non-combatants, in practice they mostly believed there was little to actually protect civilians.[153] Scepticism and pessimism with regards to the law were

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145 See, for instance, the recent case of the US bombing of a hospital operated by Médecins Sans Frontières in Kunduz, Afghanistan, in 2015, where US commentators claimed the hospital was not marked with the Red Cross sign and that the US was not certain of its location, see Derek Gregory, 'Fighting over Kunduz', *geographical imaginations* (17 November 2016) <https://geographicalimaginations.com/2016/11/17/fighting-over-kunduz/>.
146 Christiane Wilke, 'How International Law Learned to Love the Bomb: Civilians and the Regulation of Aerial Warfare in the 1920s' (2018) 44(1) *Australian Feminist Law Journal* 29, 47.
147 Alexander, 'The Genesis of the Civilian' (n 15) 375.
148 Spaight was the most prolific British writer on the topic of air power and international law during first decades of the twentieth century. From before the First World War to the Second World War he wrote over a dozen books on aerial warfare and numerous articles in legal journals. Between 1918 and 1937 he worked at the British Air Ministry, reaching the position of Principal Secretary to the Air Ministry. See JM Spaight, 'Air Bombardment' (1923) 4 *British Yearbook of International Law* 21; JM Spaight, *Air Power and War Rights* (Longmans, Green and Co., Second Edition, 1933); JM Spaight, 'The Chaotic State of the International Law Governing Bombardment' (1938) 9(1) *Royal Air Force Quarterly* 25; JM Spaight, *Air Power and War Rights* (Longmans, Green and Co., Third Edition, 1947); JM Spaight, *Air Power and War Rights* (Longmans, Green and Co., 1924); JM Spaight, 'The Doctrine of Air-Force Necessity' (1925) 6 *Brit. YB Int'l L.* 1.
149 Spaight, *Air Power and War Rights* (n 148) 43.
150 Ibid 44.
151 Ibid.
152 JM Spaight, 'Non-Combatants and Air Attack' (1938) 9 *Air Law Review* 372, 375.
153 Alexander, 'The "Good War": Preparations for a War against Civilians' (n 3) 18.

recurrent: 'we cannot put too much trust on rules'[154] argued Colby, while Spaight concurred, sustaining that 'in air warfare… the heart and conscience of the combatants are the guarantee of fair fighting, not any rule formulated in a treaty or in a manual'.[155] If much of this scepticism can be attributed to cultural narratives about the First World War,[156] this is only part of the story of how international law came to regulate aerial bombardment. In fact, it overlooks how in the same period and through other means and institutions, such as the League of Nations, bombing civilians came to be normalised and legitimated by international law. If the concept of the civilian was thus paradoxical in its depiction of a population that was simultaneously exposed, in need of protection, and a desired target whilst contributing to the war effort, as in the paradigmatic case of munitions workers, a look at colonial bombing illustrates how the concept was convoluted in other tortuous ways. It highlights the limits of the concept of the civilian, its racialised history, its dependence on cultural representations of different places and peoples and the continuing quandaries of its application to civil wars and internal conflict.

Yet when examining what international lawyers had to say about colonial bombing in the interwar period we are immediately faced with the fact that the topic was mostly dismissed as a side note by international lawyers grappling with the regulation of aerial warfare. This state of affairs can be explained by how colonialism shaped the geography of international law, so that colonial bombing was often seen as a matter of policing rather than armed conflict.[157] A clear example is given by Nathaniel Berman's study of a major of event of that period: the 1925-26 War of the Riff between France and Moroccan rebels.[158] Berman notes that no major French, American or British international law journal published any article about that war.[159] When consulted by the French Human Rights League at the time, the renowned French international lawyer Georges Scelle argued that the League of Nations had no competence in the Moroccan affair and that 'legally, one cannot even say there is a war – an international war, of course, because there is a war in the larger sense of the term'.[160]

The same silence in international law journals of the period can be found regarding most other instances of colonial bombing. Barely ever did the topic emerge in legal doctrine as the legal

[154] Elbridge Colby, 'Aerial Law and War Targets' (1925) 19(4) *The American Journal of International Law* 702, 715.
[155] Spaight, 'Air Bombardment' (n 148) 32.
[156] Alexander, 'The "Good War": Preparations for a War against Civilians' (n 3) 24.
[157] Mégret (n 10) 271.
[158] Nathaniel Berman, '"The Appeals of the Orient": Colonized Desire and the War of the Riff' in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press, 2004) 195, 195.
[159] Ibid 202.
[160] 'Rapport de M.m Georges Scelle', 25 Les Cahiers des droits de l'homme (1925) 496, in: Ibid.

literature on aerial warfare of the 1920s and 1930s was almost exclusively concerned with the legacies of the Great War and contemporary and future European wars.[161] Take, for instance, the discernible interest of international lawyers of the period in the Spanish Civil War.[162] There is however one palpable exception, which rather proves the rule: the bombing of Damascus by the French, during the Great Syrian Revolt. This event was the object of discussion in the *American Journal of International Law*[163] and in the Permanent Mandates Commission (PMC) of the League of Nations.[164] It offers us an insight into how colonial bombing was treated by international lawyers of the period and how the idea of distinction and the concept of civilians applied to a mandated territory.

3.7 Bombing Damascus

The bombing of Damascus was part of a wider conflict that became known as the Great Syrian Revolt of 1925-26. France had occupied Syria and Lebanon in the early 1920s under the aegis of the League of Nations Mandates system. Article 22 of the League Covenant famously proclaimed that colonies and territories 'which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world' would be placed under the tutelage of advanced nations whom, acting as Mandatories on behalf of the League, would apply 'the principle that the well-being and development of such peoples form a sacred trust of civilisation'. A permanent commission was set up to oversee the administration of those territories, though little was said or known about what powers it would have besides reviewing annual reports by the Mandatory powers.

The 1920s were marked by a number of rebellions against Mandatory powers. The argument that international oversight would make imperial rule less violent and that it would eventually

[161] I can only refer here to literature in English as I have not yet been able to explore in depth literature related to international law in other languages.
[162] James W Garner, 'Questions of International Law in the Spanish Civil War' (1937) 31(1) *The American Journal of International Law* 66; HA Smith, 'Some Problems of the Spanish Civil War' (1937) 18 *Brit. YB Int'l L.* 17; Norman J Padelford, 'International Law and the Spanish Civil War' (1937) 31(2) *American Journal of International Law* 226; Alfred de Zayas, Oxford University Press, *Max Planck Encyclopedia of Public International Law* (at 2013) 'Spanish Civil War (1936-39)'.
[163] It is noteworthy that this discussion appeared in the American Journal of International Law and not in the main French international law of the period, the Revue Générale de Droit International Public, see Quincy Wright, 'The Bombardment of Damascus' (1926) 20(2) *American Journal of International Law* 263; Elbridge Colby, 'How to Fight Savage Tribes' (1927) 21 *American Journal of International Law* 279.
[164] For a thoroughly researched account of the debates in the Permanent Mandates Commission see Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press, 2015) Chapter Five.

lead mandated peoples into self-rule soon proved unfounded. Across the board, mandated territories were treated like colonies and in some instances governed even more oppressively.[165] As Susan Pederesen argues, international oversight did little to change ruling practices on the ground or to improve the condition of the colonised. Rather, it forced mandatory powers 'to *say* they were governing them differently' – while administration remained in the hand of imperial powers, legitimation moved to Geneva and to international institutions.[166] The legitimacy of the use of violence and military force to suppress rebellions was a topic that came up early in the work of the Permanent Mandates Commission (PMC), and it is where the use of concepts originating in the laws of war proved useful.

Despite its justification as a temporary and developmental arrangement, the French occupation of Syria bore the marks of colonial paternalism and economic extraction which by 1925 had led to widespread disillusionment and resentment.[167] The division of the country into separate statelets[168] and the increasing militarisation of the mandate government combined with more immediate causes leading to a full-blown revolt. In the Jabal Druze, the local governor set out to transform the region through a program of road construction and land reform which made extensive use of forced labour. As disgruntlement grew and French repression followed, local leader Sultan Al-Atrash led a Druze revolt that over the course of three months became a national rising.[169]

The French responded violently, using airplanes to bomb villages accused of harbouring or assisting the rebels and employing colonial troops to 'pacify' the country. The city of Hama was the object of prolonged aerial bombardment, which eventually cost several hundred lives and forced the insurgents to withdraw. When the revolt reached Damascus, the French burned numerous villages around the city accused of sheltering insurgents and paraded the dead bodies

165 Ibid 4.
166 Ibid 4–5.
167 On the Great Syrian Revolt see Philip S Khoury, *Syria and the French Mandate: The Politics of Arab Nationalism, 1920-1945* (Princeton University Press, 1987); Michael Provence, *The Great Syrian Revolt and the Rise of Arab Nationalism* (University of Texas Press, 2005); Daniel Neep, *Occupying Syria under the French Mandate: Insurgency, Space and State Formation* (Cambridge University Press, 2012); Stephen Hemsley Longrigg, *Syria and Lebanon under French Mandate* (Octagon Books, 1972).
168 On how contemporary borders in Syria and the Middle East in general are still seen as 'artificial' or problematic because they produced multicultural states where supposedly different sects and ethnicities held particularist loyalties, see Asli Bâli, 'Sykes-Picot and "Artificial" States' (2016) 110 *AJIL Unbound* 115; see also Toby Dodge, 'The Danger of Analogical Myths: Explaining the Power and Consequences of the Sykes-Picot Dellusion' (2016) 110 *AJIL Unbound* 132.
169 Jan Karl Tanenbaum, *General Maurice Sarrail, 1856-1929; the French Army and Left-Wing Politics* (University of North Carolina Press, 1974) 185–214; Pedersen (n 164) 144–145.

of two dozen of them through the streets of the city, leaving them exposed in a public square.[170] On October 17, 1925, revolted crowds assisted by insurgents attacked French troops in Damascus. The next day the French sent tanks into the city and began evacuating all troops before starting a vast bombardment. Between October 18-21, 1925, Damascus was under heavy fire from airplanes and tanks. Whole neighbourhoods were destroyed and hundreds of its inhabitants were killed.[171]

Rubble in Damascus (22 October 1925)
Source: League of Nations archive/Wikimedia Commons[172]

As eyewitness accounts of the bombing of Damascus started to emerge, the revolt in Syria and its suppression gained increasing press attention and diplomatic censure. Reports of villages burned to the ground, the parading of rebel corpses and the bombing of a large city – including the destruction of historic and cultural icons such as the Azm Palace – turned public opinion

[170] 'Damascus Riots', *The Times* (London, England, 27 October 1925) 15; Wright (n 163) 264.
[171] The number of dead as a result of the bombardment varies a lot according to different sources. Quincy Wright claimed between 500-1,000 deaths, while mentioning that General Sarrail reported 137 killed and Arabs of Damascus counted more than 5,000 dead, see Wright (n 163) 264; French representatives at the PMC extraordinary session to discuss the bombardment held that 150-200 people were killed, see Permanent Mandates Commission, *Minutes of the Eighth Session (Extraordinary) Including the Report of the Commission to the Council* (No C 174 M 65 1926 VI, League of Nations, March 1926) 152–153.
[172] Luís Paulo Bogliolo, 'Damascus, 1925: The Bombing of the City, Humanitarian Relief and Petitioning for Syrian Independence to the League of Nations' [2017] *Online Atlas on the History of Humanitarianism and Human Rights* <http://nbn-resolving.org/urn:nbn:de:0159-2018012328>.

against the French. Setting the tone for debates that were to follow, the *Times* highlighted the resentment generated by the fact that 'an open town like Damascus, including areas which are officially known as European, should have been bombarded… without the slightest warning'[173] and in an indiscriminate manner.[174] As Susan Pedersen argues in her work on the mandates system, 'no other controversy so rocked the system's very foundations' as the bombing of Damascus.[175] The reason it did so is the challenge it posed to the 'framework of civilizational uplift and tutelage that underpinned mandatory rule'.[176]

In other words, whilst the Syrian revolt was initially seen as another small-scale colonial campaign or another instance of 'certain disagreeable Oriental problems which have a habit of recurring through centuries with a regularity',[177] the bombing of Damascus led some to view the conflict rather as a war of national liberation against an occupying power: 'the wanton destruction of an ancient and beautiful city and the subjection of its civilian inhabitants to terror and fire – that really turned civilizational assumptions on their heads'.[178] Mandatory rule and humanitarian relief could no longer rely on easy assumptions about civilisational hierarchies, barbaric rebels and Arab fanatics when even some within the West, including journalists and professors, began to see the revolt as a war of national liberation against an occupying power.

The Permanent Mandates Commission of the League of Nations was inundated with telegrams and petitions from all over the world, a great share of which came from the Syrian diaspora. From Rio de Janeiro to Berlin, Detroit to Lahore, appeals for humanitarian relief were replaced by telegrams calling for Syrian liberation and the intervention of the League. They condemned French atrocities and the betrayal of the civilising mission, denouncing the unnecessary bombing of an ancient and open city and the killing of thousands of children and women.[179] The bombing turned a campaign for independence mostly pursued by the Syrian-Palestinian Congress in Geneva into a global mobilisation. The Mandates Commission became a major centre for cataloguing, documenting and forwarding petitions to mandatory powers. Its archives contain a vast array of telegrams and appeals related to the bombing of Damascus.[180] The widespread attention brought by the bombing of Damascus eventually led to the call for an

[173] 'Damascus Riots' (n 170).
[174] 'The Damascus Troubles', *The Times* (London, England, 27 October 1925) 15.
[175] Pedersen (n 164) 147.
[176] Ibid.
[177] 'The Druse Rebellion', *The Times* (London, England, 10 August 1925) 11.
[178] Pedersen (n 164) 147–148.
[179] Bogliolo (n 172).
[180] 'League of Nations Archive R21-R24, Geneva'.

extraordinary session of the Mandates Commission, which was held in Rome between February and March 1926.

Whether the bombing of Damascus was seen as an act of 'pacification' instead of an actual armed conflict was one of the issues at stake at the extraordinary session of the PMC. It was also central to the disagreement chronicled in the *American Journal of International Law* between Quincy Wright, a professor of international law from the University of Chicago who happened to have visited Damascus after the French bombardment, and Captain Elbridge Colby, a US army lawyer and an early apologist for aerial warfare. On both those occasions, it is interesting to note that the idea of distinction and of how the population of the city and the Syrian rebels were qualified was crucial to determining whether or not the bombing was considered legitimate and whether the laws of war were applied.

Examining whether or not the laws of war were applicable to the bombing, Wright noted that the Arabs looked at the situation as one of warfare and argued it was forbidden to bomb an undefended town. The French, on the other hand, referred to acts of brigandage or banditry which were outside the purview of international law.[181] Affirming that the laws of war made no distinction with regard to race or civilisation, Wright acknowledged there was an insurgency in Syria and that the burning of villages and the bombing of Damascus was in excess of any conceivable policing requirements.[182] Curiously, he ignored the gradual shift to the concepts of military objectives and civilian population established in the 1923 Hague Rules and applied the past distinction of The Hague Conventions between defended and undefended places to the bombing of Damascus, concluding that Damascus could only be said to be defended by the presence of the French troops themselves. Wright notes, however, that 'no effort was made to spare private residences; in fact, they were the very objects of attack, and several mosques were struck', ultimately meaning that 'a policy of terrorism seems to have been adopted'.[183] By mostly eschewing the issue of distinction and underlining that French authorities failed to give any warning to foreign consuls – to other Europeans, who 'seem to owe their lives to the Moslem Arab notables of the city' –[184] he established that France had violated international law by bombarding Damascus.[185] Yet Wright was swimming against the rising tide of legalising

[181] Wright (n 163) 265.
[182] Wright refers to Lorimer's division of humanity into 'civilized humanity, barbarous humanity and savage humanity', but concludes that Syria would come better under the head of 'non-age' or immaturity, which warranted a right not of recognition but of guardianship, see ibid 270.
[183] Ibid 273.
[184] 'The Damascus Troubles' (n 174).
[185] Wright (n 163) 273; 275.

bombing in the colonies and mandated territories.

In a scathing reply to Wright's article, Captain Elbridge Colby took as his central theme the idea of distinction and articulated one of the last systematic enunciations of the exclusion of 'uncivilised peoples' from international law.[186] Colby assumed that 'among savages, war includes everyone… there is no distinction between combatants and non-combatants'.[187] His argument was rather crude: because 'savage' or 'semisavage' people waged war as complete tribes – not distinguishing themselves in fact – there could be no distinction made in law. The methods used against those tribes had to be, as Fuller defended, 'more brutal'.[188] In exemplifying the methods to be used in this 'different kind of war', Colby was quick to mention British aerial attacks in Afghanistan and US Army doctrine on aerial operations against irregular enemies.[189] As an enthusiast of air power, Colby saw aerial bombardment as the ultimate weapon against 'savages', claiming that 'if a few "non-combatants" – if there be any such in native folk of this character – are killed, the loss of life is probably far less than might have been sustained in prolonged operations of a more polite character'.[190] Unlike Wright, who avoided the issue of who is a combatant and who is a civilian from the outset, questioning instead whether Damascus was an undefended city, Colby takes an essentialised difference between Europeans and 'savages' as his starting point:

> To a Frenchman, a shell striking Rheims Cathedral… is a lawless act of the enemy which infuriates the temperamental soul and arouses wrath and gives a fine incident for overseas propaganda. To a fanatical savage, a bomb dropped out of the sky on the sacred temple of his omnipotent God is a sign and a symbol that that God has withdrawn his favour. A shell smashing into a putative inaccessible village stronghold is an indication of the relentless energy and superior skill of the well-equipped civilized foe. Instead of merely rousing his wrath, these acts are much more likely to make him raise his hands and surrender.[191]

In the end, his notion of who is a civilian and who is not one leads him to the disturbing conclusion that the 'inhuman act thus becomes actually humane, for it shortens the conflict and prevents more excessive quantities of blood'.[192] This conclusion is not surprising, however, if we take into account the theories of air power that were in vogue at the time. Bombing 'savages'

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[186] Colby (n 163); Mégret (n 10) 290.
[187] Colby (n 163) 281.
[188] Ibid 283.
[189] Colby cites the United States Army Training Regulations No. 17-70: 'The effect of bombing… is generally very great upon the morale of an irregular enemy. The objective of irregular operations… may be the capital of the people, their main source of supply, their prominent leaders, or, if a fanatical people, the seat of their religion', see: Ibid.
[190] Ibid 287.
[191] Ibid.
[192] Ibid.

and air power theory went hand in hand, and Colby is perhaps one of the clearest examples of this union.

As already noted, the bombing of Damascus was also discussed at length at the Permanent Mandates Commission of the League of Nations on its eighth session in 1926. As a mandated territory under French tutelage, the League of Nations exercised its powers to supervise, advise and ensure the fulfilment of the mandate.[193] By the time the PMC debated the bombing, the occasion turned out to be one in which France enlisted the Commission's authority in exchange for complying with its the rules on reporting, responding to petitions and upholding, at least rhetorically, the Mandate system's goals.[194] If the PMC was initially disgruntled with the lack of detail and evidence in the French reports on Syria, by the time it penned its conclusions on the affair, the French representative, Robert de Caix, could be sure that the French would be taken for their word, while reports from Syrian nationalists would be taken as misrepresentations.[195] Whilst questioned about the repressive measures taken by the French during the Syrian revolt, Caix was reassured that 'the Commission had never desired to create embarrassment for the mandatory power or to dictate a line of conduct'.[196] Accordingly, when interrogated about the use of airplanes for bombing villages accused of harbouring rebels, Caix noted that 'the repressive measures taken by aeroplanes were not exceptional; such measures were frequently taken in similar cases – for example, in Iraq'; furthermore, he insisted it 'was not a particularly barbarous method of repression, as the people could almost always hear the aeroplanes coming and had time to take shelter; further, the bomb-throwing was extremely inaccurate'.[197]

Inaccuracy was thus taken as a justification for the proportionality of bombing as a repressive method. As Becker Lorca notes, 'an incipient test of proportionality and reasonableness was adopted by the PMC in order to assess the mandatory power's responsibility in relation to measures of suppression'.[198] In a period when the nature of the laws of war and their application to mandated or colonised peoples was contested – as we see in Wright and Colby – it is noteworthy that despite the PMC acknowledging the French bombings as a measure of law and order, Caix had no qualms in referring to the events as war operations.[199] He added that 'a war

[193] Quincy Wright, *Mandates under the League of Nations* (The University of Chicago Press, 1930) 190–218.
[194] Pedersen (n 164) 152.
[195] Ibid 165.
[196] Permanent Mandates Commission, 'Minutes of the Eighth Session (Extraordinary) Including the Report of the Commission to the Council' (n 171) 138.
[197] Ibid 148.
[198] Becker Lorca (n 69) 302.
[199] Ibid 300–301; Permanent Mandates Commission, 'Minutes of the Eighth Session (Extraordinary) Including the Report of the Commission to the Council' (n 171) 151.

in which the operations were being conducted against people who were not in uniform might involve very unfortunate consequences'.[200] When it was suggested that Caix himself could not in his own heart approve the measures he was bound to justify – specifically the bombardment of villages – he retorted that the assumption was wrong:

> *In these countries things were much less simple*… a village which did not refuse hospitality was in many cases a village which willingly accorded it… it was a delicate matter to criticise the attitude of military authorities who were obliged to suppress an insurrection in which men belonging to band and the peasants were so difficult to distinguish, all the more so as they might pass from one category to the other as opportunity offered.[201]

At the tenth session of the PMC, its conclusions on the matter read: 'there is no reason to affirm that the suppression of the revolt was carried out in an abnormal manner or was accompanied by reprehensible excesses'; the victims of the events, 'if there have been innocent victims', were unfortunate occurrences 'in the course of forcible measures of this kind'.[202] In this sense, aerial bombardment of civilians in the mandated territories was being progressively normalised. The idea of distinction was not, as some would suggest, disregarded or ignored in that process. The commissioners of the PMC referred repetitively to the fact that women and children or non-combatants were killed,[203] but at the end of the day they merely stated their regrets and reminded that measures such as 'air bombardment, burning, destruction of villages and collective fines' should only be taken in cases of absolute necessity and under the supervision of French officers.[204]

Until then, international law had repeatedly failed to restrict aerial bombing. The Hague Conferences of 1899 and 1907, the Washington Disarmament Conference of 1921-22 and its offshoot Jurists Commission at The Hague in 1923, all failed to meaningfully condemn or proscribe bombing. If the classic form of making international law had not succeeded, perhaps aerial warfare could be restricted through the incipient norm-making powers of international organisations. But here we notice that while international bodies such as the Permanent Mandates Commission and the International Labour Organisation were undoubtedly

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[200] Permanent Mandates Commission, 'Minutes of the Eighth Session (Extraordinary) Including the Report of the Commission to the Council' (n 171) 151.
[201] Ibid 152–153.
[202] Permanent Mandates Commission, *Minutes of the Tenth Session* (No C 632 M 248 1926 VI, League of Nations, December 1926) 186.
[203] Permanent Mandates Commission, *Minutes of the Third Session* (No A 19 1923 VI, League of Nations, August 1923) 123; Permanent Mandates Commission, 'Minutes of the Eighth Session (Extraordinary) Including the Report of the Commission to the Council' (n 171) 148.
[204] Permanent Mandates Commission, 'Minutes of the Tenth Session' (n 202) 190. The reason a French officer should supervise these measures was due to the fear that excesses would be more likely to be committed by foreign troops employed by the French in Syria.

extraordinary innovations in international law, where previously bilateral relationships between coloniser and colonised were triangulated, adding an international forum where new participants could have a voice and where some limited confrontation took place,[205] these liberal international institutions were only some of the new actors, from national liberation movements to the Communist International, that scrutinised colonial domination.[206] Significantly, although nominally aiming for decolonisation and furthering the cause of international justice, these international institutions paved the way to neo-colonialism, in what Anghie rightly describes as a tragedy for the Third World.[207] When it came to restricting bombing, international oversight instead of condemning aerial warfare and air policing, sanctioned the practice.[208] In doing so, not only was the development of aerial bombing linked to a racist representation of the world, where peace to white people meant bombs to the colonised, it was also an integral part of the establishment of new economic structures that reproduced colonial relations in new forms – bombing having become a substitute for occupation, and occupation no longer an end to war.[209]

3.8 Conclusion

Contrary then to what may be thought in this context, international law certainly had a role in instances of colonial bombing, if only through the intervention of international organisations. Iraq, Syria and other mandated territories were not beyond the reach of the laws of war and international law did not ignore, but rather legitimated colonial bombing. How could the idea of distinction be reconciled with the normalisation of bombing undefended villages? Part of the answer lies in the ideas disseminated by air power theorists and in the practice of bombing in the colonies and mandated territories. Military thought and strategy of the interwar period supported a notion of the moral effect of bombing that portrayed it as a more effective and 'cleaner' form of war when compared to the bloodbath of trench warfare. Reliance on the doctrine of the moral effect of bombing was also crucial in justifying the use of air power in

[205] James P Daughton, 'Behind the Imperial Curtain: International Humanitarian Efforts and the Critique of French Colonialism in the Interwar Years' (2011) 34(3) *French Historical Studies* 503; Simon Jackson, 'Transformative Relief: Imperial Humanitarianism and Mandatory Development in Syria-Lebanon, 1915–1925' (2017) 8(2) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 247.
[206] See, for instance, Stephen White, 'Colonial Revolution and the Communist International, 1919-1924' [1976] *Science & Society* 173.
[207] Anghie (n 69) 192.
[208] Pedersen (n 164) 166.
[209] Thomas Hippler, *Governing From the Skies: A Global History of Aerial Bombing*, tr David Fernbach (Verso, 2017) 62; on the relevance of air power as police power, framing it in a war of accumulation, see Neocleous, *War Power, Police Power* (n 12).

policing empire, a point closely associated to Trenchard and the early days of the RAF. In the practice of bombing mandated territories and the colonies, ideas about the moral effect of bombing combined with narratives about places ('Arabia') and peoples ('savage tribes') in such a way that the concept of the civilian was interpreted in a distinct manner from the discussions predominant in Europe about whether munition workers deserved immunity or not. When faced with the scandal of the bombing of Damascus by the French in 1925, the Permanent Mandates Commission of the League of Nations summoned concepts from the laws of war and deployed them as standards which justified the repression of rebellions and of anticolonial wars. In doing so, it reinforced the gendered and racist stereotypes which informed the application of the principle of distinction in a colonial setting.

If today's idea of a good war is one that prioritises the protection of civilians, one may look at our contemporary approach to international law as radically different than that of the interwar period.[210] Nevertheless, a focus on how the idea of distinction was used in that period in relation to colonial bombing yields a different image, one which emphasises the continuities with earlier uses of air power and the similarities between today's and past debates on whether bombing the peripheries of empires amounted to war measures and were regulated by the laws of war.[211] It highlights, for instance, why it is that we still avoid or disagree on counting civilian deaths in certain places, even if the idea of protecting civilians has acquired such a central place in international law.

While fetishizing technological development may lead us to never-ending debates about precision, an inquiry into the history of ideas such as distinction and the concept of the civilian sheds light into how narratives about war make certain actions and methods more or less acceptable. It allows us to see a connection between the United States' recent count of 'non-combatant deaths in counterterrorism strikes' between 2009 and 2015[212] and Trenchard's insistence in the 1920s that casualties in Iraq had to be reported in bulk numbers.[213] In the West's representations of the Middle East, where 'life in the desert is a continuous guerrilla

[210] Alexander, 'The "Good War": Preparations for a War against Civilians' (n 3) 3.
[211] Priya Satia, 'Drones: A History from the British Middle East' (2014) 5(1) *Humanity* 1, 1.
[212] 'Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities' <https://www.dni.gov/index.php/newsroom/reports-and-publications/214-reports-publications-2016/1392-summary-of-information-regarding-u-s-counterterrorism-strikes-outside-areas-of-active-hostilities>. Referring to other areas 'outside active hostilities' the document then lists an estimate of 64-116 non-combatant deaths in 'counterterrorism strikes' between January 20, 2009 and December 31, 2015.
[213] Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (n 17) 33–34.

warfare'[214] and the Arab mind can only understand 'force, pride and saving face', as a US Captain in Iraq in 2003 declared,[215] the idea of who is a civilian is as much linked to specific territories[216] as it is to the history of aerial warfare. Understanding this history, we are able to comprehend how air power was presented in the interwar period as a more efficient, cheaper and humane form of warfare, just as armed drones are today marketed as a clean humanitarian weapon that promises strict adherence to the principle of distinction and more precision in targeting.[217] It also helps us to see how the seductive qualities of aerial bombing, its promises of professionalised adherence to distinction and proportionality on one end and of zero casualties on another, are always at least partially betrayed.[218] Besides, as the experience of the Mandates Commission in applying the laws of war in its oversight of the suppression of rebellions shows, the promise of legality in relation to aerial bombing 'can't deliver us from the evil of the object's misuse'.[219] This exaggerated reliance on the principle of distinction to restrict aerial bombing, leading to calls for more transparency on civilian casualty statistics,[220] masks the experience of daily terror and constant threat of those on the receiving end of aerial bombing.[221]

In a broader sense, bombing civilians in the peripheries of empires during the interwar period was also a practice that had a crucial impact in shutting down other international legal projects, such as disarmament. By the early 1930s the British Prime Minister Stanley Baldwin was well aware of the threat that aerial warfare posed, warning Parliament that failure to abolish the

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214 The words are from John Glubb, a RAF intelligence officer, as quoted in Satia, 'Drones: A History from the British Middle East' (n 211) 9.

215 Dexter Filkins, 'A Region Inflamed: Strategy; Tough New Tactics by U.S. Tighten Grip on Iraq Towns', *The New York Times* (7 December 2003); Satia, 'Drones: A History from the British Middle East' (n 211) 10.

216 Munro (n 16) 257.

217 As Harold Koh stated, 'advanced technologies have helped to make our targeting even more precise' in Harold Hongju Koh, 'The Obama Administration and International Law, Annual Meeting of the American Society of International Law' (U.S. Department of State, 25 March 2010) <//2009-2017.state.gov/s/l/releases/remarks/139119.htm>; or as the former CIA Director argued, 'It's this surgical precision - the ability with laser-like focus to eliminate the cancerous tumor called an al-Qaida terrorist, while limiting damage to the tissue around it, that makes this counterterrorism tool so essential.' in 'John Brennan Delivers Speech On Drone Ethics', *NPR* <https://www.npr.org/2012/05/01/151778804/john-brennan-delivers-speech-on-drone-ethics>; se also Philip Hammond, 'In Defence of Drones | Philip Hammond', *The Guardian* (online, 18 December 2013) <https://www.theguardian.com/commentisfree/2013/dec/18/in-defence-of-drones-keep-civilians-troops-safe>.

218 Ioannis Kalpouzos, 'Armed Drone' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press, First Edition, 2018) 118, 129.

219 Ibid 126.

220 Amnesty International, *'Will I Be next?' US Drone Strikes in Pakistan* (2013) 49; Reprieve, *Opaque Transparency: The Obama Administration and Its Opaque Transparency on Civilians Killed in Drone Strikes* (2016).

221 Against the narrow focus of international humanitarian law on civilian deaths, see: Alex Edney-Browne, 'The Psychosocial Effects of Drone Violence: Social Isolation, Self-Objectification, and Depoliticization' (2019) 40(6) *Political Psychology* 1341; see also International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* (September 2012) <http://chrgj.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf>.

bomber would spell doom for European civilisation.[222] Nevertheless, British willingness to ban bombers was outweighed by their desire to keep bombing the colonies. When Lloyd George insisted on the right to retain airplanes 'as necessary for police purposes in certain outlying regions', he offered the final blow to a comprehensive treaty for air disarmament at the Geneva Disarmament Conference of 1932-34.[223] The desire to keep air policing in the peripheries of empire prevented international law from meaningfully restricting aerial warfare, a lesson that should not be lost in today's anxieties about the legal framework for the use of weaponised drones, especially once 'the rest of the world turn drones loose, upsetting the simplistic norm of white-on-Middle Eastern use of drones'.[224]

Finally, it is striking to notice that through the work of the PMC, as aerial bombardment was discussed, accepted and normalised, concepts from the laws of war were incorporated into a wider set of standards which were applied in the process of pacification of mandated territories and peoples. The laws of war which had notoriously excluded the 'uncivilised' or the 'savage' from their application throughout the 19th century,[225] were redeployed to rationalise Western violence not as an exceptional measure in a rigid scheme which separated the laws of war and the laws of peace but as standards which could be applied to justify violence in a much wider range of occasions and in a much more regular, administrative way.

[222] Kennett (n 27) 68–69.
[223] Omissi (n 6) 179–180; Lindqvist (n 43) 79; Kennett (n 27) 68–69.
[224] Satia, 'Drones: A History from the British Middle East' (n 211) 22.
[225] Article 24 of the Lieber Code (General Orders No. 100 of 1863) makes this point in the clearest terms: 'The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection, and every disruption of family ties. Protection was, and still is with uncivilized people, the exception'.

4. Military objectives: strategic bombing and international law

> A characteristic of air wars is that those who sow the wind do not reap the whirlwind and those who reap the whirlwind did not sow the wind.[1]
>
> What were we to do? Stop Bombing? […] That would have meant our losing the war. So the German worker had to suffer.[2]

In this chapter I examine the legal arguments for the strategic bombing campaigns over Germany and Japan during the Second World War. I trace the expansion of the category of legitimate targets for aerial bombing in British and American justifications. While the British initially declared that civilians were not targeted, they qualified the distinction between civilians and combatants by arguing that industrial workers were somewhere between these two categories. Killing German workers and destroying their dwellings became a deliberate tactic rather than an unintended effect of bombing. The United States, on the other hand, never claimed to be targeting workers themselves and emphasised precision bombing of strategic military objectives. Yet by the end of the war they were resorting to area bombing to the same extent of the British, destroying Japanese cities from the air at an extraordinary pace. The legal justifications for these bombing campaigns centred on the gradual broadening of the concept of military objectives, which came to include large industrial cities. Once vast urban areas were considered military objectives, there was little else that could not potentially fall within the scope of this concept.

[1] Jörg Friedrich, *The Fire: The Bombing of Germany 1940-1945*, tr Allison Brown (Columbia University Press, 2006) 484.
[2] JM Spaight, *Air Power and War Rights* (Longmans, Green and Co., Third Edition, 1947) 273.

4.1 Operation Gomorrah

The city of Hamburg was bombed throughout the Second World War. Between 1940 to 1945, 1.7 million bombs were dropped on Hamburg, one for each resident.[3] That these facts were not exceptional is an indication of how widespread aerial bombing had become. The Germans had bombed Rotterdam, Warsaw, London, Coventry and a number of other British cities; the Japanese Nanjing, Shanghai, Wuhan, Chongqing, amongst others; but it was the strategic bombing campaigns carried out by the Allies that dwarfed previous bombings and that are to this day a matter of deep controversy. The five years of air raids on Hamburg would have been unremarkable were it not for three days in the summer of 1943.

Since late 1941 the British Directorate of Bomber Operations at the Air Ministry had been studying possible urban targets in northern Germany. Hamburg was listed as presenting the best conditions for a large-scale raid with incendiary bombs. The only question was how to create a major conflagration with the existing weapons. Over two years, British and American military planners and scientists tested different weights of oil bombs and various proportions of incendiary to high-explosive bombs for burning down different kinds of buildings in simulated German roofing.[4] The resulting combination of weapons was put to effect in July 1943, the month of Operation Gomorrah.

On the night of July 24-25, British bombers began an attack on Hamburg. US air force bombers continued the attack the following day. Bad weather prevented large-scale attacks on July 26, but on the night of July 27-28 the weather was exceptionally dry and warm. The RAF raid on that night lasted just over an hour. 729 aircraft dropped approximately 1,200 tons of incendiary bombs on the packed working-class districts of Hammerbrook, Hamm, and Borgfelde, creating what codename 'Gomorrah' predicted: the numerous fires merged into a roaring tornado, creating a pillar of hot air rising to more than three kilometres above the city which sucked all the oxygen from its surroundings with hurricane-force winds, destroying buildings, uprooting trees, and sucking human bodies into the flames. Those who were not swiftly incinerated in the 800°C winds died from gas poisoning in the cellars which became crematories absorbing the external heat. Rescue crews had to wait for ten days until the masses of rubble had cooled down.[5]

[3] Friedrich (n 1) 166.
[4] RJ Overy, *The Bombers and the Bombed: Allied Air War over Europe 1940-1945* (Viking, 2013) 139–140.
[5] Ibid 143–144; Friedrich (n 1) 96–97, 166–167.

Another major raid was carried out on the night of July 29-30, dropping a higher tonnage than the night of the firestorm but failing to create a similar conflagration. Operation Gomorrah killed between 40,000 and 50,000 people in the single largest attack on civilians in one city during the whole European war.[6] It barely touched the historic city centre or major military facilities given the targets were the residential areas north of the river Elbe. An estimated 7,000 children were killed and 10,000 left orphaned. Around 900,000 people evacuated the city after the bombing. Operation Gomorrah marked a turning point in the air war. In Germany, the failure of air defences prompted an acceleration in the production of fighter aircraft and an intense effort to combat the lead the Allies had achieved in radar and communication technologies. In Britain, where the raids were treated as a success, it gave Bomber Command the evidence it needed to argue that the bombing of German cities could win the war.[7] More generally, the fire-bombing of Hamburg inaugurated the large-scale annihilation of cities in a short period of time: 'ever since the period from the summer of 1943 to the summer of 1945, the span between Hamburg and Tokyo and Hiroshima, this kind of annihilation is possible'.[8] Significantly, annihilation in this scale was not an accident or a side-effect of targeting military facilities. As Richard Overy argued in his major works on the air war:

> The destruction of Hamburg in an uncontrollable firestorm on the night of July 27-28, 1943, is often presented as if it were an accident, the result of exceptional meteorological conditions and the failure of German defences, and not a product of deliberate intention. This is to misunderstand entirely the purpose of the city-bombing campaign, which was predicated from the start on causing as much general damage and loss of life as possible by means of large-scale fires. The firebombing of Hamburg was not exceptional. Not for nothing was its vulnerability rated 'outstanding'; it was expected to burn well.[9]

[6] Overy (n 4) 136; Friedrich (n 1) 96.
[7] Overy (n 4) 146.
[8] Friedrich (n 1) 168.
[9] Overy (n 4) 136.

Aerial view of ruined residential and commercial buildings in the Eilbek district of Hamburg (1943)

Source: Imperial War Museum[10]

4.2 Justifying area bombing

How was the firebombing of Hamburg justified? What were the relevant international norms that applied to area bombing? Was it legal? These are the questions addressed in this chapter. I focus on the concepts and arguments deployed in legal and political debates about legitimate targets during the strategic bombing campaigns of the Second World War. I take a specific interest in two sets of ideas, the first related to the distinction between combatants and non-combatants and the second related to the concept of military objectives, and to how they overlap in arguments about aerial bombing. Examining the deployment of such concepts in a total war and the accompanying legal discourse used to justify area bombing provides us a clearer historical understanding of the law of armed conflict. I argue that in the justifications for the area bombing campaigns over Germany and Japan the distinction between civilians and combatants was qualified by a clear sense of class difference: it was not so much the people as a whole that were being targeted but the working class in particular. While this is an assumption implied in theories of air power developed prior to the war and in strategic bombing policy during the conflict, it is more clearly discernible in the legal manoeuvres that tried to conciliate

[10] 'Royal Air Force Bomber Command, 1942-1945', *Imperial War Museums* <https://www.iwm.org.uk/collections/item/object/205023601>.

area bombing of densely populated areas with the principle of distinction in the laws of war. At the same time, the concept of military objectives, which emerged with the rise of air power, was used to justify the bombing of an ever-broadening range of targets. It signalled a move from a distinction between individuals to one focused on objects and economic resources.

Given the vast amount of historical material on the subject of aerial bombing during the Second World War, there is comparatively little on it from an international legal perspective. Here I draw from, among others, the work of James Molony Spaight, easily the most prolific writer on air power and international law of the first half of the twentieth century and until 1937 Principal Assistant Secretary to the British Air Ministry. His books *Air Power and War Rights*, published in three different editions (1924, 1933 and 1947), deal with the legal questions surrounding strategic bombing and are excellent guides to the literature on air power of that period. I refer mostly to the third and last edition, written after the Second World War and therefore containing a more detailed legal justification of the British strategic bombing of Germany, and to an unpublished confidential supplement to the book prepared by Spaight for the Air Ministry.[11]

I am not so interested in passing judgment on the justifications for the bombing of civilian populations during the war,[12] but rather in drawing out in the legal justifications for these bombing campaigns who were the civilians that international lawyers talked about and what work was carried out by the use of the concept of military objectives. I focus on the British and American bombing campaigns over Germany and not on the bombing campaigns carried out by the Axis powers due to my particular focus on the legal challenges that liberal democracies faced when justifying their actions. Furthermore, more than other nations, it was Britain who put more effort into strategic bombing in the European conflict and the United States in the Asian one.[13] After the end of the war it was also the Allies who had the stronger influence in shaping concepts and ideas that are still flourishing in contemporary international law. What is more, if the legacy of strategic bombing during the Second World War can still be felt, it is most

[11] JM Spaight, 'AIR 41/5. International Law of the Air, 1939-1945. Confidential Supplement to Air Power and War Rights, The National Archives, Kew' (1945); W. Hays Parks speculated that Spaight prepared this supplement in June 1945 in response to the controversy over the destruction of Dresden by the Allies, see W Hays Parks, 'Air War and the Law of War' (1990) 32 *Air Force Law Review* 1, 42–43.

[12] This is still today a controversial issue, especially in reference to the bombing of Dresden in February 1945 and to the atomic bombings of Hiroshima and Nagasaki in August 1945. Over time, however, it has become more and more accepted that the destruction of German and Japanese cities by area-bombing during the last stages of the war was unnecessary and unjustified. See AC Grayling, *Among the Dead Cities: The History and Moral Legacy of the WWII Bombing of Civilians in Germany and Japan* (Walker & Company, 2007).

[13] This is not to understate the scale and the suffering caused by Axis strategic bombing, or an attempt to compare different evils. See Mark Connely, 'The British Debate' in Igor Primoratz (ed), *Terror from the Sky: The Bombing of German Cities in World War II* (Berghahn Books, 2010) 181, 181.

likely in doctrines and ideas that permeate the United States military and its interpretations of international humanitarian law. For instance, US military manuals and Air Force doctrine 'still think in Second World War terms about "civilian morale" and the legitimacy of what can be described as "economic targets"'.[14] It is thus worthwhile understanding how it is that aerial bombing campaigns with high civilian costs have been conducted and justified, and the role that international law and lawyers have played in them.

I do not, however, intend to compare, to single out, or to condemn exclusively the British and American bombing campaigns without taking into account the wider context in which they took place.[15] Rather, my aim is limited to looking at the concepts and ideas that were deployed to justify them in order to reflect on those legacies for our contemporary world. The purpose is to recognise and comprehend how it is that the bombing of urban districts, the killing of workers and the burning of entire cities could all be construed, without much sophistry, as legitimate objectives. In a sense, my focus is not as much on the destruction of the bombs as on the framing of its reality. I examine how international legal discourse is implicated in the process of creating the visual and conceptual frameworks that construe populations as objects of knowledge and targets of war, and that distinguish 'lives to be preserved' from those that are 'dispensable'.[16]

4.3 From Cautious Restraint to Obliteration Bombing

In the two decades preceding the Second World War, all major imperial powers had practiced the bombing of civilians in their colonies and mandated territories. The terrors of aerial bombing were well-known, even if they had only just begun to be felt in Europe.[17] By the late 1930s there was a tangible fear in British society of the destruction that aerial bombardment

[14] Grayling (n 12) 275 the strategy of 'shock and awe' applied in the Iraqi conflict of 2003 was a good example of how this thinking is ingrained in the US Air Force. For an academic example of how extreme views on aerial bombing are still quite prevalent see Charles J Dunlap Jr., 'Clever or Clueless? Observations about Bombing Norm Debates' in Matthew Evangelista, Henry Shue and Tami Davis Biddle (eds), *The American Way of Bombing: Changing Ethical and Legal Norms, from Flying Fortresses to Drones* (Cornell University Press, 2014) 109; see also Adil Ahmad Haque, 'Misdirected: Targeting and Attack under the DoD Manual' in Michael A Newton (ed), *The United States Department of Defense Law of War Manual* (Cambridge University Press, 1st ed, 2019) 225.

[15] It is often argued that Allied bombing during the war was not equivalent and nowhere near in a scale of moral atrocity to the Shoah or to Japanese aggression and destruction.

[16] Judith Butler, *Frames of War: When Is Life Grievable?* (Verso, 2016) xviii–xix.

[17] I refer here to the famous bombing of Guernica, as well as that of Barcelona and of other cities during the Spanish Civil War.

would bring in a European war.[18] When we look at the debates on the subject that preceded the Second World War, from the Geneva Disarmament Conference of 1932-34 to discussions in the House of Commons in 1936-39, the concern for the protection of civilian populations from aerial bombardment appears as a recurrent theme. This concern coexisted throughout that period with ideas about 'morale bombing' which justified the bombing of civilian populations and of industrial cities. In this context, the extent to which each state supported stronger restrictions on aerial bombing through international law was linked to that state's potential vulnerability to aerial attacks or capacity to inflict aerial violence upon its enemies.

In June 1938, at a point when the House of Commons was discussing the aerial bombing of Spanish and Chinese cities by the German and Japanese air forces respectively, Prime Minister Chamberlain famously stated:

> I think we may say that there are, at any rate, three rules of international law or three principles of international law which are applicable to warfare from the air as they are to war at sea or on land.
>
> In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law.
>
> In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification.
>
> In the third place, reasonable care must be taken in attacking these military objectives so that by carelessness a civilian population in the neighbourhood is not bombed.[19]

These principles were incorporated almost word for word and without dissent in a League of Nations Assembly resolution of the same year,[20] and were again echoed in President Roosevelt's appeal on the 1st September 1939 to European powers calling them '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'.[21] As clear as these principles may seem, Chamberlain himself recognised that their practical application was fraught with difficulties. There was no agreement on a definition of military objectives, and as Spaight noted there was even less understanding of who were the civilians who should be protected.[22] As to Roosevelt's appeal, it was deemed 'a relic of an age already past', not least for his reference to *unfortified* cities – a criterion that for over a generation had been supplanted by that of military

[18] Brett Holman, *The next War in the Air: Britain's Fear of the Bomber, 1908-1941* (Ashgate Publishing Limited, 2014).
[19] As cited in Spaight, *Air Power and War Rights* (n 2) 257.
[20] 'League of Nations Paper A. 69, 1938, IX. 28 September 1938, Protection of Civilian Populations against Air Bombardment.' (28 September 1938).
[21] Cited in Spaight, *Air Power and War Rights* (n 2) 259.
[22] Ibid 258.

objectives.[23]

Although all major powers replied positively to Roosevelt's appeal, in little time they reneged on that pledge over the argument of reprisals for enemy violations. During the first months of the war – a period called the 'phoney war in the air' – British policy was one of restraint. Yet the Chief of the Air Staff did not hesitate to tell the Secretary of State that he felt 'sure this restriction will not last very long, but we obviously cannot be the first to take the gloves off'. Already on 15 October 1939 the point had been raised by an Air Marshall that 'owing to German action in Poland, we are no longer bound by any restrictions under the instructions governing naval and air bombardment nor by our acceptance of Roosevelt's appeal' and that therefore 'our action is now governed entirely by expediency'.[24]

For Britain, as for other powers, recourse to international law was also an attempt to gain strategic advantage in an impending conflict. Given the apprehension about aerial attacks on London and the fact that by the late 1930s the Royal Air Force was substantially weaker than Germany's Luftwaffe, it was in Britain's interest to limit aerial warfare to a certain extent. Having this in mind, on July 7, 1938, the Committee of Imperial Defence issued a call through its Limitation of Armaments Sub-Committee for a report on the legal aspects of aerial bombing. This task was presented to Sir William Malkin, the Legal Adviser of the Foreign Office.

A committee was set up to discuss the legal aspects of aerial bombing and to assess the position that Britain should take in international negotiations on the topic. The Malkin Committee proposed several recommendations and some rules for aerial bombardment. It did not, however, go as far as supporting a total prohibition on bombing. The Committee was unanimous in agreeing that it was in Britain's interests that an attempt should be made to update the draft 1923 Hague Rules. It thus proposed that aerial bombardment should only be legitimate in the following circumstances:

> 1. Against warships, including transports and fleet auxiliaries, at sea;
> 2. On land, in accordance with the following rules:
>
> Any objective on land which may legitimately be bombarded under the rules applicable to land warfare, may be bombarded from the air if it is within the range of medium artillery, which for this purpose should be taken as ten miles from any of the forces of the belligerent who effects the bombardment or his allies.
>
> In addition, the following objectives may be bombarded, provided that they are either

[23] Ibid 259.
[24] Cited in: Spaight, 'AIR 41/5. International Law of the Air, 1939-1945. Confidential Supplement to Air Power and War Rights, The National Archives, Kew' (n 11).

> anywhere on territory occupied by an invader or within a radius of fifty miles of the nearest troops or air forces of the belligerent carrying out the bombardment or of his allies:
>
> a) Enemy troops and air forces;
>
> b) Ammunition dumps, military supply depots, artillery parks and similar well defined aggregations of distinctly military equipment, stores or supplies;
>
> c) Supply columns and other means of transport which are engaged in transporting supplies to or from the depots etc. mentioned under (b).[25]

These rules would have made strategic bombing illegal, limiting aerial bombing to its tactical applications. The Malkin Committee further considered a prohibition on bombing at night, except in the immediate neighbourhood of the operations of land forces or against warships at sea, and on bombardment when the objective is of such a size or so situated that it cannot be bombarded with a reasonable expectation that damage will be restricted to it. These propositions would prohibit the bombing of warships in harbour and thus suited a strong naval power like Britain. Perhaps because Britain's proposals would be met by German demands to limit belligerent rights at sea, but mostly due to the internal contradictions of British air policy, the Malkin Committee's proposals were dropped by January 1939.[26] By then the Sub-Committee on Limitation of Armaments admitted that the prospect of obtaining any international agreement on the topic was extremely remote and Bomber Command had started plans for a bombing force designed to be used only at night.[27]

Ultimately, instead of advancing the idea that aerial bombing could be restricted or was susceptible to being 'humanised', the Malkin Committee turned out to be an opportunity for the Air Ministry to establish the notion that factories and armaments workers were legitimate targets for bombing. The discussions of the committee came up against the difficulty of defining what was encompassed by the concept of military objectives and the objection that a possible international agreement would in any case be disregarded in a real war.[28] Having established this, there was nevertheless strong pressure in the sense that no country wanted to be seen to be the first to 'take the gloves off' in the bombing war. The first instructions sent by the Air Ministry to Bomber Command on September 15, 1938, stated that in the opening stages of war action 'should be rigorously restricted to objectives which are manifestly and unmistakably military on

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[25] Ibid.
[26] Uri Bialer, *The Shadow of the Bomber: The Fear of Air Attack and British Politics, 1932-1939* (Royal Historical Society, 1980) 119–120; Parks (n 11) 44.
[27] Spaight, 'AIR 41/5. International Law of the Air, 1939-1945. Confidential Supplement to Air Power and War Rights, The National Archives, Kew' (n 11).
[28] 'AIR 9/202. First Meeting, Sub-Committee on the Humanisation of Aerial Warfare, July 8, 1938, The National Archives, Kew' (1938).

the narrowest interpretation of the term'. [29] Still, it was clear from the beginning that an aerial offensive at a later point was in the making. The same instructions continued: 'it will be necessary to abstain from bombardment of objectives in populated areas, even though these objectives may be regarded as perfectly legitimate in themselves'.[30] Furthermore, despite the official rhetoric a number of practical measures had already been taken in that direction, from the creation of Bomber Command in 1936, to the rejection of Hitler's proposals in 1935-36 to restrict bombing to combat areas as well as the aforementioned dismissal of the Malkin Committee's proposals.[31]

The move from a policy of restraint to bombing raids involving over a thousand planes with the explicit goal of provoking firestorms in urban areas in Germany has been well documented by historians.[32] Here I do not want to dwell long on that point, but instead to draw attention to how the idea that workers were legitimate targets was at the centre of instructions that led to the strategic bombing of entire cities. The attack on the morale of the German people was inaugurated by a number of instructions and directives issued to Bomber Command over the course of 1940. The first step taken in that direction was to say that attacks could now be made on military objectives 'in the widest sense' of the term and tolerating that civilian casualties would be unavoidable though 'undue loss of civil life' was to be avoided.[33] Further restraints were then lifted on October 1940 in a directive to Bomber Command which stated that from that point onward it was important to attack the morale of the German people. According to the directive, 'efforts were to be concentrated on oil installations and on causing of heavy material destruction in large towns and centres of industry' with 'as many heavy bombers as possible'. Later instructions continued to develop the idea that factories and workers should be targeted. A letter of July 9, 1941, from Bomber Command clarified that 'it is only possible to obtain satisfactory results by heavy, concentrated and continuous *area attacks of large working class and industrial areas* in carefully selected towns'. According to Spaight, this plan of July 1941 marked an important stage in the development of bombing policy as it outlined a programme

[29] 'Sub-Committee on the Humanisation of Aerial Warfare: Report, 15 July 1938. In ADM 116/4155. Air and Naval Bombardment Policy: Limitation of Objectives in Accordance with Hague Convention, The National Archives, Kew' (1938).
[30] Spaight, 'AIR 41/5. International Law of the Air, 1939-1945. Confidential Supplement to Air Power and War Rights, The National Archives, Kew' (n 11).
[31] 'Sub-Committee on the Humanisation of Aerial Warfare: Report, 15 July 1938. In ADM 116/4155. Air and Naval Bombardment Policy: Limitation of Objectives in Accordance with Hague Convention, The National Archives, Kew' (n 29).
[32] Two good books on the topic, one from a British and the other from a German author, are Overy (n 4); and Friedrich (n 1).
[33] Overy (n 4) 42.

of area attacks on 'congested industrial towns where the psychological effect would be the greatest'.[34] From that point onwards aerial bombing policy by the British (if not yet by the United States) was predicated on the erosion of the distinction between the civilian worker and the fighting man.

The culmination of these efforts came in the well-known area bombing directive of February 14, 1942, the objective of which was to 'focus attacks on the morale of the enemy civil population and *in particular the industrial workers'*. The day after the directive was issued, the Chief of the Air Staff Charles Portal sought clarification from his deputy who had drafted it: 'I suppose it is clear the aiming points will be the built-up areas, and not, for instance, the dockyards or aircraft factories where these are mentioned… this must be made quite clear if it is not already understood'.[35] Later that year, on November 3, 1942, Portal produced a paper setting out his aims for 1943 and 1944. The goal was to drop 1.25 million tons of bombs on Germany, destroying 6 million dwellings, creating 25 million homeless, killing 900,000 people, and injuring a further million.[36]

Strategic bombing would only be limited or questioned late in the war, in 1945, when Churchill's attitude to the area bombing campaign had changed. He did not mention Bomber Command's work in his victory radio broadcast on 13 May 1945 and Arthur Harris, head of Bomber Command, was not allowed to publish his final dispatch summarising his command's activities in the war.[37] As the Dresden raids of February 1945 produced an outcry in the foreign press and in Parliament unlike those that came before, Churchill penned a self-serving and self-revealing memorandum that raids of this sort went against British interests: 'it seems to me that the moment has come when the question of the area bombing of cities simply for the sake of increasing the terror, though under other pretexts, should be reviewed'.[38]

The practical results of this policy of obliteration bombing could be seen during the execution of *Operation Gomorrah*, as described earlier in this Chapter. After this episode, the term 'Hamburgisation' was coined to describe this new technological achievement which permitted

[34] All preceding quotes are taken from Spaight, 'AIR 41/5. International Law of the Air, 1939-1945. Confidential Supplement to Air Power and War Rights, The National Archives, Kew' (n 11).
[35] Ibid.
[36] John Terraine, *The Right of the Line: The Royal Air Force in the European War, 1939-1945* (Hodder and Stoughton, 1985) 505.
[37] Grayling (n 12) 175–176.
[38] Douglas P Lackey, 'Four Types of Mass Murderer: Stalin, Hitler, Churchill, Truman' in Igor Primoratz (ed), *Terror from the Sky: The Bombing of German Cities in World War II* (Berghahn Books, 2010) 134, 147; Max Hastings, *Bomber Command* (Zenith Press, 2013) 401.

the creation of beacons of fire in densely populated areas.[39] There is no doubt that this was not accidental or what today would be described as the result of collateral damage. As Jörg Friedrich shows in meticulous detail, by 1943 the British and Americans employed research staffs that studied maps and photographs of enemy cities, marked fire cells in them, and calculated the necessary combinations of incendiary and high explosive bombs that had to be dropped for the respective areas.[40] Occasionally some would stop to think twice about this research. One who did was Freeman Dyson, a physicist at the Operational Research Section of Bomber Command: 'I felt sickened by what I knew […] I sat in my office until the end, carefully calculating how to murder most economically another hundred thousand people'.[41]

Internally at least, there was equally no concealing the fact that the ultimate aim was the disruption of workers' lives and lowering of the morale of the German civilian population, even though public communiqués or official statements were instructed to refer only to the 'destruction of governmental control centres of the Nazi war machine'.[42] Throughout most of the war, British and American bombing was continuously presented as directed against the enemy's military targets. In occasions where the air forces would receive commands to conduct attacks against 'industrial populations', the term would be altered in official communications to 'industrial centres' in order to obscure the fact that civilians were the real target, which was recognised as 'contrary to the principles of international law'.[43] In October 1943, Arthur Harris unsuccessfully attempted to convince the Air Ministry to be more candid about the work of Bomber Command. He argued that the Ministry should stop claiming that British bombers were hitting precise military targets and should instead announce that their purpose was urban destruction and 'the killing of German workers'.[44] Whilst the United States held on for longer to the idea of precision bombing, preferring to conduct its aerial operations over Germany during the day, the discrepancy between American and British bombing rested mostly on intention as by 1943 the escalation of the air war meant that US bombers were attacking city areas through clouds in the hope of hitting precise targets.[45]

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[39] Friedrich (n 1) 81.
[40] Ibid 10.
[41] Stephen A Garrett, *Ethics and Airpower in World War II: The British Bombing of German Cities* (St. Martin's Press, 1993) 64.
[42] 'AIR 42/122. Air Attack on German Civilian Morale. Psychological Warfare Division. 25 August 1944, The National Archives, Kew'.
[43] Overy (n 4) 49.
[44] Richard Overy, '"The Weak Link"? The Perception of the German Working Class by RAF Bomber Command, 1940-1945' (2012) 77(1) *Labour History Review* 11, 28.
[45] Overy (n 4) 157–158.

B-17 Flying Fortress formation over Schweinfurt, Germany (1943)

Source: Wikimedia Commons

4.4 From bombing savages to bombing workers

> Below, they left ruins and blazing conflagrations and heaped and scattered dead; men, women, and children mixed together as though they had been no more than Moors, or Zulus, or Chinese.[46]

The legal justifications and argumentative manoeuvres used by international lawyers to justify strategic bombing are intimately connected to the practices of empire and the theories of air power that legitimated them. It is therefore not surprising that the 'philosophy of the bomb'[47] has continually rested on racial, gender and class frameworks. It is the latter that is most evident in the legal discourse related to strategic bombing during the Second World War, even if they intersect in several ways.

Before turning to the work of James Molony Spaight and his legal defence of the British air offensive, it is interesting to note that his justifications are remarkably similar to the beliefs of those most closely associated with the theory of attacking the morale of the enemy population.

[46] HG Wells, *The War in the Air* (Fisher, 1926) 207.
[47] I borrow this expression from Thomas Hippler, *Governing From the Skies: A Global History of Aerial Bombing*, tr David Fernbach (Verso, 2017) Chapter 7.

Arthur Harris, for instance, had an unshakable belief that breaking the population's will to resist was the way to win the war. He consequently rejected the logic of precision bombing and constantly criticised plans that pretended to aim bombing at specific targets.[48] This was due in no small part to his previous experience of colonial wars by bombing Arabs in the Middle East. It was also a result of his adoption of Douhet's *Command of the Air* as an article of faith and of the legacy of Hugh Trenchard and his arguments for the moral effect of bombing in the early years of the RAF.[49] As I argue in the previous chapter, the strategic bombing campaigns that materialised in the Second World War are directly connected to the colonial mindset in which the use of air power flourished during the early twentieth century. It is therefore no surprise that when Charles Portal wrote to Churchill in September 1941 to elucidate the strategy of attacking the 'general activity of a community' in Germany he explained that:

> it is an adaptation, though on a greatly magnified scale, of the policy of air control which has proved so outstandingly successful in recent years in the small wars in which the Air Force has been continuously engaged.[50]

This theory of the moral effect of bombing was based on evidently racist assumptions about the 'lack of moral fibre' of colonised peoples throughout the 1920s. In Britain itself it was argued that during the raids on London in 1917 the people who had most panicked were the 'East End Jews'.[51] Yet when it came to European wars, Trenchard found it necessary to qualify his views that 'the natives of these tribes love fighting for fighting's sake… they have no objection to being killed'.[52] It is hence at the point when bombing came back to Europe that justifications for bombing based on race were merged with justifications based on class. In relation to European wars, Trenchard was forced to concede that the indiscriminate bombing of cities for the purpose of terrorising the civilian population was contrary to the dictates of humanity, but he concurrently sustained that it was entirely legitimate to demoralise *workers*. 'Why should the person who made the gun be less a target than he who fired it?' he questioned, concluding that the moral effect created by bombing workers was the inevitable result of a *lawful* operation of

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48 Spaight documented many of Harris' criticisms of precision bombing in Spaight, 'AIR 41/5. International Law of the Air, 1939-1945. Confidential Supplement to Air Power and War Rights, The National Archives, Kew' (n 11).

49 Giulio Douhet, *The Command of the Air*, tr Dino Ferrari (Air Force History and Museums Program, New Imprint. Originally published by Coward-McCann in 1942, 1998); Thomas Hippler, *Bombing the People: Giulio Douhet and the Foundations of Air-Power Strategy, 1884-1939* (Cambridge, 2013).

50 Charles Portal, 'Lord Portal Collection, Portal to Churchill, Septermber 15, 1941, Encl. "The Moral Effect of Bombing" quoted in Overy (n 44) 21.

51 Robert Anthony Pape, *Bombing to Win: Air Power and Coercion in War* (Cornell University Press, 1996) 61–62.

52 David E Omissi, *Air Power and Colonial Control: The Royal Air Force 1919-1939* (Manchester University Press, 1990) 170; Priya Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (Oxford University Press, 2008) 248.

war – the bombing of a military objective. To be succinct, this was the basis of most legal arguments used throughout the war to justify the area bombing campaign.[53]

Since the October Revolution, the threat to civilisation posed by savages in the peripheries of empires was no longer the only menace to the established order which the bomber could put to rest. While the First World War was still raging, Prime Minister David Lloyd George was more troubled by thoughts of a proletarian revolution than by the German army: 'cooperation of the wage-earners was our vital concern, and industrial unrest spelt a graver menace to our endurance and ultimate victory than even the military strength of Germany'.[54] No wonder then that whereas the use of poison gas by the Germans in the First World War had shocked the British public, the bombing of Bolsheviks with chemical weapons during the British intervention in Russia in 1918-19 was deemed entirely appropriate by Churchill – a renowned apologist for the use of poison gas against 'barbarian tribes'. Aerial bombing with poison gas had thus become 'the right medicine for the Bolshevist'.[55]

During the interwar period, while bombing civilians in the Middle East, Africa and Asia, British authorities found at home another use of air power. Airplanes were used to intimidate workers on strike and to drop propaganda leaflets and conservative newspapers to areas where they could not otherwise reach.[56] Workers were henceforth targeted from both sides: by bombers of enemy nations and by counter-revolutionary aviation from their own government.[57] Those who posed a threat to the established social order were accordingly prone to become primary targets for aerial bombardment. If these had for a short period of time been restricted to insurgents and rebels in faraway lands, soon enough the working class and especially communists were equated with the barbarians who could be legitimately subjected to bombing.[58] Class difference became one of the cornerstones of aerial bombing, a fact that was evident in the strategy of Allied air forces and also in the writings of international lawyers.

The German working class and the urban areas of large cities became primary targets for both the British and American air forces, but it was the RAF Bomber Command which most unswervingly attacked workers' morale and housing *per se* and analysed the reasons for doing

[53] Grayling, above n 39, 133–134.
[54] As quoted in Hippler (n 47) 106.
[55] Simon Jones, "'The Right Medicine for the Bolshevist": British Air-Dropped Chemical Weapons in North Russia, 1919' [1999] (12) *Imperial War Museum Review* 78.
[56] Hippler (n 47) 105.
[57] Ibid 111.
[58] Ibid 110.

so.[59] For their part, the Americans also aimed at causing a collapse of the enemy's civil society. But they did so not by targeting workers directly but by aiming to destroy the key industrial links in the enemy's economy, based on the 'industrial web thesis' developed in the United States Air Corps during the 1920s and 1930s. This doctrine assumed that the modern city was a complex system assimilated to a tightly woven web and that by targeting its nodes or nerve centres the system would breakdown. In practice, however, the difficulty of hitting precise targets and the assumption that almost any city with a population of over 50,000 was likely to contain military and industrial plants and accordingly to become a legitimate target meant that the United States Army Air Forces (USAAF) conducted area bombing by default.[60]

If the practical results of British and American bombing were therefore generally similar, the justifications differed, as did the legal concepts that were used to justify each campaign. In the British case a much more apparent class-based analysis led to formulations that assimilated workers to combatants, or in any case to a class in between those of civilians and combatants, being legitimate targets themselves. In the American case, the focus on cities and on key industries meant that attacks were framed as targeting military objectives – industries, transport and communications – as opposed to workers. In any case, except for a few slippages such as Churchill's above-mentioned sudden and late attack of conscience, the British pursued their attacks on the German working class while concealing this intention from the wider public. They thus publicly adopted throughout the war the same discourse of the Americans of targeting only military assets. One can notice, nonetheless, in the work of international lawyers of the period, and mostly in that of James Molony Spaight, the constant reference to workers as a justification for the strategic bombing campaign.

4.5 Distinction and the legal case for strategic bombing

> One might almost say that it has been found necessary to reverse the process by which the Chinese arrived at the secret of roast pork. The cooking could be done, after all, only by the burning of the house down.[61]

In making his case for the legality of the strategic bombing campaigns of the Second World War, Spaight was caught between a rock and a hard place. On the one hand, he provides an

[59] Overy (n 44) 12.
[60] Grayling (n 12) 141.
[61] JM Spaight, *Volcano Island* (Geoffrey Bles, 1943) 69.

ardent defence of the rule of distinction: 'try to break down that great rule and you cut at the root of all civilised war'.[62] On the other hand, he must explain why area bombing of cities does not violate this rule, while resisting the argument that everyone is a legitimate target. His solution starts with an acknowledgment of the innovation of aerial warfare, a weapon that for the first time enabled belligerents to strike not only at the *users* of armaments but also at the *makers*. Consequently, Spaight argues that 'the civilians of whom the old laws of war spoke have now to be split up, differentiated, categorized'.[63]

The real question then was no longer a distinction between soldiers and civilians, but that between civilians who should be immune from direct attack and civilians 'who are more logically bracketed with the soldiers'.[64] For Spaight, these were the war-workers who were engaged in the manufacture, processing or transportation of instruments of war. Spaight was not alone in arguing that in international law related to aerial bombing workers invited classification as 'quasi-combatants'.[65] The renowned French jurist Louis Rolland reasoned that munitions workers occupied an intermediary position between combatants and non-combatants, similar to those in the army's auxiliary services. He concluded that violence employed against them was certainly permitted.[66] James Garner, from the United States, concurred with Rolland, but added that civilians engaged in the manufacture of arms were immune to bombardment only while they are in their homes.[67] In Germany, the jurist Alex Meyer claimed that the distinction between armed forces and civilians was no longer of any use and should be replaced by a distinction between 'peaceable' and 'non-peaceable' persons.[68] There was therefore a reasonably extensive consensus between international lawyers of that period around the fact that in any big city there were thousands of civilians 'who cannot be called non-combatants in any true meaning of the term'.[69] These were, of course, the working class.

Having set out this distinction between targetable workers and peaceable civilians, Spaight moves on to sustain that cities too must be distinguished: there are the 'sheep' on which no

[62] Spaight, *Air Power and War Rights* (n 2) 47.
[63] Ibid 44.
[64] Ibid 261.
[65] Geoffrey Best, *War and Law since 1945* (Clarendon Press, 1994) 202.
[66] Louis Rolland, 'Les Pratiques de La Guerre Aérienne Dans Le Conflit de 1914 et Le Droit de Gens' (1916) Tome Vingt-Troisième *Revue Générale de Droit International Public* 497, 554.
[67] James W Garner, 'Proposed Rules for the Regulation of Aerial Warfare' (1924) 18 *The American Journal of International Law* 56, 69.
[68] Alex Meyer, *Völkerrechlicher Schutz Der Friedlichen Personen Und Sachen Gegen Luftangriffe* (Ost-Europa-Verlag, 1935) 82.
[69] Spaight, *Air Power and War Rights* (n 2) 47.

bombs should be wasted, and there are 'goats' in which 'there are activities which it may be more important to interrupt than to defeat the enemy's army in the field'.[70] These so-called 'goats' are the cities where there is a great number of workers and where the industrial plants are located. It is curious to note that, while providing a legal case for the bombing of cities, Spaight was well aware that 'one must think of battle as being *pre-fabricated*' as 'most of the work of making it has been done before the encounter takes place'.[71] Here Spaight admits that the material realities that structured aerial bombing also shaped international law: 'if in no other way than by target-area bombing can a belligerent destroy his enemy's armament centres… then target-area bombing cannot be considered to offend against the principles of the international law of war'.[72]

British propaganda poster depicting two Lancaster bombers on a night raid over a German city (1943)

Source: Imperial War Museum

A similar conclusion was reached by another prominent authority on international law and aerial warfare from across the Atlantic. In his 1928 book *Aerial Bombardment and the International Regulation of Warfare*, Morton William Royse affirmed that aerial bombing was not restricted by any international agreement, nor was it likely to be so. He argued that like the crossbow, the

[70] Ibid 261.
[71] Ibid 262.
[72] Ibid 271.

musket and the submarine, aerial bombardment would also be judged on a purely utilitarian basis. It was thus to be expected that 'military objectives are likely to be hunted down and attacked, and the fact that the incidental harm may fall upon non-combatants…probably will be accepted'.[73]

The most common denunciation of the tactic of obliteration bombing during the war referred to the fact that it came down to an intentional attack upon thousands of innocent people.[74] Countering this argument, Spaight claimed that, firstly, most of the people attacked were not innocent as they were workers engaged in production and transportation of weapons. Second, even if 'genuinely innocent' persons were injured, that was 'an *incidental* result, neither intended or desired, and justified by the *proportionate cause* which was at stake'.[75] In this sense, he could conciliate the idea of target-area bombing with the claim that nothing in the Second World War had shaken the legal objection to indiscriminate bombing.[76]

It is important to draw attention here to the fact that killing German workers and their dwellings was a deliberate tactic that was not justified as an unintended effect of bombing. In a sense, then, the idea of collateral damage which is so prominent today in the law of war was back then turned on its head. The killing of workers and the destruction of housing was not considered a side effect of bombing factories and communication lines, but damage to industry was the tributary consequence of destroying working-class neighbourhoods.[77] By the time the area bombing campaign got under way, German cities had been profiled systematically and maps had been made where the working-class inner-city boroughs were designed as the key targets. In the Air Ministry's classification of zones to be bombed, the bombing value of central residential quarters was fifty times greater than those of suburban or industrial areas, which had no priority in British bombing strategy.[78] Furthermore, in the autumn of 1941 the RAF decided to use incendiary bombs as the principal means of area bombing given the evidence by then amassed that fire caused a lot more damage to urban dwellings than explosives. The military objective had thus become workers and their houses while, as Arthur Harris clarified, 'the

[73] Quoted in A Hammerskjöld et al, *La Protection Des Population Civiles Contre Les Bombardements: Consultations Juridiques* (Comité International de la Croix Rouge, 1930) 241; see MW Royse, *Aerial Bombardment and International Regulation of Warfare* (Harold Vinal, 1928).
[74] John C Ford, 'The Morality of Obliteration Bombing' (1944) 5(3) *Theological Studies* 261.
[75] Spaight, *Air Power and War Rights* (n 2) 272.
[76] Ibid 277.
[77] Overy (n 4) 58.
[78] Overy (n 44) 26.

destruction of factories could be explained as a bonus'.[79]

While the idea inherited from Trenchard of attacking the morale of the civilian population persisted throughout the war, there was a marked shift in the interpretation by the British of what it meant to attack the enemy's morale. Drawing from the air power theorists of the interwar period and the experience of bombing in the peripheries of empire, at the start of the war in the air the idea that the working-class would succumb under attack prevailed in British strategy. It was thought that the labouring masses were the most difficult part of the population to control and therefore the most prone to dismay, stampede and rebellion.[80] The goal was to indirectly provoke a social crisis in the enemy state which could lead to political upheaval and eventual capitulation, and so during most of 1940 there was a serious belief that there was 'a very real prospect of disorganisation spreading to the German home front'.[81]

Associated with the belief that the working-class was more susceptible to bombing was also the idea that the German population – similarly to other peoples formerly bombed by Britain – lacked moral fibre. In a memorandum of January 1941 to the Prime Minister, the Minister of Information declared that 'all evidence goes to prove that the Germans, for all their present confidence and cockiness, will not stand a quarter of the bombing that the British have shown they can take'.[82] As the historian Richard Overy notes, in July 1941 the British government sent officials to Lisbon to meet a group of American consular staff who had been posted in Germany in order to question the effects of bombing on the German workforce. When the Consul General in Cologne and the First Secretary of the US Legation were asked 'would you bomb workers in their homes or key industrial plants?' the answer was a forthright 'the workers every time'.[83]

Nonetheless, British hopes of provoking revolution through bombing remained entirely illusive and as the war progressed reports on the morale of the German workforce indicated growing scepticism about the possibility of political revolt. At this point, targeting the morale of workers shifted from being premised in the idea that it would yield a political dividend to becoming part of economic warfare, where the goal was to destroy the working-class as a factor of

[79] Hastings (n 38) 146; Lackey (n 38) 145.
[80] LEO Charlton, *War from the Air: Past, Present, Future* (T. Nelson and Sons, 1935) 171–172; Overy, above n 47, 13.
[81] PRO, PREM 3/193/6A, Foreign Office report, 'Summary of secret reports regarding internal conditions in Germany since May 1 1940', cited in Overy (n 44) 15.
[82] Ibid.
[83] Ibid 16.

production.[84] It was noticed from the British experience of German bombing that killing, disabling and dehousing workers was more effective than destroying the factories where they worked.[85] So even though technological limitations, or the inaccuracy and ineffectiveness of night bombing, contributed its share to the British decision to target the working-class, it was also a strategy that was planned for and established as a legitimate military goal.[86]

4.6 The aftermath: Nuremberg, Tokyo, and strategic bombing

Not much changed in international law in the immediate aftermath of the war. The International Military Tribunal (IMT) set up by the Allies to try the leadership of the Nazis and the subsequent Nuremberg trials passed over aerial bombing in silence. Reluctant to draw attention to their own aerial bombing campaigns, the Allies preferred not to prosecute the Germans for bombing civilians. In the rare occasions when the topic came up, aerial bombing was met in similar fashion to the issue of unrestricted submarine warfare, which warranted the accusation of *tu quoque*.[87]

This was the case in the judgment of Alfred Jodl, Chief of the Operations Staff of the German Armed Forces High Command. When the prosecutor interrogated how many thousands civilians did he think were killed in the bombing of Belgrade, he immediately replied: 'I cannot say, but surely only a tenth of the number killed in Dresden, for example, when you had already won the war'.[88] In his final report on the Nuremberg trials, Brigadier General Telford Taylor concluded that the ruins of German and Japanese cities were the result of deliberate policy and that, since aerial bombardment of cities had been carried out by all nations, no charges were brought against the defendants arising out of their conduct of the war in the air.[89] The same approach was taken by the International Military Tribunal for the Far East (the Tokyo Tribunal), where aerial bombardment was overlooked in the wake of the atomic bombing of Hiroshima

[84] Ibid 14–15.
[85] This view is most commonly associated to Frederick Lindemann (Lord Cherwell), who was the British government's scientific advisor and who sent the renowned 'dehousing memorandum' on 30 March 1942 to Prime Minister Winston Churchill.
[86] Overy (n 44) 24.
[87] Best (n 65) 204.
[88] 'Trial of the Major War Criminals before the International Military Tribunal. Proceedings, Volume XV' (1948) 477.
[89] Telford Taylor, 'Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10' (US Government Printing Office, 15 August 1949) 65.

and Nagasaki.

At the Tokyo Tribunal, however, a different view of international law in its relation to aerial bombing was presented in the famous dissent of Justice Radhabinod Pal. As one of the two Asian judges appointed to determine the responsibility of high-ranking Japanese officials, Pal penned a dissenting opinion of over 700 pages in which he acquitted all of the accused of all of the charges they had been indicted.[90] He slammed the Tribunal's effort to authorise the outlawing of 'aggression' in a world that was still in large part under imperial control. The crime of aggression, in his view, would serve only to consolidate the imperial status quo by criminalising anti-imperial revolts.[91] When it came to the topic of aerial bombing, rather than charging the Japanese leaders for bombing civilian populations – a charge that would invite scrutiny of the American devastation of Japanese cities – the prosecution had charged them for the execution of the allied airmen who had fallen under their control. The charges fell under two heads: i) execution of airmen on trial; and ii) execution without trial. While dismissing the evidence presented in relation to the responsibility of the accused for executions without trial, Pal strongly criticised the allegation that executions on trial had taken place under an *ex post facto* law. With irony, he noted that many of the judges of the IMT and the Tokyo Tribunal had accepted the authority of the victor nations to create *ex post facto* law for the trial of prisoners of war, but refused to accept that Japanese authorities could have the power to create regulations for the trial of allied airmen.[92]

After reviewing the interwar efforts to establish rules on aerial bombing and analysing the 1923 Hague Rules, Pal argued that 'leaving aside the case of bombardment by atom bomb, even in using ordinary bombs, the suggested rules of bombardment were not at all heeded'.[93] He thus concluded that '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'.[94] But the most poignant reprimand in his dissent came as a comment on the hypocrisy of the Allies:

> We should not fail to remember that the real horror of the air warfare is not the possibility of a few airmen being captured and ruthlessly killed, but the havoc which can be wrought by the indiscriminate launching of bombs and projectiles. The conscience of mankind

[90] Radhabinod B Pal, *International Military Tribunal for the Far East: Dissentient Judgment of Justice Pal* (Kokusho-Kankokai, 1999) 697.
[91] Adil Hasan Khan, 'Inheriting a Tragic Ethos: Learning from Radhabinod Pal' (2016) 110 *AJIL Unbound* 25, 27.
[92] Pal (n 90) 678–679.
[93] Ibid 681.
[94] Ibid.

> revolts not so much against the punishment meted out to the ruthless bomber as against his ruthless form of bombing.[95]

Here was an articulation that placed the question of justice in its relation to aerial bombing in a longer history of imperial violence and in a broader context of all the disasters that had produced suffering in the Pacific theatre of the Second World War. For Pal, the crimes of the Japanese should not erase other atrocities such as the fire-bombing of Japanese cities and the use of nuclear weapons. These disasters, he argued, continued to haunt and structure the present 'international society'. From Pal's dissent 'we can discern a disruptive challenge to the truncated construction of the disaster of the war itself'.[96]

The judges at the International Military Tribunal for the Far East, Justice Pal on the left (1946)
Source: Wikimedia Commons

Justice Pal's dissent notwithstanding, the silence of the post-war trials on strategic bombing provided some credence to what Arthur Harris had said about international law: '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'.[97] If anything, the war did at least provoke a change in wording in Oppenheim's notorious manual *International Law*: *A Treatise*. Whilst in the 6th edition, of 1944, it argued that 'international law protects non-combatants from indiscriminate bombardment from the air; recourse to such bombardment constitutes a war crime',[98] by 1952,

[95] Ibid 682.
[96] Adil Hasan Khan, 'International Lawyers in the Aftermath of Disasters: Inheriting from Radhabinod Pal and Upendra Baxi' (2016) 37(11) *Third World Quarterly* 2061, 2065.
[97] Arthur Harris, *Bomber Offensive* (Pen & Sword Military Classics, 1947) 177.
[98] Lassa Oppenheim and Hersch Lauterpacht, *International Law: A Treatise*, vol 2: Disputes, War and Neutrality (Longmans, Green and Co., 6th ed, 1944) 416.

in the 7th edition, having the devastation of German and Japanese cities at the late stages of the war in mind, it read 'international law protects non-combatants from indiscriminate bombardment from the air directed primarily against them for the purpose of instilling terror or for similar reasons; recourse to such bombardment is unlawful'.[99] Recalling Spaight's arguments, it could therefore be argued that target-area bombing was not directed *primarily* for the purpose of instilling terror, but rather for killing workers who were, after all, legitimate targets.

A comparable view was held by the celebrated international lawyer Hersch Lauterpacht, when writing about the punishment of war crimes. Dealing with 'the question of aerial bombardment of centres of population' all he could claim was that 'the ubiquity and indefiniteness…of legitimate objectives' made it difficult to answer the question of the legitimacy of aerial bombardment by way of criminal prosecutions against individuals, except – and here he shows his bias – for 'clearly criminal acts unrelated to the major aspects of disputed rules, such as deliberate machine-gunning of civilian refugees or, possibly, such acts of mere terrorism and frightfulness as the bombardment of Rotterdam in April 1940'.[100] The failure of the post-war international criminal tribunals and of international lawyers to come to terms with the strategic bombing campaigns of the Second World War would leave a lasting legacy. Until the 1970s, Western states avoided and delayed the creation of legal protections for civilians against aerial bombing, clinging to 'the "total war" belief that their combat practices and weapons use should remain unburdened'.[101]

4.7 The Geneva Conventions of 1949 and aerial bombing

The Geneva Conventions of 1949 are frequently regarded as a response to the horrors and atrocities experienced during the Second World War. In contrast to the Hague Conventions, which focused on the conduct of hostilities, the 'Geneva law' is said to emphasise the protection of the victims of war.[102] For the first time, a whole convention was dedicated solely to the

[99] Lassa Oppenheim and Hersch Lauterpacht, *International Law: A Treatise*, vol 2: Disputes, War and Neutrality (Longmans, Green and Co., 7th ed, 1952) 526.
[100] Hersch Lauterpacht, 'The Law of Nations and the Punishment of War Crimes' (1944) 21 *British Yearbook of International Law* 58, 75.
[101] Giovanni Mantilla, 'Conforming Instrumentalists: Why the USA and the United Kingdom Joined the 1949 Geneva Conventions' (2017) 28(2) *European Journal of International Law* 483, 510.
[102] Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94(2) *American Journal of International Law* 239, 243.

protection of civilians.[103] Yet despite superficial appearances, there is little in the Geneva Conventions to protect civilian populations from aerial bombing. In fact, aerial bombing was once again avoided as a topic for regulation and restraint by international law.

The civilians protected by Geneva Convention IV are not the 'civilian population' as a collective group, subject to aerial bombing, as initially devised in the 1923 Hague Rules. Rather, the Convention conceives civilians in individualistic terms, referring to them as 'protected persons'. Article 4 defined protected persons as 'those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals'.[104] This provision not only restricted protection based on nationality, but, crucially, it excluded those who, not being 'in the hands' of an enemy power or in occupied territory, were more likely to be victims of aerial bombing. To be fair, Part II of the Convention did claim to provide some protection to 'the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion'.[105] Yet an analysis of the provisions in Part II shows that the protection provided to this seemingly broader class of civilians is 'modest and guarded in its terms'.[106] To the extent that they can be said to provide some additional protection, it is limited to the civilian sick and infirm, the old, children, and expectant mothers[107] – a reflection of an older conception of non-combatants that emphasised gender, age, motherhood, and an idea of innocence from a time before the advent of the airplane. Nothing in these provisions offered any added legal protection against aerial bombing. Geneva Convention IV may have considerably advanced the legal protection to civilian persons outside actual military operations. Yet 'it stands in direct contrast with the uncertain legal protection of the civilian from the effects of modern operations' as Colonel Draper affirmed in his course on the Geneva Conventions at the Hague Academy of International Law.[108]

To comprehend such astonishing gap in the Geneva Conventions, we must remember that 1945 marked the end of the Second World War, but not the end of violent conflicts involving Europeans around the globe. On May 8, 1945, the day that the war in Europe ended, the French started the repression of the Sétif insurrection, which lead to the massacre of some 40,000

[103] *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Adopted 12 August 1949, 75 UNTS 287 (Entered into Force on 21 October 1950)* ('*Geneva Convention (IV)*').
[104] Ibid article 4.
[105] Ibid article 13.
[106] G I. A. D. Draper, *The Geneva Conventions of 1949*, vol 114 (Brill, 1965) 124.
[107] *Geneva Convention (IV)* (n 103) articles 14 and 16.
[108] I. A. D. Draper (n 106) 139.

Algerians. In Greece, a protracted and violent civil war broke out. Over 100,000 Dutch soldiers were sent to crush uprisings in Indonesia in 1947 and 1948, and thousands of French troops and almost half a million Vietnamese died between 1946 and 1954 in the First Indochina War. Having barely returned from the European conflict, Britain sent its troops to reconquer its colonial possessions, fighting counterinsurgency campaigns in Malaya, Kenya, Palestine, Cyprus, and South Yemen. Meanwhile, India's independence and partition engulfed it in mass bloodshed.[109] In such context, the post-war trials and the debates on the revision of the laws of war proposed by the International Committee of the Red Cross (ICRC) were not just about the horrors of the Second World War, but 'were very much prospective, crucially involved in outlining new military doctrines and methods of combat for the myriad lingering conflicts in which the main actors of these trials and debates were implicated'.[110]

Invigorated by the discourse of human rights and dignity as means of condemning Nazi atrocities, the ICRC played an instrumental role in reviving drafts for a convention on the protection of civilians.[111] Meanwhile, in the aftermath of Nazi occupation, continental European states had radically shifted some of their attitudes towards the protection of civilians in wartime. The debates in Stockholm and in Geneva from 1947 to 1949 that led to the Geneva Conventions thus saw a clash between continental Europeans that sought greater protections for civilians in occupied territory and for partisans fighting against aggressors, and their Anglo-American allies, who had their own security interests as occupiers in Germany, Japan, Palestine and in their colonies as a priority. Both sides ended up getting a little of what they sought. The continental Europeans managed to include stronger protections for civilians in occupied territory in the 1949 Geneva Conventions, while the British and Americans successfully fended off all attempts to provide legal protection to victims of air bombing.[112]

Even within the ICRC, the more ambitious proposals for protecting civilian populations from aerial bombing were shut down in order not to upset Anglo-American sensibilities. Jean Pictet, one of the main actors behind the push the revision of the laws of war, had been deeply disappointed by the silence of the Nuremberg trials on the topic of aerial bombing. He endorsed

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[109] Pieter Lagrou, '1945-1955: The Age of Total War' in Frank Biess and Robert G Moeller (eds), *Histories of the Aftermath: The Legacies of the Second World War in Europe* (Berghahn Books, 2010) 287, 288; see also Roger Vétillard, *Sétif, Mai 1945, Massacres En Algérie* (Éditions de Paris, 2008); Caroline Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (Pimlico, 2005); Ira Pande and India International Centre (eds), *The Great Divide: India & Pakistan* (Harper Collins, 2009).
[110] Lagrou (n 109) 289.
[111] Boyd van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions' (2018) 112(4) *American Journal of International Law* 553, 566–567.
[112] Ibid 571.

a special Red Cross resolution aimed at protecting not only civilians as individuals, but the civilian population as a collective subject 'against all *armes aveugles*, such as atomic and carpet bombing'.[113] Yet the head of the ICRC's Legal Division at the time, believing such a resolution would antagonise the British and the Americans and possibly derail the convention on the protection of civilians, ultimately dismissed Pictet's suggestion.[114]

At the Diplomatic Conference in Geneva in 1949, having only joined negotiations at the latest stage, the Soviet Union took the opportunity to try to embarrass the British and Americans by assuming the role of a 'great humanitarian'.[115] It focused its efforts on proposals to introduce a number of provisions criminalising the 'extermination of civilian populations', indirectly referencing the strategic and atomic bombings of the Second World War.[116] Recent scholarship on the understated role played by the Soviet Union and the Eastern Bloc in the formation of the Geneva Conventions shows that the Western Bloc's opposition to the Soviet proposal was 'caused by a major concern, especially among their military officials who feared losing a strategic military capability and their dominance in United Nations disarmament talks'.[117] Ultimately, the impetus to change norms and to establish legal protections against strategic bombing after the war proved feeble and short-lived. Engagement in colonial conflicts, occupation, and in the development of new technologies of aerial bombing limited recourse to international law as a retrospective discourse on the unlawfulness of certain atrocities committed during the Second World War.[118]

4.8 Conclusion

Allied bombing during the Second World War killed an estimated figure of 800,000 civilians, most of which were the victims of deliberate attacks on urban areas.[119] In Europe, not only Germans but at least 60,000 Italians, 53,600 French, 12,000 Belgians, and 8,000 Dutch and many other thousands of Bulgarians and Romanians were victims of Allied aerial bombing. The firestorm generated by Operation Gomorrah in a single night in July 1943 was ignited by five

[113] Quoted in ibid 569.
[114] Ibid.
[115] Boyd van Dijk, "'The Great Humanitarian": The Soviet Union, the International Committee of the Red Cross, and the Geneva Conventions of 1949' (2019) 37(1) *Law and History Review* 209.
[116] Ibid 228.
[117] Ibid.
[118] Lagrou (n 109) 291.
[119] Grayling (n 12) 6.

kilotons of explosives. After the atomic bombs dropped on Hiroshima and Nagasaki, the power of aerial bombing began to be measured in megatons.[120]

Looking at how the idea of distinction in the laws of war was deployed during that conflict to justify this massive bombing campaign sheds light on the assumptions behind the philosophy of bombing. In the writings of international lawyers, as illustrated by the work of James Molony Spaight, the dissection of the category of the civilian population into different classes allowed workers to be assimilated to combatants. If the whole civilian population was eventually bombed, it was the working class in particular that was targeted or that in any case justified the bombing of entire cities. In the age of total war, it was arguably not the whole population of the enemy nation that had become a target, but mostly the industrial workers who sustained the economy.

No other nation put as much effort into strategic bombing during the war as did Britain, and in the writings of British lawyers and legal advisers the dissection of the civilian population into a targetable working class and a residue of innocent bystanders is most evident. On the other hand, if later in the war the United States air forces joined the RAF in directing their attacks to city areas, most notoriously over Berlin, Dresden and other big cities in early 1945, they never professed to be targeting workers themselves. At this point, however, the Americans were also carrying out the fire-bombing of Japanese cities and 'burning to death 100,000 civilians in one night', a campaign that would end with the dropping of the atomic bombs.[121] The main standpoint upon which legal justifications for these bombings were based was the concept of military objectives, as industrial centres fell under this category. The concept had not been incorporated into any treaties and it would take more than thirty years until it was codified in the Additional Protocols of 1977 to the Geneva Conventions.[122] Looking back at the justifications for the strategic bombing campaigns of the Second World War, it is perplexing that this concept outgrew its origins in total war to become one of the foundations upon which

[120] Adam Tooze, 'Book Review: "The Bombers and the Bombed" by Richard Overy', *The Wall Street Journal* (14 February 2014) <https://www.wsj.com/articles/to-break-an-enemy8217s-will-1392417564>.
[121] In a fascinating interview, Robert McNamara, United States Secretary of Defence during the height of the Vietnam war, commented: 'what one can criticise is that the human race prior to that time, and today, has not really grappled with what are called the rules of war. Was there a rule that said you shouldn't bomb, shouldn't kill, shouldn't burn to death a hundred thousand civilians on a night?' in Errol Morris, *The Fog of War - Eleven Lessons from the Life of Robert S. McNamara* (Sony Pictures Classics, 2003).
[122] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Opened for Signature 8 June 1977, 1125 UNTS 3 (Entered into Force 7 December 1978) articles 48 and 52(2) ('Additional Protocol I').

modern international humanitarian law is built.[123] We see both in the British and American justifications of strategic bombing how the idea of distinction and the concept of military objectives, two pillars of the law of armed conflict, were interlaced and used as arguments for vindicating area bombing.

The history of strategic bombing and international law during the Second World War shows how doctrines about the moral effect of bombing combined with racist assumptions, class difference, and broad interpretations of military objectives to justify killing from the air in a colossal scale. The Geneva Conventions of 1949 did little to change this state of affairs. The legacy of total war outlived the end of the conflict and persisted in international legal discourse as well as in military culture. It is for instance well known that the United States military forces' view of international humanitarian law still includes very wide interpretations of the concept of military objectives, especially through the understanding that military advantage 'may involve… economic targets of the enemy that indirectly but effectively support and sustain the enemy's war fighting capability'.[124] It was also not too long ago that official US air force doctrine explicitly referred to strategic attack as producing effects to *demoralise* the enemy's population and their *will to fight*, citing as examples World War II and Operation Desert Storm.[125]

Perhaps another conclusion would be to see in the interaction of international law and the bombing campaigns of the Second World War some of the perils and limitations of international humanitarian law in general and of the principle of distinction and the concept of military objectives in particular. In other words, it compels us to see how the language of international law can become 'a public and technical discourse for the defence of the killing of the innocent'.[126] From this point of view, we might question the desire of many contemporary international lawyers to bring law to bear on the problem of war, a desire which obstinately relies on the protection of civilians,[127] overlooking the history of the debates about aerial bombing and distinction, as shown in the case of World War II.

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[123] On why and when the law of war became known and morphed into international humanitarian law (IHL) see Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26(1) *European Journal of International Law* 109.
[124] US Navy, US Marine Corps and US Coast Guard, 'Annotated Supplement to the Commander's Handbook on the Law of Naval Operations' (1997) para 8.1.1.
[125] USAF, 'Air Force Basic Doctrine Document 1, September 1997.' 51.
[126] Martti Koskenniemi, 'Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons' [1997] (10) *Leiden Journal of International Law* 137, 152.
[127] Mark Neocleous, 'Red and Dead: Reply to Critics' (2015) 3(2) *London Review of International Law* 353, 361 ('Red and Dead').

5. The Politics of Proportionality: Vietnam, aerial bombing and the Additional Protocols

> The war in Vietnam cannot be considered dispassionately; the conscience of civilised man living in the second half of the twentieth century, despite, or perhaps because of the horrors of war this century has experienced, instinctively revolts against the military attempt of a Great Power to annihilate a poor people, whatever the strictly formal reasons which provide a cover for it may be.[1]
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> The passage of time and the preoccupation with present security challenges have led to an unfortunate neglect of the Vietnam precedent, which retains an extraordinary relevance, especially for the development of American thought and practice relative to military intervention in foreign societies.[2]

This chapter examines the Vietnam War as the backdrop to the long debates and conferences that led to the conclusion of the Additional Protocols of 1977 to the Geneva Conventions. I argue that the 1960s and early 1970s offered radically different views of the laws of war than those established almost exclusively by Europeans until then. Anticolonialists fighting wars of national liberation both invoked the laws of war to expose the hypocrisy of imperialists who had established them and to call for radical reforms in this area of law. Rather than asking how to incorporate aerial bombing within the rules of land or sea warfare, anticolonialists denounced the atrocities committed by technologically superior nations to civilians and movements fighting for national liberation. They presented one of the most promising, but ultimately failed, attempts to rewrite the laws of war. Instead of placing the Vietnam war and the conferences of the 1970s

[1] Charles Chaumont, 'A Critical Study of American Intervention in Vietnam' in Richard A Falk (ed), *The Vietnam War and International Law* (Princeton University Press, 1969) 127, 127.

[2] Richard A Falk, 'Why the Legal Debate on the Vietnam War Still Matters: The Case for Revisiting the International Law Debate' in Stefan Andersson (ed), *Revisiting the Vietnam War and International Law: Views and Interpretations of Richard Falk* (2017) 388, 388.

as catalysts for progress in the laws of war, I trace many of the paradoxes and deficiencies of our contemporary international law of armed conflict to the ideological and institutional transformations that began in that period. The failure of more radical changes to the laws of war and the growing dismissal of international institutions marked the closure of a historical moment that had made a vision of anticolonial worldmaking possible.

5.1 Bombing Vietnam

By the end of 1972 the United States had completed seventeen years of involvement in the Vietnam War. From 18 to 29 December of that year, President Nixon ordered a 'maximum effort' bombing campaign of North Vietnam aimed at destroying major targets in Hanoi and Haiphong. Operation Linebacker II, which came to be known as 'the December raids' and 'the Christmas bombings', saw the largest heavy bomber strikes launched by the United States since the end of World War II. The ultimate goal was to force the North Vietnamese back to the negotiating table, allowing the United States to achieve 'peace with honour'. In order to do so, Nixon warned then Chief of Staff Admiral Thomas H. Moorer: 'I don't want any more of this crap about the fact that we couldn't hit this target or that one. This is your chance to use military power effectively to win this war'.[3]

During the eleven days of bombing, B-52 airplanes dropped 15,237 tons of bombs, causing 1,318 civilian deaths and 1,216 wounded in Hanoi.[4] Given the concentration and intensiveness of the bombing, the number of civilian casualties was relatively low – partly due to the fact that evacuations from the capital had been carried out before and throughout the campaign. Despite this fact, more than a quarter of Hanoi's housing stock was destroyed, leavings tens of thousands homeless.[5] It was the most concentrated aerial bombing attack inflicted on any country up until that time, and it shocked the world at a time when a peace agreement was looming. The *Washington Post* characterised the attacks as 'the most savage and senseless act of war ever visited, over a scant ten days, by one sovereign people upon another'.[6]

[3] John Morrocco, *Rain of Fire: Air War, 1969-1973* (Boston Pub. Co, 1985) 147.
[4] Mark Clodfelter, *The Limits of Air Power: The American Bombing of North Vietnam* (Free Press ; Collier Macmillan, 1989) 195.
[5] Mark Bradley, *Vietnam at War* (Oxford University Press, 2009) 130.
[6] Editorial of 28 December 1972, quoted in Mark Clodfelter, *The Limits of Air Power: The American Bombing of North Vietnam* (Free Press ; Collier Macmillan, 1989) 191.

Air power appeared to have accomplished the goals pursued by the United States. Henry Kissinger proclaimed that the bombings 'speeded the end of the war' and Nixon was satisfied that the air force had done its job.[7] After years of unsuccessful struggle in Vietnam, Operation Linebacker II seemed to vindicate strategic bombing as a political tool. American civilian and military leaders claimed that the bombing forced the North Vietnamese to reach an agreement, and in less than a month after the bombings the Paris Peace Accords 'Ending the War and Restoring Peace in Vietnam' were signed.

The huge amount of destruction notwithstanding, it would be going too far to concede that strategic bombing had proved its value and that aerial bombing had brought the war in Vietnam to an end. North Vietnam had refused to negotiate while bombing took place. When it stopped, they made no new concessions and the final agreement allowed North Vietnam to keep their army in the South.[8] The ceasefire gave them time to regroup and to rebuild their army. Nixon's willingness to defend South Vietnam after the ceasefire was never tested. Two years later, on 30 April 1975, the People's Army of Vietnam entered Saigon, united the country and put an end to one of the longest wars of decolonisation of the last century.

5.2 The Vietnam war and international law

The Vietnam war was until recently the longest war in the history of the United States. It has now been overtaken by the war in Afghanistan or, more generally, by the 'war on terror', in which aerial bombing has played perhaps an even larger strategic function. Both in political and in international legal discourse, there are a number of parallels but also significant differences in the way we write and talk about those two conflicts. Many contemporary legal questions concerning intervention, the selection of targets, the permissibility of collateral damage and the protection of civilians are similar to those faced during the Vietnam war. Yet the vocabulary we have become accustomed to using when we refer to these questions was not as natural or as consensual then as it is today. During the 1960s and 1970s, international lawyers writing about the war in Vietnam were very much aware of the competing visions of world order and of justice and injustice of war that divided Western, Eastern and the Non-Aligned blocs.[9] They were

[7] John T Smith, *The Linebacker Raids: The Bombing of North Vietnam, 1972* (Cassell, 2000) 138.
[8] Ibid 173–174.
[9] Anne Orford, 'Moral Internationalism and the Responsibility to Protect' (2013) 24(1) *European Journal of International Law* 83, 91.

keenly attentive to the impact and demands that newly independent states had upon the traditional concepts and ideas in international law.[10] This sensitivity to different visions of international law and order and awareness of conflicting projects of worldmaking has been somewhat lost since the 1990s. As the second decade of the twenty first century comes to a close, the challenges to the hegemony of the 'liberal international order' may be an opportune moment for international lawyers to take up again the sense of conflict and struggle inherent in different visions of worldmaking, making this an opportune moment to revisit the struggles over international law during and after the conflict in Vietnam and neighbouring countries.[11]

In this chapter I look at how the Vietnam war, one of the most prominent struggles for decolonisation and national liberation in the twentieth century, played a fundamental role in fostering changes in how international law regulated aerial bombing. I argue that the 1960s and early 1970s offered radically different views of the laws of war than those established almost exclusively by Europeans until then. Anticolonialists fighting wars of national liberation both invoked the laws of war to expose the hypocrisy of imperialists who had established them and to call for radical reforms in this area of law. Alongside the Vietnam war, the Algerian war of national liberation was a landmark in the invocation of the Geneva Conventions by a national liberation movement against a colonial power. The successful campaign of the Algerian Liberation Front in using international law and institutions to delegitimise French colonialism demonstrated the potential of the laws of war as standards that could be held up against colonial powers.[12] The Vietnam war further intensified debates about the laws of war and perhaps more than any other conflict of that time exposed its limitations and its controversial character. The prolonged and colossal bombing campaigns that so conspicuously marked this conflict coincided with a number of conferences and calls for revision of the laws of war. The war was in fact still under way by the time countries began officially debating the Additional Protocols to the Geneva Conventions in 1974.

The years that followed the end of the conflict, more specifically the late 1970s, marked a nodal point in time when concepts and ideas that had been evoked since the early days of aviation

[10] See the course given at The Hague Academy of International Law by Richard Falk: Richard A Falk, *The New States and International Legal Order*, vol 118 (Brill, 1966).
[11] The argument that this is a creative moment for international law, where political struggles and conflicting views of world order are becoming more evident, see "'I Want to Put the Social Question Back on the Table" - An Interview with Anne Orford', *Opinio Juris* (27 November 2019) <http://opiniojuris.org/2019/11/27/i-want-to-put-the-social-question-back-on-the-table-an-interview-with-anne-orford/>.
[12] Mohammed Bedjaoui, *Law and the Algerian Revolution* (International Association of Democratic Lawyers, 1961); Algerian Office, *White Paper on the Application of the Geneva Conventions of 1949 to the French-Algerian Conflict* (May 1960).

were invoked, reinterpreted and incorporated into the laws of war. The Additional Protocols to the Geneva Conventions, signed on 8 June 1977, codified for the first time in a binding document a number of concepts which had developed in synchrony with aerial warfare. In contrast to the Geneva Conventions of 1949, where the topic of aerial bombing was ultimately avoided, during the negotiations of the Additional Protocols it became a major issue, no doubt due to the experience of national liberation movements and wars of decolonisation. Concepts such as military objectives, civilian objects and civilian population, proportionality, precaution and the idea of collateral damage were debated and incorporated into Additional Protocols I and II.[13]

That period also anticipated and reconfigured our contemporary questions about aerial bombing and collective violence more generally. In retelling this story, I draw attention to how the anticolonial account of the laws of war marked a radical break from the European views about regulating warfare and international violence. It offered a different account of how new weapons and technologies should be regulated and challenged the reigning views about the inevitability and legitimacy of aerial warfare. Rather than asking how to incorporate aerial bombing within the rules of land or sea warfare, anticolonialists denounced the atrocities committed by technologically superior nations to civilians and movements fighting for national liberation. They called for the ban of weapons such as napalm, cluster bombs and defoliants as well as of methods of bombing that included devastating whole areas or establishing 'free fire zones'. This narrative challenges the view that the laws of war concerning aerial bombing evolved naturally towards a more protective or humanitarian framework as a continuing unfolding of vague humanitarian principles established in the nineteenth century. By focusing on the Vietnam war and the debates that followed it, we can uncover the rise and fall of the most radical challenge to date to international law concerning aerial bombing.

This story is also about how this radical challenge was part and parcel of a broader project of anticolonial worldmaking whose vision fell into crisis by the late 1970s.[14] With most wars of decolonisation having ended in the previous two decades and new states facing the contradictions and the unstable character of postcolonial independence, a lot of the material

[13] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Opened for Signature 8 June 1977, 1125 UNTS 3 (Entered into Force 7 December 1978)* ('*Additional Protocol I*') articles 48-52; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Opened for Signature 8 June 1977, 1125 UNTS 609 (Entered into Force 7 December 1978)* ('*Additional Protocol II*') articles 13-17.

[14] Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton University Press, 2019) 29.

and ideological battles had already been won or lost. In the field of the laws of war, most of the disputes were already resolved by 1977, when the Additional Protocols were signed.[15] Anticolonialists, supported by socialist states of the Eastern Bloc and the Soviet Union, won stronger protections for civilians and for guerrilla fighters.[16] On the other hand, the most fundamental questions related to aerial bombing had not yet been resolved by the time the conferences for the revision of the Geneva Conventions got under way. Unlike the victories won by the anticolonialists concerning the recognition of wars of national liberation, the protection of civilians and the expansion of the category of combatants, the Additional Protocols incorporated much of what Western, imperialist and technologically superior states had argued for when it came to aerial bombing.

With the more ambitious projects of anticolonialists waning on the international stage and the increasing concerns about stability and domestic dissent, the radical visions of reform concerning the laws of war had by 1977 lost much of their weight. The bolder proposals to restrict aerial bombing were eventually dropped. The resulting Additional Protocols, notwithstanding the consolidation of a number of victories of anticolonialists, failed to restrict aerial bombing in an effective way. The codification of the principle of distinction and of the prohibition of indiscriminate attacks in the final document were partly aimed at prohibiting saturation bombing of the type that had been practiced in World War II and in Vietnam. However, the incorporation of standards of proportionality and of a particularly wide definition of military objectives marked a victory for those countries that relied on air power and a stringent defeat for revolutionary proposals to reform the laws of war on an anticolonial foundation. In this sense, when it comes to aerial bombing, I look at the Additional Protocols less as a step forward in the restriction of aerial warfare than as a squandered opportunity for anti-imperialist visions of the laws of war and of international justice.

Instead of placing the Vietnam war and the conferences of the 1970s as catalysts for progress in the laws of war, I trace many of the paradoxes and deficiencies of our contemporary international law of armed conflict to the ideological and institutional transformations that began in that period. The failure of more radical changes to the laws of war and the growing dismissal of international institutions marked the closure of a historical moment that had made

[15] Amanda Alexander, 'International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I' (2016) 17(1) *Melbourne Journal of International Law* 34.
[16] On the relevant role of the Soviet Union and the Eastern Bloc since the negotiations of the 1949 Geneva Conventions see Boyd van Dijk, '"The Great Humanitarian": The Soviet Union, the International Committee of the Red Cross, and the Geneva Conventions of 1949' (2019) 37(1) *Law and History Review* 209.

a vision of anticolonial worldmaking possible.[17] In its place, the appropriation by the United States and Western states of a neoliberal version of human rights discourse in the late 1970s, which permeated and seeped into the laws of war, was as much a technique to critique and discredit the promises of decolonisation as a way of taming the legacy of Vietnam and avoiding a true reckoning.[18]

For the more than four decades that followed, debates concerning aerial bombing and international law centred around the interpretation and application of the Additional Protocols. The adoption of its definitions of military objectives, civilian population and of standards of proportionality might appear today as progressive and perhaps inevitable. But to come to this set of conclusions is to evade reckoning with the highly contested character of these concepts and of the promises and ruins of alternative anticolonial visions of the laws of war. In this sense, revisiting the Vietnam war and the debates that led to the Additional Protocols might serve as a reminder that what appeared to be the moment of closure in a long path towards the codification of rules on aerial warfare was also a staging ground for an anticolonial and egalitarian version of what the laws of war could be.

5.3 The most heavily bombed areas on Earth

Operation Linebacker II was only the last of a series of bombing campaigns of North Vietnam that were carried out between 1965-72. During the year of 1965, with a deteriorating situation on the ground, the United states took a crucial step towards escalating the conflict by initiating a policy of sustained reprisal against North Vietnam. President Lyndon Johnson approved Operation Rolling Thunder in February 1965, and by March a campaign which would eventually reach enormous proportions had begun. During its first two years, Operation Rolling Thunder resulted in an estimated 52,000 casualties in North Vietnam.[19] Yet aerial bombing did little to weaken North Vietnam's willingness and capability to continue the war. If anything, it was used domestically to create popular support for the war and internationally it led to many members

[17] Getachew (n 14) 179.
[18] Barbara J Keys, *Reclaiming American Virtue: The Human Rights Revolution of the 1970s* (Harvard University Press, 2014) 3; on human rights discourse in the 1970s and neoliberalism, see Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso Books, 2019); see also Samuel Moyn, *Not Enough: Human Rights in an Unequal World.* (Belknap Press of Harvard Univ. Press, 2019).
[19] Director of Intelligence, Central Intelligence Agency, 'Estimated Casualties in North Vietnam Resulting From the Rolling Thunder Program' (21 May 1967); Clodfelter (n 4) 136.

of the United Nations joining a plea for a cessation of the bombing of North Vietnam as a necessary step toward peace negotiations.[20]

The American government argued that the targets of aerial bombing were carefully selected. The Joint Chiefs of Staff sent a list of possible targets for approval to the White House, where the President would sit down with the Secretary of Defence, the Secretary of State, the National Security Adviser and the Press Secretary on Tuesday luncheons to decide on the targets.[21] Target selection was so important that President Johnson once boasted that 'they can't even bomb an outhouse without my approval'. Curiously, the tradition of 'Terror Tuesdays' – a symbol of Executive control over life and death through air strikes – is one of the legacies that was passed from the Vietnam war down to the Obama and Trump administrations.[22] Similarly to contemporary reports by journalists on the high number of civilian casualties from drone strikes despite the procedures for target selection, it did not take long during the Vietnam war for reports of the damage caused by the bombing campaign to reach the public. If this was a well-known fact for the Vietnamese living in targeted areas, in the United States the reports of *New York Times* journalist Harrison Salisbury from behind enemy lines revealed that the bombing campaign was killing a substantial number of civilians. Questioning Johnson's assertions that the continuous bombing of North Vietnam was 'directed at concrete and steel, and not human life', Salisbury's experience indicated that bombing was never as precise and accurate as claimed.[23] In his book *Behind the Lines*, he reported on how bombing had caused extensive and devastating damage to civilians in North Vietnam.[24] Throughout the rest of the conflict, the damage and casualties caused by aerial bombing were one of the central issues of the antiwar movement.

Significantly, the bombing of North Vietnam was only part of the broader air war in South-East Asia, which was not one but four wars overlapping in time and space. In South Vietnam, air power was mainly used for assisting troops fighting Vietcong and North Vietnamese forces in a conflict characterised as a guerrilla war. Besides ground support, aerial bombing was used in retaliatory destruction of villages and memorably in the indiscriminate use of chemical defoliants

[20] PE Corbett, 'The Vietnam Struggle and International Law' in Richard A Falk (ed), *The International Law of Civil War* (Johns Hopkins Press, 1971) 368.
[21] Timothy N Castle, *One Day Too Long: Top Secret Site 85 and the Bombing of North Vietnam* (Columbia University Press, 1999) 10; Clodfelter (n 4) 85.
[22] Derek Gregory, 'I Don't like Tuesdays...', *geographical imaginations* <https://geographicalimaginations.com/tag/tuesday-lunch/>.
[23] Annessa C Stagner, 'From Behind Enemy Lines: Harrison Salisbury, the Vietnamese Enemy, and Wartime Reporting During the Vietnam War' (College of Arts and Sciences of Ohio University, 2008) 22.
[24] Harrison E Salisbury, *Behind the Lines - Hanoi, December 23-January 7* (Harper Collins, 1967).

and of napalm. One of the iconic images of the conflict was taken on 8 June 1972, after a plane dropped napalm on the village of Trang Bang, in South Vietnam, burning houses and people. As people fled their homes, the photographer Huỳnh Công 'Nick' Út snapped shots of children crying running down a road. In the centre of the photograph that became known as 'The Terror of War' was a nine-year-old girl whose clothes had been burned off and whose expression of terror and pain was on the front pages of major newspapers in the United States the following day.[25]

[REDACTED IMAGE]

Vietnam Napalm 1972
Source: Nick Ut /AP Photo

Whereas bombing Vietnam became a prominent part of the United States strategy, the air war over the most heavily bombed countries in history was conducted for most of its duration *in secret*. To this day, almost fifty years after the United States' withdrawal from South-East Asia, relatively few people are aware that an estimated 2.1 million tons of bombs were dropped on Laos, as much as the combined tonnage dropped by the United States over Germany and Japan during the whole of World War II.[26] It was only surpassed by the 2.7 million tons of bombs dropped over Cambodia, making these two countries the most heavily bombed areas on Earth. The legacy of such colossal bombings is still felt today in the lives of Laotians and Cambodians

[25] Keys (n 18) 48.
[26] Fred Branfman (ed), *Voices from the Plain of Jars: Life under an Air War* (The University of Wisconsin Press, 2nd ed, 2013) 3.

harmed by unexploded ordnance.[27]

The bombings of Vietnam, Cambodia and Laos were closely connected, despite the prominence of the first and the secrecy of the latter. Often, what at the times seemed like a reduction or halt in the bombing campaign was nothing less than a shift in focus. On the evening of 31 March 1968, President Lyndon Johnson gave one of the most important speeches of his life on a nation-wide television announcement from the White House. Before declaring he would not run for another term as President, Johnson claimed he was taking the first step to de-escalate the conflict by substantially reducing the bombardment of North Vietnam. However, as the Pentagon Papers later revealed, the day before Johnson's speech the State Department had sent a cable to U.S. Ambassadors in Australia, New Zealand, Thailand, Laos, the Philippines and South Korea which revealed that due to weather limitations bombing would have to be limited in any case. More importantly, the cable asserted that air power that had been used in North Vietnam could now be diverted to Laos.[28] There was no clear military reason for doing so, other than as stated by a U.S. diplomat 'we had all those planes sitting around and couldn't just let them stay there with nothing to do'.[29] When in March 1970 President Nixon finally admitted the United States had been bombing Laos, he defended the observance of Laos' neutrality by claiming 'the United States has no ground forces in Laos'.[30] Aerial bombing apparently did not count.

In 1969, while working in Laos as an educational adviser, Fred Branfman became one of the first U.S. citizens to realise the scale of the massive air war over Laos. As refugees started flowing into the capital Vientiane from the Plain of Jars, in the north-east of the country, Branfman and his friend Bouangeun Luangspraseuth began interviewing and collecting testimonies in refugee camps. The accounts and drawings they collected were published in a remarkable book in 1972. *Voices from the Plain of Jars* contained vivid first-hand accounts of the war by the people on the receiving end of the bombs, the villagers whose voices provide us a glimpse of the suffering and the impact of aerial bombing upon civilians across South-East Asia.[31]

In his introduction to the essays and drawings contained in the book, Branfman argues that the

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[27] Castle (n 21) 17.
[28] 'The Pentagon Papers, Part IV. C. 7. b. Evolution of the War. Air War in the North: 1965-1968. Volume II' 196.
[29] Montreagle Stearns, testimony to US Senate Committee on Foreign Relations, October 1969, quoted in Fred Branfman (ed), *Voices from the Plain of Jars: Life under an Air War* (The University of Wisconsin Press, 2nd ed, 2013) 36.
[30] Victor B Anthony and Richard R Sexton, *The United States Air Force in Southeast Asia: The War in Northern Laos, 1954-1973* (Office of Air Force History, January 1993) 106, 239.
[31] Branfman (n 26) Reflections on History's Largest Air war, Foreword by Alfred W. McCoy.

bombing of the Plain of Jars marked 'one of the most significant events of the twentieth century: the advent of unilateral and secret U.S. Executive Branch automated warfare'.[32] By automated warfare he meant that the majority of fighting was done by aircraft, not troops. Air power was used 'to take and hold ground by sheer force of aerial bombardment',[33] a precedent that would be repeated in many subsequent wars. The tragedy and trauma of Vietnam led directly to the rise of aerial bombing as the preferential mode of military interventions by the United States and its allies in the decades that followed. Compared to the incessant attention given to the ground struggle in South Vietnam, Laos had been secretly bombed for almost six years in a war conducted mostly by aircraft and on the Central Intelligence Agency's (CIA) authority. The CIA sought to demonstrate that its clandestine air war over Laos was more effective than the disastrous ground campaign that had been going in South Vietnam. When the government ultimately disclosed the bombing of Laos to the American public, it avoided mentioning civilian casualties. The claimed purpose had been an interdiction campaign to stop the flow of people and materials through the Ho Chi Minh Trail. Nonetheless, as Branfman claimed, in north-east Laos aerial bombing targeted mainly villages, for there was little other signs of life that could be seen from above.[34]

Commenting on the air war over Laos, Branfman posed a question that was also confronted by international lawyers in relation to the U.S.'s intervention in Vietnam. Were the bombings justified? This question could be divided into two separate but interrelated points. The first one being 'did the United States have the right to bomb anywhere in Laos?' and the second one 'did the United States have the right to massively bomb civilian targets?'.[35] The answer to the first question reflected one's overall view of the highly controversial character of the United States intervention in South-East Asia. As Richard Falk, one of the most insightful international lawyers since that time incisively put it, traditional international law provided little guidance to governments in defining the circumstances in which intervention in a civil war was permissible.[36] The characterisation of the conflict as an armed attack by one state against another or as a civil war was the central dividing point between those who were for or against the American intervention. Given the disputed interpretation of the facts of the conflict, both sides generally resorted to moral, ideological and political foundations to sustain their case. The debate

[32] Ibid 3.
[33] Ibid xv.
[34] Ibid 6.
[35] Ibid 7.
[36] Richard A Falk (ed), *The International Law of Civil War* (Johns Hopkins Press, 1971) 16.

concerning the legality of the American intervention was as passionate as it was relentless, given how strongly and personally academics, students, journalists and pretty much everyone felt about the war.[37]

But irrespective of one's views on whether the United States had the right to bomb Laos, Cambodia or Vietnam, Branfman stated that the answer to the second question was an unambiguous no. He argued that the bombing of civilians in Laos was both immoral and illegal and that international law clearly prohibited the bombing of undefended towns and villages.[38] The United States had not argued or tried to defend that the bombing of civilian targets was legal, but simply denied that they had done so. Yet the huge disparities in resources and technology between the parties to the conflict led many to question whether the strategy and the weapons used by the United States caused destruction and civilian casualties that were disproportionate to the military effort. This was particularly the case in relation to strategic aerial bombing against dispersed targets of little military value.[39]

5.4 The Laws of War and the Bombing of South-East Asia

The role of air power in modern armed conflicts had gone a long way from its early stages in the Italian invasion of Libya, through two world wars, to Vietnam. Yet by the early 1970s there was still surprisingly little in international law that specifically regulated air operations in wartime. The two Hague Declarations on the launching of projectiles and explosives from balloons and article 25 of the 1907 Hague Convention respecting the laws and customs of war on land, which had been drafted specifically to include aerial bombing in its scope, remained the only provisions that ever came into force.[40] Despite the paucity of conventional rules, there were vigorous debates concerning the legality of aerial bombing in South-East Asia.

What distinguished the air war in Vietnam from previous conflicts was the excessiveness and the virtually unilateral character of the bombings. The Soviet Union provided North Vietnam with ground-to-air missiles, fighter planes and radar systems, but the limited defence capability

[37] Naz K Modirzadeh, 'Cut These Words: Passion and International Law of War Scholarship' (2019) 61 (forthcoming) *Harvard International Law Journal* 45.
[38] Branfman (n 26) 7.
[39] Richard A Falk, 'International Law and the United States Role in the Viet Nam War' (1966) 75(7) *Yale Law Journal* 1122, 1144.
[40] Desaussure Hamilton, 'The Laws of Air Warfare: Are There Any?' in Richard A Falk (ed), *The Vietnam War and International Law* (Princeton University Press, 1976) 304, 307.

remained immensely disproportionate to the practically unlimited attack potential of the United States Air Force. The air war was also unilateral in the sense that the bombing of Vietnam did not give rise to an equivalent retaliation.[41] Bombing was limited, as the Americans claimed, only when measured against the vast destructive power of the United States, who feared further escalation would bring China and the Soviet Union more directly into the conflict. Nevertheless, as the war progressed restrictions on the areas and targets bombed were gradually relaxed, culminating in the Christmas bombings of 1972.

The American government initially justified the bombing of North Vietnam as a reprisal for Vietcong attacks on United States air bases. President Johnson declared that the bombing had the goal of imposing a penalty on North Vietnam.[42] With the passage of time, the claims of reprisal were merged with the broader American claim of collective self-defence of South Vietnam.[43] These claims related to the legality of the use of force by the United States were, of course, immensely contested. It is not the aim of this chapter to analyse them, but regardless of one's view on the use of force, the United States could not ignore the laws of war related to aerial bombing.

Two main issues stood out in relation to the legality of aerial bombing in South-East Asia. The first was the permissible scope of the concept of the military objective. Closely related to the definition of military objectives was the question of proportionality: how many casualties and how much material destruction was acceptable in relation to the military advantage obtained? Defining military objectives was not enough; one needed to establish whether it would be acceptable to cause harm to civilians even if the targets of aerial bombing were military objectives, and if so, how much damage would be too much damage. The second issue which gained prominence in Vietnam was the choice of weapons employed in aerial bombing. In this section I analyse each of these issues and how they were considered during the course of the Vietnam war.

[41] Henri Meyrowitz, 'The Law of War in the Vietnamese Conflict' in Richard A Falk (ed), *The Vietnam War and International Law* (Princeton University Press, 1969) 516, 550.
[42] 'Department of State Bulletin, March 27, 1967' 515.
[43] For the American point of view on the use of force in Vietnam see the Department of State Memorandum of March 8, 1966, to the Senate Committee on Foreign Relations, see also John Norton Moore, 'International Law and the United States Role in Viet Nam: A Reply' (1967) 76(6) *The Yale Law Journal* 1051; For the opposing view, see Richard Falk, 'International Law and the United States Role in Viet Nam: A Response to Professor Moore' (1967) 76(6) *The Yale Law Journal* 1095.

5.5 Military objectives, Proportionality and Civilian Casualties

Inherent in the problem of defining military objectives is the question of whether, and how, in air warfare, can the distinction between combatants and non-combatants be made. By the 1960s there was enough agreement and practice to state that military barracks, camps, supply depots, military ports and airfields, arms factories and military convoys were all legitimate military objectives. There was also an emerging consensus that launching attacks against the civilian population *as such* was prohibited. This principle had been laid down by the ICRC at the Vienna conference of 1965 and was reaffirmed in UN General Assembly Resolution 2444, adopted unanimously on 13 January 1969. The sticking point, however, was defining the limits or the 'border' between military objectives and the civilian population. Evoking justifications for area bombing during the Second World War, international lawyers argued over whether there was an intermediate or middle category – the so-called 'quasi-combatant' – which would comprise the industrial or auxiliary work force of the enemy within the scope of the military objective. Doubts also existed over the status of 'mixed targets', installations and buildings whose primary purpose is to serve the needs of the civilian population but that can also be utilised for military purposes. Amongst these mixed targets are railway stations, roads, bridges, power plants, fuel storage facilities, and similar objects.

A prominent example of a mixed target during the Vietnam war was the port city of Haiphong and its oil storage facilities, which for a long period had been spared bombing by the U.S. until it was targeted during Operation Linebacker II. Yet it was the targeting of villages accused of harbouring the Vietcong in South Vietnam, and of bridges, factories, stations and railroads in North Vietnam that drew the strongest critiques of American bombing. After the experience of the Second World War, it was difficult to ignore that the heavy bombing of populated areas would kill civilians and destroy their residences, even if the targets were considered to be military objectives. Former bomber pilot-turned-international lawyer Hamilton Desaussure posed the question in striking terms: is the Vietnamese hamlet to be compared with the Abbey of Monte Cassino in World War II? Is the village which feeds, supports and shelters the Vietcong to be equated to the large industrial cities of the Ruhr Basin in World War II?[44] In Vietnam, area or saturation bombing had been reintroduced, only that this time the target was the vast jungle canopy which served as a protective shelter to Vietcong and North Vietnamese forces and communication lines. North Vietnam was a small and mostly agricultural country where

[44] Hamilton (n 40) 309–310.

authentic military targets were relatively few and could be quickly eliminated. As bombing progressed, inevitably mixed objectives became the targets, and more and more installations which served the daily needs of the civilian population were bombed. In some areas, as in the Plain of Jars in north-eastern Laos, it could hardly be said that there were any proper military objectives being targeted as for years American planes bombed villages and buildings that had no tangible military value.

The bombing in South Vietnam faced a similar but distinct challenge. There, the regions controlled by the Vietcong and by the Americans and the South Vietnamese army were constantly changing. The extreme mobility of the front meant that in practice it was hard to distinguish the zone of military operations from strategic bombing behind the enemy lines. If the Americans alleged that only defended localities were bombed in order to facilitate the taking of these localities, it was often the case that the mere presence of Vietcong forces in an area – real or imagined – or the presence of arms hidden in homes was deemed sufficient to constitute the area as a target.[45] As a result, in South Vietnam, even more than in the North, a strategy of *devastation* by means of aerial bombing and artillery fire was practiced. If the Americans could not occupy an area taken by the Vietcong, they would prevent this area from falling again into the enemy's hands by razing it. This strategy of devastation stretched the concept of the military objective beyond limits that the public could accept. Despite the American insistence, in the words of then Secretary of Defence Robert McNamara, that 'no US aircraft have been ordered to strike any civilian targets at any time' and that 'United States policy is to target military targets only',[46] it was clear even to some U.S. Congress members that 'perhaps thousands' of villages had been destroyed by American air power.[47]

The debate about the scope of the concept of military objectives had clearly shifted from the Second World War to Vietnam. Whilst the saturation bombing of industrialised cities in Germany and Japan in an all-out confrontation may have been seen as acceptable, the asymmetry of a technologically advanced hegemon such as the U.S. employing area bombing against a small, agricultural-based country led many to see the air strikes as analogous to other war crimes that had been perpetrated by the United States' forces. In this sense, the U.S. air strikes could be compared to the My Lai massacre, one of the most egregious mass murders of

[45] Meyrowitz (n 41) 555.
[46] Report of Secretary McNamara to House Armed Services Committee, February 1966.
[47] Hamilton (n 40) 312.

unarmed Vietnamese civilians which sparked war crimes investigations in the United States.[48]

Telford Taylor, who had been involved in the Nuremberg trials, invoked the memory of Nazi crimes to describe how far American values had sunk in Vietnam. In his book *Nuremberg and Vietnam: An American Tragedy*, he placed eyewitness accounts of the massacres committed by the Germans against the Jews in the 1940s side by side to accounts of the events of My Lai in 1968.[49] Even though he had been an early supporter of the American intervention in Vietnam as 'an aggression-checking undertaking in the spirit of the United Nations Charter', it was mainly the escalation of the aerial bombing campaign, which he argued changed the nature, scale and effect of the intervention, that made him change his mind about the war:

> How could it ever have been thought that air strikes, free-fire zones and a mass uprooting and removal of the rural population were the way to win 'the allegiance of the South Vietnamese'? By what mad cerebrations could a ratio of 28 to 1 between our investments in bombing and in relief for those we had wounded and made homeless, have even been contemplated, let alone adopted as the operational pattern?[50]

But Taylor found that his application of the Nuremberg principles to the war in Vietnam led to an awkward result when it came to aerial bombing. After all, the Nuremberg and Tokyo judgments had been silent on the subject of aerial bombardment.[51] There was no basis for war crimes charges based on the bombing of North Vietnam, he reasoned, rejecting the Vietnamese claims that American pilots were war criminals under the Nuremberg precedents. When the moral repugnance of the bombing campaign confronted the state of the laws of war, Taylor concluded that 'if the silence of Nuremberg answers no questions about what "ought" to be the law, it certainly asks them'.[52] He could not go as far as stating that the air war in Vietnam was generally illegal, but he noted that it was one thing for the U.S. to have bombed large industrial areas in World War II to cripple the enemy's war-making capability, and quite another to demarcate large free strike zones suspected of guerrilla activity, where pilots ought to be held to the same standards of distinguishing combatants from non-combatants as the infantryman using his gun.[53]

The definition and scope of what constituted military objectives, and therefore the dividing line

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[48] Twenty-six soldiers were charged with criminal offences for the My Lai massacre, but only Lieutenant William Calley Jr. was convicted. He was found guilty of killing 22 villagers and was given a life sentence, but only served three years and a half under house arrest before being released.
[49] Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Quadrangle Books, 1970) 124–125.
[50] Ibid 206–207.
[51] The exception was Judge Radhabinod Pal's lone dissenting opinion in the Tokyo Trials in which he argued that the Allies were culpable for the strategic bombing of civilian targets.
[52] Taylor (n 49) 142.
[53] Ibid 147.

between legitimate and illegitimate targets for aerial bombardment, had not yet been settled in international law during the Vietnam war. But throughout the conflict it had become clear that the only argument open to the United States was that whatever it was that they were bombing they were only targeting military objectives. It had become impossible to argue, as the British had done during the Second World War, that the civilian population and its morale had been targeted. Moreover, it was not enough to argue that only military objectives were being targeted, for the indirect damage caused to civilians also needed a legal justification. The arguments over the proportionality of the damage caused to the goals pursued thus became a fundamental aspect of the legality of bombing in Vietnam.

A complicating factor was the notable difficulty in defining the American goals as the war progressed and how much bombing was contributing towards their achievement. Richard Falk claimed the United States effort combined ineffectual with excessive force.[54] The use of aerial bombing as reprisals for North Vietnam's involvement in the war in the South was ultimately ineffective both in breaking North Vietnam's will to fight and in stopping the flow of combatants and materials to the South. How then could increasing numbers of civilian casualties be justified when the military advantage gained was hardly any at all? Antiwar activists and scholars invoked the idea of proportionality to argue that the incidental damage caused to civilians by bombing was disproportional to the contribution to the military effort. On the other hand, proportionality was also invoked by those defending the bombing of Vietnam as a way to justify the collateral damage caused by air strikes. In his reply to Falk's sharp criticism of American bombing, John Norton Moore argued that the limited bombing of the North could plausibly be the least costly option leading to the termination of the conflict. Moore understood that it was difficult to assess aerial bombing as a strategy choice, but he nonetheless argued that it was 'within the range of reasonable responses'.[55] Proportionality could thus be seen both as a restriction on the extent of permissible bombing and as a justification for broadening the amount of acceptable damage.

5.6 Nuclear Weapons, Defoliants, Napalm and Cluster Bombs

There was a tangible fear during the 1960s and early 1970s that the Vietnam war could hasten a

[54] Falk, 'International Law and the United States Role in the Viet Nam War' (n 39) 1144.
[55] Moore (n 43) 1077.

nuclear confrontation between the world's superpowers.[56] The legality of nuclear weapons had been a hot topic in international law since they were deployed in Hiroshima and Nagasaki in 1945. The anticolonial movement sought to use its recently gained strength in the United Nations General Assembly (UNGA) to express its understandings of the illegality of nuclear weapons. In 1961, with a majority of 55 votes against 20, with 26 abstentions, UNGA Resolution 1653 (XVI) was approved declaring that the use of nuclear and thermo-nuclear weapons would cause indiscriminate suffering and destruction and as such would be contrary to the rules of international law. Nuclear powers countered that in the absence of any customary or conventional rule prohibiting nuclear weapons their use would not violate international law. Fortunately, the prospect of nuclear conflict did not materialise in the course of the Vietnam war. The world's attention was nonetheless gripped by the extensive use of incendiary and chemical weapons.

In Vietnam, Laos and Cambodia many commentators, scholars and international lawyers saw the first modern occasion in which the natural environment had become a military objective in its own capacity. The comprehensive and systematic destruction of the environment resulted from the military conviction that insurgents had to be denied cover, food and life-support from their environment. The United States developed a number of methods to achieve this objective. 'Crop-denial programs' were implemented alongside the destruction of vast tracts of forest land. The use of herbicides, principally in South Vietnam, reached gigantic proportions. Defoliants such as Agent Orange were sprayed from the air over 44% of South Vietnam's dense forests and more than 43% of its arable land. In the process, herbicides were often dispersed beyond the targeted areas by the wind and contaminated crops which were then consumed by the population.[57] The vast damage to the environment and the long-term consequences of the use of these chemicals led Richard Falk to describe this policy as 'ecocide'. He argued that 'as counterinsurgency warfare tends towards genocide with respect to the people, so it tends toward ecocide with respect to the environment' and prepared an entire draft convention on the crime of ecocide.[58]

[56] David E Sanger, 'U.S. General Considered Nuclear Response in Vietnam War, Cables Show', *The New York Times* (6 October 2018).
[57] Richard A Falk, 'Environmental Warfare and Ecocide' in Richard A Falk (ed), *The Vietnam War and International Law* (Princeton University Press, 1976) 287, 292.
[58] Ibid 287 and Appendix I.

U.S. Military planes crop dusting in Vietnam during Operation Ranch Hand which lasted from 1962 to 1971

Source: U.S. National Agricultural Library / Wikimedia Commons

Just as herbicides were a noticeable feature of American bombing so was the use of napalm, an incendiary weapon famous for two main characteristics: burning at high temperatures of 800-1200 degrees Celsius for a long duration and sticking tenaciously to its targets. When used against people, napalm sticks to the skin and clothing, melts the flesh and burns it to the bone causing unimaginable pain. When hit by napalm, victims in panic often try to wipe it off only causing it to spread and burn a larger area. Invented during the Second World War at Harvard University as an innovative incendiary weapon that did not rely on rubber to extend the duration of burning, napalm was first tested in bombing raids on Berlin and Tokyo.[59] Its use in the Vietnam war dwarfed previous uses. From 1963 to 1973 the amount of napalm dropped in Vietnam was ten times that used during the Korean War and twenty times that used in the Pacific during the Second World War. As images of civilians hit with napalm started circulating the world, its effects shocked audiences. Napalm became the symbol of all that was abhorrent about the Vietnam war. In the United States, the antiwar movement called for a boycott of The Dow Chemical Company which had become its sole producer and questioned why their government was burning the people of Vietnam. For their part, the anticolonialists had

[59] For a comprehensive history of the invention and use of napalm, see Robert M Neer, *Napalm: An American Biography* (2015).

consistently denounced the use of napalm as one of the 'crimes of the colonists'.[60] Despite its recognised military effectiveness, anticolonialists argued that napalm caused unnecessary suffering and was often used in indiscriminate attacks.

Another infamous weapon that was used in aerial bombing during the Vietnam war was the so-called Cluster Bomb Unit (CBU). In a cluster bomb, hundreds of bomblets are lodged within a hollow dispenser. When dropped from an airplane, the dispenser splits apart and releases its bomblets. These small bomblets are programmed to fragment before, during or after impact according to the fuse employed. When detonated, each dispenser covers a wide patterned area on the ground. Due to the high speed of the fragments and the uniformity of their dispersion, it is almost certain that any persons within the targeted area will be killed or wounded.[61] Cluster bombs were enhanced and employed extensively during the Vietnam war, especially in North Vietnam and in eastern Laos against targets along the Ho Chi Minh Trail. They left a legacy of unexploded ordnance that afflicts South-East Asia to this day.[62] Throughout the conflict the use of cluster bombs was denounced as an indiscriminate area weapon. The danger they posed to civilians and the long-term consequences of their use led many to call for their ban.

Looking back, it is difficult to dissociate the massive bombing campaigns of the Vietnam war from the indiscriminate use of defoliants, napalm and cluster bombs. Together they portrayed the American intervention as fundamentally immoral. Those opposed to the war could cite the laws of war to question the unnecessary suffering, the lack of proportionality or the indiscriminate character of the use of such weapons. But it was also clear that the same language and standards could be used to support and to justify the employment of such methods and weapons. Ultimately, the moral issues felt so obvious that antiwar protesters and anticolonialists felt that the legal arguments seemed to be lagging behind. Questioning the moral conscience of Americans, Falk asked: 'how does one explain bombing patterns directed against village communities? How are we to comprehend the use of anti-personnel bombs, napalm, and delayed-action bombs against rural areas that are far from supply lines and remote from battlefields?'.[63] The mounting pressure for a revision of the laws of war had reached a tipping point in the last years of the Vietnam war. The number of issues which lacked a clear answer in

[60] Bedjaoui (n 12) 207.
[61] Michael Krepon, 'Weapons Potentially Inhumane: The Case of Cluster Bombs' in Richard A Falk (ed), *The Vietnam War and International Law* (Princeton University Press, 1976) 266, 267.
[62] Ariel Garfinkel, 'The Vietnam War Is Over. The Bombs Remain.', *The New York Times* (20 March 2018).
[63] Richard A Falk, 'A Vietnam Settlement: The View from Hanoi' in Stefan Andersson (ed), *Revisiting the Vietnam War and International Law: Views and Interpretations of Richard Falk* (2017) 3, 5.

international law had ballooned during the conflict. So had the number and the diversity of actors that had stakes in the remaking of the laws of war.

5.7 Algeria, Palestine, Vietnam and the road to the Additional Protocols

In the aftermath of the aerial bombardments of the Second World War, the International Committee of the Red Cross (ICRC) spearheaded the push for stronger restrictions on aerial bombing to be incorporated into international law. Aerial bombing was one of the main themes of concern for the ICRC throughout the 1950s.[64] Not long after the conclusion of the Geneva Conventions, in 1956 the ICRC prepared an ambitious set of 'Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War'. The draft rules explicitly prohibited target-area bombing as practiced in World War II, providing in article 10 that 'it is forbidden to attack without distinction, as a single objective, an area including several military objectives at a distance from one another where elements of the civilian population, or dwellings, are situated in between said military objectives'. They also extended their application to internal as well as international conflicts and placed a strong emphasis on the responsibility of the belligerent engaged in offensive operations to take precautions to minimise collateral civilian casualties from aerial bombardment. Additionally, article 14 of the proposed rules condemned weapons 'whose harmful effects – resulting from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree'.[65] At the XIXth Conference of the Red Cross which took place in New Delhi in 1957 the draft rules were submitted to governments. But in the midst of the Cold War, both the Soviet Union and the United States were sceptical at what they saw as an attempt by the ICRC to regulate nuclear weapons. Other governments had virtually no reaction and so the rules were left, in the words of Richard Baxter, 'to wither on the vine'.[66]

It would take another ten years and a set of new actors to pick up the topic again. When the ICRC reintroduced the draft rules at its XXth Conference in 1965 in Vienna, support for them came from an unexpected direction. Anticolonialists from recently independent states who formed what Baxter called the 'human rights constituency in the United Nations' moved into

[64] Pierre Boissier, *L'épée et la balance* (Labor et Fides, 1953) 55–56.
[65] 'ICRC Draft Rules on the Protection of Civilians in Time of War, 1956' <https://ihl-databases.icrc.org/ihl/INTRO/420>.
[66] RR Baxter, 'Modernizing the Law of War' (1977) 78 *Military Law Review* 165, 178.

Red Cross turf and took up the cause of reforming the laws of war.[67] These actors used the language of human rights and recast the right of self-determination into a project aimed at creating a world in which international law and institutions would secure conditions of non-domination.[68] Central to this project was an expansive account of empire which appealed to the laws of war to expose the violence and hypocrisy of imperial nations at the same time as it critiqued its colonial origins and called for its transformation.

The war for the liberation of Algeria marked a turning point in the relation of anticolonialists to the laws of war. In its struggle against the French, the Algerian Front de Libération National (FLN) conducted an international campaign denouncing the abuses committed by colonialists not only as immoral but also as illegal. Whereas the laws of war had in the past been summoned to exclude 'savages' from protection,[69] the FLN turned them against the supposedly civilised French. Undermining the claim that France was the representative of the Rights of Man and was engaged in a civilising mission in Algeria, the FLN denounced the crimes committed by French forces and claimed they were violations of the laws of war. Contrary to French barbarity, the Algerians portrayed themselves as 'competent, rational, and, most importantly, civilised enough to demand deserve and self-rule'.[70] The FLN appealed for the involvement of the ICRC in the conflict and called for the application of Geneva Conventions. As early as February 1956, representatives of the FLN wrote to the ICRC accusing the French of executing Algerian combatants and therefore violating provisions protecting prisoners of war. Meanwhile, the FLN instructed its commanders and officers to strictly observe the Geneva Conventions.[71] These efforts reached a high point on 20 June 1960, when the Provisional Government of Algeria formally acceded to the Geneva Conventions.

The public campaign denouncing French war crimes focused on the widespread use of torture in detention camps and the displacement and incarceration of large parts of the Algerian population. The ICRC had also received a number of reports from its delegates recording serious war crimes committed by the French army, highlighting the bombardment of villages

[67] Jessica Whyte, 'The "Dangerous Concept of the Just War": Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions' (2018) 9(3) *Humanity Journal* 313, 316.
[68] Getachew (n 14) 2.
[69] Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press, 2006) 265.
[70] Helen Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press, 2011) 131.
[71] Fabian Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* (University of Pennsylvania Press, 2013) 126.

with napalm and the mass execution of prisoners.[72] But a major international outcry only broke out when a confidential ICRC report found its way into the hands of journalists of the French newspaper *Le Monde*. On 5 January 1960 the newspaper published the report on the internment camps in Algeria which stated that almost everywhere, when ICRC delegates were able to talk privately to inmates, they 'charged that they had been tortured, treated by "electricity" or "water" during their questioning'.[73] The report both showed the systematic nature of France's crimes and the incapacity of the ICRC to do much to change the situation when faced with the refusal of the French to apply the Geneva Conventions.[74]

Arguing against the French refusal to apply the laws of war, in his impassionate book *Law and the Algerian Revolution* Mohammed Bedjaoui assigned to the Algerian Revolution the role of acting as 'a bloodstained lever for the consistent advancement of the anticolonial cause'.[75] As an international lawyer, his particular role in the struggle was to interpret the existing laws of war and principles of international law and present the legal case for Algerian self-determination. He drafted the Provisional Government's 'White Paper on the Application of the Geneva Conventions of 1949 to the French-Algerian Conflict' where he contended that Algeria was not an integral part of France and that the conflict was not a domestic police action. He argued that France should respect Common Article 3 to the Geneva Conventions and that it was 'the minimum humanitarian protection, applicable in all circumstances'.[76] Referring to the records of the Diplomatic Conference of 1949, the FLN recalled that the French delegate had in that occasion expressed the willingness of the French government to apply basic humanitarian principles 'even to bandits'.[77] For the Algerians, it was absurd that 'this terrible seven years war, as it has been called, does not legally exist in the eyes of the French government'.[78] For Bedjaoui and the anticolonialists, international law was moving from 'colonial law' to the 'law of decolonisation'. The laws of war needed to follow this transition, a transition which the Algerian war proved had been pursued through resort 'to fire and sword'.[79]

Importantly, a particular incident involving aerial bombing altered the course of the Algerian war and anticipated the pattern of American bombing campaigns during the war in Vietnam.

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[72] Ibid 136.
[73] 'Le Rapport de La Croix-Rouge Internationale Sur Les Camps d'internement d'Algérie', *Le Monde* (Paris, 5 January 1960).
[74] Klose (n 71) 137.
[75] Bedjaoui (n 12) 11.
[76] Algerian Office (n 12) 19.
[77] Ibid 57.
[78] Bedjaoui (n 12) 218.
[79] Ibid.

As in many other wars of national liberation, the FLN was engaged in a guerrilla campaign against more numerous and better resourced French forces. In such circumstances, their forces would often seek sanctuary in neighbouring Tunisia and Morocco, where the French were reluctant to pursue them lest they expand the conflict. On 11 January 1958, a small detachment of French troops was ambushed by the FLN from the Tunisian border. Then on 7 February 1958, a French plane was shot from the Tunisian village of Sakiet Sidi Youssef, which was close to the Algerian border. The following day the village was bombed by the French Air Force as a reprisal. The attack killed seventy civilians, amongst them dozens of school children, sparking outrage inside and outside France. It was later revealed that the equipment used in the bombing had British and American origins, a fact that embarrassed those countries.[80] The incident internationalised the Algerian conflict and led to American and British attempts to interfere in the war through mediation. US Secretary of State John Foster Dulles accused the French government of premeditating the bombardment and argued that France was incapable of solving 'the Algerian problem'. Inadvertently, the uproar generated by the bombing of Sakiet Sidi Youssef publicised the Algerian war, soured relations between France and Tunisia, contributed to the military escalation of the conflict, and eventually led to the fall of the French government, to a riot in Algiers, a crisis of the French regime and the return of General de Gaulle.[81]

[REDACTED IMAGE]

The Bombing of Sakiet (1959)
Source: Peter de Francia / Tate

[80] Geoffrey Barei, 'The Sakiet Sidi Youssef Incident of 1958 in Tunisia and the Anglo-American "Good Offices" Mission' (2012) 17(2) *The Journal of North African Studies* 355, 359; for an apologetic French view of the incident see Jacques Valette, 'Le bombardement de Sakiet Sidi Youssef en 1958 et la complexité de la guerre d'Algérie' (2009) 233(1) *Guerres mondiales et conflits contemporains* 37.
[81] Valette (n 80) 37.

By 1962, France still had the military upper hand in Algeria, but the conflict had become so controversial and damaging for France's international standing that de Gaulle had to concede to Algerian demands to end the war. From 1954, when the Algerian uprising initiated the struggle, to 1962, when it ended, the perception of French colonialism to the French public went from being acceptable and beneficial to oppressive and illegitimate. In international legal terms, the conflict went from a domestic police operation of pacification to a just war of self-determination. As Amanda Alexander argues, this conversion was achieved by 'the dissemination of an ethical narrative about the evils of imperialism and the development of a new approach to international law'.[82] As the 1960s rolled in, anticolonialists had set their targets on reforming international law. The laws of war, as the Algerian conflict painfully demonstrated, needed urgent attention.

Following the Algerian war, anticolonialists pushed for reforming the laws of war in a number of conferences and meetings, using the UN General Assembly and the ICRC conferences as spaces where this agenda could advance. They also created new fora where their visions of an anti-imperial law of war were discussed. In early 1966, the first Tri-Continental of Asian, African and Latin American Revolutionary Solidarity was held in Havana, sponsored by the Afro-Asian Peoples Solidarity Organisation. The war in Vietnam was one of the major topics discussed at the conference. Delegates denounced American aggression and highlighted the viciousness of aerial bombing. At the closing of the conference, Fidel Castro praised the steadfast and heroic resistance of the Vietnamese against the hundreds of planes that were sent every day to demand their surrender.[83] Socialists and anticolonialists gathered in Havana carefully couched their condemnations of the United States bombing campaigns in law of war terms declaring the indiscriminate character of the bombings, the targeting of non-military objectives, the excessive number of civilian casualties and the use of illegal weapons.[84] The same strategy which had been successfully deployed in the United Nations General Assembly to condemn colonialist aggression was now turning to its law of war aspects.

The representation of air power as a remnant of the days of colonialism and a persistent threat

[82] Alexander (n 15) 24.
[83] Fidel Castro, *At the Closing Session of the Tricontinental Conference* 15 January 1966 <https://www.marxists.org/history/cuba/archive/castro/1966/01/15.htm>.
[84] W Hays Parks, 'Air War and the Law of War' (1990) 32 *Air Force Law Review* 1, 68 Hays Parks called socialists and anticolonialists 'highly questionable allies' of the ICRC in his long apology of aerial bombing and critique of the Additional Protocols. .

to the self-determination and independence of the emerging nations was further intensified by the Arab-Israeli conflict. During the Six-Day War in June 1967, Israel relied on its superior air power to defeat the larger armies of Arab nations. The UN Security Council and General Assembly passed resolutions calling for Israel to respect the humanitarian principles contained in the Geneva Conventions, a move which indicated the willingness of the Arab bloc to appeal to the laws of war against occupying colonial powers.[85] Noticing the interest of anticolonialists in revising the laws of war, around this time the ICRC revisited its proposal to convene a conference to update them.

Just days before the Six-Day War, the ICRC sent a memorandum to all State parties of the Geneva Conventions with a draft list of rules it considered to be the conventional and customary laws of war still in force. It pressed states to ponder their further development. The moment was an auspicious one. On the following year, between April and May 1968, representatives of 84 states and 57 non-governmental organisations (NGOs) met in Tehran for the first United Nations International Conference on Human Rights. Marked by a large presence of states from the Global South and happening at a time when the American bombing of Vietnam was reaching ever greater proportions, most delegates were concerned with the state of the laws of war. They noted that the 'massacres, summary executions, tortures, inhuman treatment of prisoners, killing of civilians in armed conflicts and the use of chemical and biological means of warfare, including napalm bombing' eroded human rights.[86] One of the main outcomes of the conference was a resolution on human rights in armed conflicts. The resolution claimed that 'minority racist or colonial regimes which refuse to comply with the decisions of the United Nations and the principles of the Universal Declaration of Human Rights frequently resort to executions and inhuman treatment of those who struggle against such regimes' and called for called for a revision of the existing treaties to ensure the better protection of civilians, prisoners and combatants, as well as the prohibition and limitation of the use of certain methods and means of warfare.[87]

The Tehran resolution on human rights in armed conflicts was restated and developed in the subsequent UN General Assembly Resolutions 2444 and 2675, the latter setting out in more detail protections for the civilian population during the conduct of military operations.[88] The

[85] 'S/RES/237 (1967) of 14 June 1967'; 'A/RES/2252 (ES-V) of 4 July 1967'; Parks (n 84) 68.
[86] 'Human Rights in Armed Conflicts. Resolution XXIII Adopted by the International Conference on Human Rights. Tehran, 12 May 1968.'
[87] Ibid.
[88] 'A/RES/2444 (XXIII) of 19 December 1968'; 'A/RES/2675 (XXV) of 9 December 1970'.

cumulative effect of these resolutions was to consolidate the demand of anticolonialists for stronger protections for the civilian population against aerial bombardment and other methods of warfare. At this point, the revision of the laws of war had become inextricably intertwined with the anticolonialist project of worldmaking which sprung out of the wars of decolonisation. The newly independent states which had since 1945 struggled for liberation against colonial powers had been relentlessly confronted with the threat or infliction of aerial bombing. In Vietnam, both France and the United States had as one of their greatest advantages a vastly superior air force. The FLN, in its struggle for Algerian independence, had faced the same experience of being subject to superior air power, as had liberation movements in Kenya, Malaya and Indonesia.[89] For the Third World, air power was one of the main methods of maintaining colonial control and lengthening struggles for liberation. The desire to limit air power was therefore both an indictment of aerial bombing as an imperial method of control and a humanitarian call for stronger protections for civilian populations. It had as much an anti-imperialist angle as a humanitarian one.

The revision of the laws of war was set in motion in a Conferences of Government Experts held in Geneva from 24 May to 11 June 1971 under the auspices of the ICRC. Experts from thirty-nine states attended the meeting, which soon proved too short for such a monumental undertaking. After complaints from Third World countries that they had not been adequately represented in the first conference, the ICRC was hard-pressed to invite all state parties to the 1949 Geneva Conventions to send representatives to the second session.[90] At the second Conference of Government Experts, held from 3 May to 2 June 1972, a change in atmosphere had occurred.[91] While the United States and other Western powers interpreted the laws of war to suit their reliance on fire power and mobility – above all obtained by air power – Third World states and anticolonialists condemned such methods. By the end of the conference, two draft protocols had been discussed for consideration by a Diplomatic Conference, the first addressing international armed conflict and the second expanding the regulation of internal conflicts. The confrontation had been set between Western nations and their traditional views of the laws of war and the anticolonialist project of reforming international law on an anti-imperialist basis.

Supported by the newly independent states, national liberation movements which were still

[89] Fabian Klose, 'The Colonial Testing Ground: The International Committee of the Red Cross and the Violent End of Empire' (2011) 2(1) *Humanity* 107, 109.
[90] RR Baxter, 'Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law' (1975) 16 *Harvard International Law Journal* 1, 9.
[91] Parks (n 84) 72–73.

fighting against colonial powers, as those in Palestine, South Africa and in Portuguese colonies, actively participated in the debates that led to the Additional Protocols. Just over a month before the Diplomatic Conference was officially inaugurated, the Organisation of African Unity (OAU) organised a seminar in Dar-es-Salaam on humanitarian law for national liberation movements.[92] In a forceful speech opening the seminar, Colonel Hashim Mbita, the Executive Secretary of the OAU's Liberation Committee, summarised the anticolonialist demands for the remaking of the laws of war. Addressing his fellow freedom fighters, he condemned Portuguese, South African and Rhodesian colonialists and highlighted their common methods of warfare: indiscriminate bombing of areas considered 'free fire zones'; summary executions of civilians; mass arrests; taking of hostages; widespread use of torture to obtain information; forcible transfer, internment and expulsion of the civilian population; mass reprisals against houses and villages; and the employment of blind weapons 'both anti-personnel, anti-material and anti-environment'.[93] Then turning to the legal demands of liberation movements, Mbita first highlighted the inadequacy of the Geneva Conventions in dealing with wars of national liberation where due to the disparity in strength – especially in firepower and in mastery of the air – between colonial armies and freedom fighters, the latter had to resort to unconventional or guerrilla warfare. This 'poor man's war' needed new rules and these needed to address the legitimacy of freedom fighters as combatants and the need to protect the civilian population from the dangers the colonial regimes resorted to.[94]

Stressing the failures of the Fourth Geneva Convention to protect civilian populations, Colonel Mbita recalled that they only covered civilians who had fallen in the hands of the enemy but that the greatest dangers to which they were exposed arose precisely from blind attacks and aerial bombardment by colonial regimes in areas that they did not control (the liberated areas). He set the tone for the approach anticolonialists would take in the Diplomatic Conference:

> …far from engaging in semantics and legalistic labyrinth [we] should, on the contrary, tackle the problem from its very humanitarian aspects which is the right of the oppressed people in Africa to self-determination and their legitimate resistance to forcible denial of this right. The whole concept of the reaffirmation and the development of humanitarian law should stem from this principle.[95]

Western states, on the other hand, approached the conference with caution and concern. Their

[92] 'Mission de Jacques Moreillon et de Pierre Gaillard En Tanzanie Du 18 Au 27 Janvier 1974, Rapports de Mission, CICR B AG 252 003-046'.
[93] 'Opening Address by Lieutenant Colonel Hashim I. Mbita, OAU Seminar for Liberation Movements on Humanitarian Law, Dar-Es-Salaam, 21 January 1974, CIRC B AG 132-OUA-018' 3.
[94] Ibid 11–12.
[95] Ibid 15.

recent experience in the UN General Assembly, dominated by a majority of Third World countries, indicated that they would be negotiating in a position of weakness. As George Aldrich, the head of the US delegation to the Diplomatic Conference, later recalled, the United States approached the conference 'as more of a hazard than an opportunity'.[96] In this position, Western states resorted to what Colonel Mbita called 'engaging in semantics and legalistic labyrinth' and defended their views under the justification of being pragmatic about the application of the laws of war. For the United States and European colonial powers, there was a need for 'damage control' in limiting anticolonial proposals that they tried to portray as unrealistic.

5.8 The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was held in four sessions in Geneva from 1974 to 1977. It was unlike any previous conference on the laws of war. The Hague Peace Conferences of 1899 and 1907 and the 1949 Diplomatic Conference had been mostly European affairs concerned with inter-imperial rivalry. In 1974, by contrast, a large number of postcolonial states took part in the debate, joined by national liberation movements and socialist states forming the Eastern Bloc. Comparing to the twenty-five nations that attended the 1899 Hague Peace Conference, there were one hundred twenty-one countries, eleven national liberation movements and twenty-four international organisations represented in the first session of the Diplomatic Conference in 1974. Furthermore, the length of the negotiations, the span of topics covered, the substantial divergence of views and the fundamental political differences between participants were unprecedented. Anticolonialists, the Eastern Bloc and Western states all came to the conference with distinct agendas and with conflicting views of the ethics of law and war. The delegates present at the conference were also in large part diplomats and lawyers. The influence of military officers was minimal when compared to the prominence of Captain Mahan and Admiral Fisher at the Hague Conferences. Looking back, some military lawyers regretted that 'there was no delegate at the Diplomatic Conference who had dropped a bomb in anger in

[96] Cited in Parks (n 84) 80.

the quarter century preceding the conference'.[97]

[REDACTED IMAGE]

Opening session of the Diplomatic Conference (1974)
Source: ICRC Audiovisual Archives

The three main topics which confronted the delegates were all closely related to the experience of Algeria, Vietnam and other national liberation wars. First, anticolonialists sought recognition for national liberation movements and the characterisation of wars of national liberation as international armed conflicts.[98] Right from the start, anticolonialists came out strongly against South Africa, Portugal, Rhodesia and Zionists and praised liberation movements in Palestine, Cambodia, Vietnam and freedom fighters in general.[99] The first main dispute that arose was the question of whether and which liberation movements should be invited to participate in the conference. Anticolonialists, supported by the Eastern Bloc, pointed to a General Assembly resolution passed just prior to the conference urging national liberation movements recognised by regional organisations to be invited to participate.[100] These demands were vigorously resisted by the United States and Western European states, who nonetheless found themselves lacking the votes to stop the conference passing a resolution of invitation.

The dispute then moved to the Drafting Committee, where North Vietnam campaigned for an invitation to the Vietcong – the Provisional Revolutionary Government of the Republic of

[97] Ibid 78.
[98] Georges Abi-Saab, 'Wars of National Liberation and the Laws of War' (1972) 3 *Annales d'études internationales* 93.
[99] Baxter (n 90) 9.
[100] 'A/RES/3102 (XXVIII) of 12 December 1973'.

South Vietnam (PRG) – which had only acceded to the Geneva Conventions a few days before the start of the conference and thus had not been invited. In perhaps the most dramatic vote of the conference, taken after much 'arm twisting and recourse to threats'[101] by the United States and a diplomatic blunder by North Vietnamese delegation, which had walked out before the vote to protest the slandering of the Vietcong, the invitation to the PRG was defeated by a single vote.[102]

Despite this particular defeat, anticolonialists were successful in their efforts to promote the right to self-determination and the legitimacy of wars of national liberation, obtaining a majority in favour of treating these conflicts in the same way as wars between states.[103] Western states argued that introducing criteria pertaining to the legitimacy of certain causes of war would undermine the structure of modern international humanitarian law by mixing *jus ad bellum* issues with the *jus in bello*. This would be a retrograde and dangerous move, they claimed, as it would introduce subjective and political elements into humanitarian law.[104] Anticolonialists, however, managed to pass an amendment with 70 votes in favour, 21 against, and with 13 abstentions, for what is now article 1(4) of Additional Protocol I, recognising as international armed conflicts 'peoples fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self-determination'.[105] At this point, the whole conference came close to unravelling as Western delegations considered walking out. But by the mid-70s, the decolonisation movement was essentially over. Most wars of national liberation had been fought and won by anticolonialists. The Portuguese empire, one of the last to fall, crumbled in 1975. Sensing very few places would be affected by the new scope of international armed conflicts, Western states decided to continue in the conference and to move on to other topics.[106]

The second main topic of debate, and one which more than any other raised controversy during and after the conference, was the status of guerrilla fighters and their right to be treated as prisoners of war. Guerrilla warfare had been well known to Europeans and to previous discussions of the laws of war in the Hague, yet by 1974, with the wave of decolonisation wars, delegates came to the conference with the idea that new regulation was needed. Western states regarded the Geneva Conventions of 1949 as obsolescent and unable to respond to

[101] Mohammed Bedjaoui, *Towards a New International Economic Order* (Homes and Meier, 1979) 150.
[102] Whyte (n 67) 321.
[103] Alexander (n 15) 6.
[104] Ibid.
[105] *Additional Protocol I* (n 13).
[106] Alexander (n 15) 6.

revolutionary violence and asymmetric warfare of the kind that predominated in the second half of the twentieth century. Third World and some socialist states, on the other hand, argued that wars of national liberation were not only new but also primarily just wars and that freedom fighters deserved more, rather than less, protection by international humanitarian law.[107] For Third World states and anticolonialists, the traditional requirements that members of resistance movements must distinguish themselves from civilians, follow a responsible command, and conduct their operations in accordance with the laws and customs of war needed to be dropped or adapted as they served imperialist states as a pretext to deny protection.[108] For their turn, Western states held to the belief that any flexibilisation of the requirements for protection for members of armed groups meant that there would be less protection for civilians.

It took the four sessions of the conference for states to agree on a compromise, one which expanded the protection afforded by prisoner of war status while muddying the distinction between civilians and combatants. Article 44 of the Additional Protocol states that combatants must distinguish themselves from the civilian population, but recognised that 'there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself', in which case it declared such person would retain combatant status provided that they carry arms openly during each military engagement and 'during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate'.[109] States disagreed as to what constituted a 'military deployment' and perhaps because of the ambiguity of the provision accepted the final compromise – to no one's ultimate satisfaction.[110] Israel and Brazil voted against the article, claiming it did not sufficiently distinguish between civilians and combatants. North Vietnam took the directly opposing view, claiming it did not protect guerrillas as much as it should. For the majority of states though the article was too ambiguous, illogical or contradictory.[111] As Amanda Alexander argues, the compromise on the status of guerrilla fighters constitutes one of the greatest paradoxes of Additional Protocol I: 'this supposedly humanitarian document, which aimed at expanding the protection of the civilian, simultaneously obscured civilian status and, with it, claims to protection'.[112]

[107] This topic is explored in more detail in ibid 7–13.
[108] Ibid 10–11.
[109] *Additional Protocol I* (n 13) Article 44(3).
[110] Alexander (n 15) 12.
[111] Ibid.
[112] Ibid 13.

Arguably, the expansion of the category of combatants in Additional Protocol I had a rather limited effect in the overall regulation of aerial bombing. The discussion and application of what came to be article 44 was much more closely related to the issue of the treatment of captured combatants (and whether they should be treated as prisoners of war) than of targeting, which is the main question for aerial warfare. In this sense, I argue that notwithstanding the ambiguity in the treatment of guerrilla fighters in Additional Protocol I, it had little effect in the regulation of aerial bombing. In simple terms, bombers were not concerned about the status of captured guerrilla fighters, but rather about what could or could not be destroyed from the air. This discussion – related to the definition of military objectives, to the principle of proportionality, and to precautionary measures – was the third main topic of the conference, and the resulting provisions perhaps one of its most relevant legacies.

5.9 Aerial Bombing and the Additional Protocols: the debate over distinction, proportionality and collateral damage

During the first two sessions of the Diplomatic Conference, in 1974 and 1975, states debated and codified some of the concepts and principles which had emerged and developed alongside the practice of aerial bombing in the preceding decades. The Vietnam war was a major catalyst for the codification of rules related to distinction, targeting and proportionality. Against the background of massive aerial bombardments, an increasing number of civilian casualties and growing opposition to the war, academics at Cornell University published a study entitled *The Air War in Indochina* in 1972. The journalist Neil Sheehan, who had obtained the classified *Pentagon Papers* in 1971, prefaced the study with a telling declaration:

> When future historians ask how the current Administration of President Richard M. Nixon was able to continue an unpopular war in Indochina for four years after the country had voted against that war in the presidential election of 1968, technological advances in weaponry, chiefly in air power, will be one of the answers the historians discover.[113]

In the chapter on the air war and international law, the Cornell study concluded that 'air warfare has been left almost totally unregulated, and air commanders and crews have been left with only general customary rules of land warfare as sources or guidance. The need for new and precise law is evident.'[114] For its part, the ICRC noted that since 1949 many conflicts had occurred

[113] Raphael Littauer and Norman Thomas Uphoff (eds), *The Air War in Indochina* (Beacon Press, 1972) v.
[114] Ibid 148.

where one side had a powerful air force while the other had no, or hardly any, aircraft. In these conflicts, ICRC delegates often found it hard to advocate for compliance with humanitarian law as a whole when faced with the absence of clear rules on bombardment:

> 'How can you ask us to show consideration for captured enemy airmen and treat them as prisoners of war when our wives and children are attacked and massacred in their homes and on the roads?' Such questions were sometimes asked to the ICRC representatives, and it was not easy to answer them.[115]

Almost every participant in the conference had an interest in the codification of rules related to aerial bombing. The ICRC drafted rules that defined the concepts of the civilian population, military objectives, proportionality and precaution. The humanitarians from Geneva drew from past state practice and from previous attempts at codifications such as the 1923 Hague Rules and suggested rules that restricted aerial bombing to some degree, but that would still be acceptable to Western states who were the main perpetrators of this method of war. Anticolonialists, Third World states and most socialist states wanted strong protections for civilians and the maximum restriction, if not an outright ban, on aerial bombardment. Lastly, Western states had an interest in codifying rules and principles that they had developed between themselves and that in their view would be 'realistic' and practical enough in order to guide military commanders and soldiers on the battlefield.

The rules that became articles 48-58 of Additional Protocol I were seen as a major achievement of the conference.[116] They are still regarded as containing 'the basis of the entire regulation of war' expressed in the principles of protection and of distinction.[117] For the first time, the idea of distinction and the definition of civilians and of military objectives was codified and endorsed in a binding instrument. The principle of proportionality and the concept of excessive collateral damage were also incorporated in the Additional Protocol. In the following section, I recount the story of how these concepts were negotiated and I draw attention to the conflicting political and ethical views that came into conflict in the debate related to aerial bombing. I argue that, rather than seeing the Additional Protocols as a step forward in the restriction of aerial bombing, filling a 'gap' in pre-existing humanitarian law, the politics behind the negotiations of the Protocols tell a very different story. This story shows that the codification and development of international humanitarian law has not been a continual balancing act between the dictates of

[115] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) 587.
[116] KJ Keith, 'The Present State of International Humanitarian Law' (1980) 9 *Australian Yearbook of International Law* 13, 14.
[117] International Committee of the Red Cross (n 115) 586.

humanitarian considerations and military necessity, but a rather more complex field in which imperialist states, anticolonialists, the Third World, humanitarians and socialist states struggled to achieve an outcome which would benefit their armed forces, their worldviews and their understandings of international order and law.

Looking back at the Additional Protocols, it is often commented that they marked the peak of anticolonial worldmaking and that the controversial provisions inserted by Third World states explain why there was so much resistance in accepting and ratifying the Additional Protocols by some Western states in the decades that followed their adoption. While recognising that many of these comments are true, especially in relation to the provisions on guerrilla fighters and prisoner of war status, I want to draw attention to the rules on targeting which mostly relate to aerial bombing. When we look at the achievements of the Diplomatic Conference of 1974-77 in this topic, it was not the anticolonialist, Third Worldist or socialist views that ultimately won, but rather those of Western states which had relied on aerial bombing to police and control their empires for most of the century. That Western states, which formed a minority during the conference and had to concede numerous positions to anticolonialists, still managed to codify rules related to aerial bombardment which largely corresponded to their aspirations should be seen as an astonishing – if regrettable – accomplishment. The easiness with which most aerial bombings can be justified in contemporary international humanitarian law should be attributed not to inherent deficiencies or ambiguities of the law, but to the political and ethical views that won in the 1970s and that were incorporated in the Additional Protocols.

By tracing the debates that led to the adoption of the Additional Protocols, I show that different visions of the laws of war that were much more restrictive of aerial bombing and protective of the civilian population were put forward at the Diplomatic Conference. The fact that these visions did not make it to the final treaty should not be attributed to their own coherence, logic, persuasiveness or lack thereof, but to the balance of political forces that at that conjuncture led to a particular result. This result was the adoption of the views of Western states on how aerial bombing should be regulated, though admittedly after a number of smaller concessions and of drafting disputes that led to repetitive and ambiguous provisions.

5.10 The Principle of Distinction

Although the Hague Conventions of 1907 and the Geneva Conventions of 1949 provided little

protection for civilians, the codification of the principle of distinction and of the definition of civilians in the Additional Protocols was taken to be a reaffirmation of the law. States generally agreed on the basic rule of distinction which became article 48 of Additional Protocol I and 'took the momentous step of codifying the principle of distinction for the first time, while managing to present the codification as though it had done nothing new, but only recorded what already existed'.[118] Richard Baxter, the American Rapporteur on the topic during the conference, said that there was a convergence of views on the idea of distinction and of respect and protection for the civilian population, the disagreements between delegations being mainly limited to those of a drafting nature.[119] Draft article 43 (which later became article 48) was adopted by consensus during the first session of the conference in 1974. France was the only state which vocalised some discomfort with the provision, claiming that it 'has direct implications as regards a State's organisation and conduct of defence against an invader' – a caveat that the French delegates would repeat throughout the conference to oppose any hint of stronger protections for civilians.[120]

5.11 The Definition of Civilians, Civilian Objects and Military Objectives

When it came to defining civilians, civilian objects and military objectives, the consensus around the principle of distinction soon proved to be superficial. The ICRC had prepared draft article 45 (article 50 in AP-I), which gave a negative definition of the civilian population as any person who does not belong to the categories of armed forces referred to in the Geneva Conventions and in the Additional Protocol. Crucially, paragraph four of draft article 45 stated that in case of doubt, a person shall be presumed to be a civilian. A number of amendments were suggested by different delegations, many of which contained minor drafting alterations. Yet the more substantial amendments clearly outlined the dividing views which persisted throughout the conference: Western states sought to keep as much freedom of action as possible in the regulation of aerial bombing while socialist states and anticolonialists vigorously argued for stringent limitations to air power and for stronger protection for civilians. Somewhat in between these two positions, the humanitarian camp composed of the ICRC, Switzerland, Sweden and

118 Alexander (n 15) 14.
119 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV' (Federal Political Department, Bern, 1978) 77 (CDDH/III/SR.10) ('Official Records of the Diplomatic Conference Vol. XIV').
120 Howard S Levie, *Protection of War Victims: Protocol 1 to the 1949 Genenva Conventions*, vol 3 (Oceana Publications, 1980) 72 (CDDH/SR.41).

Norway, argued for compromises that would incorporate parts of both approaches – though ultimately privileging the general positions of Western states.

Romania, one of the most vocal proponents of robust protections for civilians during the conference, suggested an amendment to article 45 which stated that 'persons whose activity may contribute directly to the military effort do not for that reason lose their civilian status'.[121] The Chinese delegate pushed the argument further and stated that guerrilla fighters were civilians who were forced to defend themselves. Accordingly, he argued that when they were not taking part in military operations, they should enjoy full civilian status and protection.[122] Representing the opposing view, the United Kingdom and Australia tried to qualify the presumption that a person should be treated as a civilian in case of doubt by adding the phrase 'unless there are reasonable grounds for supposing that he is about to commit a hostile act' or 'until his status is otherwise established'.[123] Ultimately, however, article 45 was adopted by consensus with practically the same text as the one the ICRC had proposed. Civilians were defined negatively as persons who did not fall under the categories of those who had combatant status, and the presumption that in case of doubt a person shall be considered to be a civilian was maintained.

Article 47 (article 52 in AP-I) of the ICRC draft codified two of the most important concepts for the regulation of aerial bombing, that of civilian objects and of military objectives. Introducing the provision to the conference, the ICRC delegate explained that the question had arisen whether civilian objects should be defined positively or negatively, to which the ICRC took the view that it seemed 'logical to establish a negative presumption in favour of civilian objects by defining military objectives'.[124] The definition of military objectives in the draft centred around three elements: the nature, purpose or use of an objective; the recognition of a 'military interest'; and a military advantage offered by the total or partial destruction of the objective. The second paragraph of the ICRC draft defined civilian object as those which are not military objectives, but listed houses, dwellings, installations and means of transport as examples of objects which should be protected 'except if they are used mainly in support of the military effort'.[125] Unsurprisingly, there was a long debate concerning these provisions.

On one side, socialist and Arab states proposed amendments that defined or listed civilian

[121] Ibid 113 (CDDH/III/30).
[122] Ibid 118 (CDDH/III/SR.10).
[123] Ibid UK: 109 (CDDH/III/22), Australia: 113 (CDDH/III/35).
[124] 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV' (n 119) 110 (CDDH/III/SR.14).
[125] Levie (n 120) 176 (CDDH/1).

objects instead of defining military objectives. For them 'it was more important to define civilian objects than to define military objectives, so that combatants would be in no doubt about the nature of the objects to be protected'.[126] On the other side, Western states argued that it would be 'unrealistic' to define military objectives strictly. Australia, Canada and the Netherlands proposed similar amendments which broadened the definition of military objectives contained in the ICRC draft.[127] France proposed an even broader definition which stated that an objective 'shall be considered a military objective if by its nature or use it contributes directly or indirectly to the maintenance or development of the military potential of the adverse party'.[128] At the sidelines, the Swedish delegate defended the ICRC text and expressed concern at 'the tendency to broaden the notion of military objectives, a tendency which had resulted in an increasing number of civilian deaths' he claimed.[129]

The debate on the definition of civilian objects and military objectives turned out to be one of the most heated of the conference, not least because the delegate from the Soviet Union introduced in the middle of the discussion the question of whether just wars should be treated differently than wars of aggression. He recalled the definition of aggression, which had been approved by General Assembly Resolution 3314 (XXIX) and he claimed it should be inserted in the Additional Protocol.[130] This provoked a strong reaction by the United States and Western states, which argued that the conference was concerned with the treatment of people affected by armed conflicts, not with the righteousness or wrongfulness of such conflicts.[131] In the midst of this debate, the Chinese delegate remembered the war in Vietnam and argued that 'the Vietnamese people, with their long history of struggle against a cruel war of imperialist aggression, were very well qualified to discuss the 1949 Geneva Conventions and the question of protection of the civilian population'.[132] The question of aerial bombing reverberated deeply with the Vietnamese, who proposed a provision denying prisoner of war status to those involved in bombing civilians, who they claimed were war criminals:

> United States pilots taken in *flagrante delicto* are at once protected by the 200 or so articles of the third Geneva Convention of 1949. They are immediately looked after and given

126 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV' (n 119) 111 (CDDH/III/SR.14).
127 Levie (n 120) 177-179 (Australia: CDDH/III/49) (Netherlands: CDDH/III/56) (Canada: CDDH/III/79).
128 Ibid 178 (CDDH/III/41).
129 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV' (n 119) 123 (CDDH/III/SR.15).
130 Ibid 121 (CDDH/III/SR.15).
131 Ibid 131 (CDDH/III/SR.16).
132 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. V' (Federal Political Department, Bern, 1978) 40 (CDDH/SR.4) ('Official Records of the Diplomatic Conference Vol. V').

> shelter under material living conditions equal to those enjoyed by our ministers while at the same time the Vietnamese citizens who are victims of the bombs just dropped by these same war criminals are still weeping over the bodies of their dead parents and children and their burnt houses.[133]

Whilst Western states defended an 'apolitical timelessness of international law', which rejected the idea that justice had a place in the laws of war,[134] the Vietnamese claimed that 'justice demands that there should not be equality of treatment between war criminals and their victims'.[135] Throughout the conference, anticolonialist and socialist delegates used the language of just wars to distinguish anticolonial violence from the wars of imperial powers. Yet their theories of just wars were not those of medieval just war thinkers in the tradition of Christian theology, but rather those of the Marxist and postcolonial traditions, which drew on the principles of anti-imperialism and self-determination. As Jessica Whyte argued, 'the evocations of just war on the conference floor were influenced more by Vladimir Lenin and Mao Zedong than by Augustine and Aquinas'.[136]

Aerial bombing was seen as a tool used mainly by colonialists and imperial powers and the dispute about its regulation followed the positions of states concerning just wars and the laws of war more broadly. Although the conference eventually reached an agreement on the definition of military objectives and civilian objects, this compromise was far from the result of 'moral progress'. Progress in the development of international humanitarian law meant very different things for the competing interpretations about the justice and injustice of war that separated anticolonialists, Western states and the Eastern Bloc.[137]

With the Vietnam war still fresh in their minds, the United States delegates clashed with the Vietnamese in the topic of defining military objectives and civilian objects. The American delegate argued that 'care should be taken to avoid formulating too narrow a ban on attacks on civilian objects which were used in support of the military effort'.[138] Supporting the United States, the British delegate argued that the amendments which wanted to confer wider protection to civilian objects were unrealistic since they would not be easily understood by

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133 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV' (n 119) 469 (CDDH/III/SR.33–36, Annex).
134 On this topic see the fascinating article by Jessica Whyte: Whyte (n 67) 322.
135 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV' (n 119) 469 (CDDR/III/SR.33–36, Annex).
136 Whyte (n 67) 323.
137 Orford (n 9) 91.
138 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV' (n 119) 119 (CDDH/III/SR.15).

soldiers.[139] In response, the delegate from North Vietnam reminded the conference of his country's experiences, drawing attention to the enormous destruction wrought by the United States on what the State Department had alleged to be 'concrete and steel blocks', in other words 'military objectives', whereas in fact attacks had been directed at civilian objects and the civilian population.[140] For Vietnam, there should have been a ban on attacks against civilian objects 'without any possibility of invoking the legitimacy of attacks on so-called "military objectives"'.[141]

After much debating, the conference adopted a version of article 47 which incorporated diverging proposals by 79 votes to none, with 7 abstentions.[142] The first paragraph included a ban on reprisals against civilian objects, a result of an amendment initially proposed by Arab states. On the other hand, the second paragraph, which crucially contained the definition of military objectives, resembled the amendments proposed by the Netherlands, Australia and Canada. The resulting definition has been widely recognised as broad and permissive. It declares that military objectives are '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 neutralisation, in the circumstances ruling at the time, offers a definite military advantage'.[143] Whatever the different points of view that anticolonialists and socialist states had defended, the final article reflected almost exactly what Western states had argued for. Even so, a number of them – Australia, Canada, France, West Germany, the Netherlands, the United Kingdom and the United States – made declarations after the vote stating that, in their opinions, '*a specific area of land may also be a military objective* if, because of its location or other reasons specified in article 47, its total or partial destruction…offers a definite military advantage'.[144] This raised a curious question when compared to the provision approved by the conference prohibiting area bombardment. As the Swedish delegate, Hans Blix, later mentioned, 'if nearly everything were deemed to constitute military objectives permissible for attack…the ban upon area bombardment could lose all meaning'.[145] Blix argued that this declaration by Western states did not seem to have been advanced to neutralise the acceptance of the prohibition of area bombardment, but rather to indicate cases where a specific area – the whole of it – might be a

[139] Ibid 119 (CDDR/III/SR.15).
[140] Ibid 120 (CDDR/III/SR.15).
[141] Ibid 121 (CDDR/III/SR.15).
[142] Levie (n 120) 203 (CDDH/SR.41).
[143] *Additional Protocol I* (n 13) Article 52(2).
[144] Levie (n 120) 204-206 (CDDH/SR.41).
[145] Hans Blix, 'Area Bombardment: Rules and Reasons' (1978) 49(1) *British Yearbook of International Law* 31, 68.

genuine military objective.[146] It is nonetheless a clear example of how the regulation of aerial bombing was fragmented within the Additional Protocol I itself, with provisions and declarations that overlapped and occasionally contradicted each other.

In summary, the debates in Committee III of the conference on the definition of military objectives and civilian objects displayed a range of strongly contrasting views, from those arguing for almost absolute protection for civilian objects to those arguing for a wide definition of military objectives which included potentially any civilian installation that made a contribution to military efforts. The latter view was ultimately triumphant, despite the initial opposition of a number of states from the Third World and the Eastern Bloc. Perhaps one the reasons these states accepted such a wide definition of military objectives is that their focus had moved to draft article 46, which codified provisions on the protection of the civilian population, and to draft article 50 on precautions in attack.[147]

5.12 Proportionality and Collateral Damage

Having codified the principle of distinction, the definition of civilians and of the civilian population, and the concepts of military objectives and civilian objects, there was one last task during the conference concerning the regulation of aerial bombing, namely that of defining the precautions that attackers should take and establishing rules for the protection of the civilian population. This task was the object of the ICRC draft article 46 on protection of the civilian population (article 51 in AP-I) and draft article 50 on precautions in attack (article 57 in AP-I). The ICRC draft of both these articles contained a reference to the principle of proportionality, which was by far the most controversial point in these provisions. During the first and second sessions of the Diplomatic Conference, in 1974-75, anticolonialists and states from the Eastern Bloc resisted attempts by Western states and the ICRC to include in the Additional Protocols a reference to the idea of proportionality. The debate showed that there was no universal agreement on the importance of the principle of proportionality or on whether it was part of customary law or not. If there was any consensus at all, it was that the principle of

146 Ibid 69.
147 The official records of the Diplomatic Conference do not give a clear indication as to why states which had so strongly opposed a wide definition of military objectives ultimately voted in favour of draft article 47 or abstained. Besides speculation as to why this happened, further historical works in national archives could provide a better explanation for this turn of events.

proportionality had a permissive aspect: proportionality permitted civilian casualties.[148] Whether that permissive aspect was desirable or not was the main disagreement between anticolonialists and Western states.

George Aldrich, the head of the U.S. delegation during the conference and Rapporteur of the Working Group in Committee III, argued that the rule of proportionality reflected existing international law, having already been established by custom and practice. It was thus necessary to codify it explicitly.[149] For the United States, as well as for most Western states, there was only one realistic or acceptable way to regulate the level of acceptable damage to civilians and civilian objects. Aldrich argued that 'collateral damage to civilians and civilian objects was often unavoidable and it was unrealistic to attempt to make all such damage unlawful: the rule of proportionality was as far as the law could reasonably go'.[150] This argument was supported by a number of Western states. The Canadian delegate argued that the reference to proportionality was necessary as 'an absolute prohibition would result in a very difficult situation'; Australia stated that nothing justified abandoning the principle of proportionality and added that 'since area bombardment was unlikely to be abandoned, there should be a distinct code related to it'.[151] Expanding the argument that proportionality was the only 'realistic' option, the Australian delegate countered the claim that draft article 46 was too subjective and provided little protection by saying that 'military commanders, acting on the best information they could obtain, would attack targets which they regarded as warranting attack' – a peculiar and unsettling reassurance for countries that criticised the provision.[152]

The United Kingdom, echoing the American point of view, argued that the conference needed to come up with provisions which could be followed in practice. That meant, in their opinion, rejecting all amendments which contained 'a somewhat unrealistic ban on attacks made indiscriminately against military and civilian persons and objects: it was difficult to visualise an attacker who would not carry out an assault upon an entrenched adversary because of the presence of one or two civilians'.[153] France, the Netherlands and West Germany concurred with the United Kingdom. Humanitarians at the ICRC, Sweden and Norway also argued for the

[148] Alexander (n 15) 18.
[149] 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV' (n 119) 67 (CDDH/III/SR.8); 194 (CDDH/III/SR.21).
[150] Ibid 67 CDDH/III/SR.8).
[151] Ibid Canada 55 CDDH/III/SR.7); Australia 62 CDDH/III/SR.8).
[152] Ibid 62-63 CDDH/III/SR.8).
[153] Ibid 64 (CDDH/III/SR.8).

adoption of the principle of proportionality, though in a more nuanced way than other Western states.

When the ICRC delegate introduced draft article 46 to the conference, which included the rule of proportionality in paragraph 3(b), he cited the long history of 'many vain attempts at codifying the immunity of the civilian population' and referred to the failed project of the 1923 Hague Rules on Air Warfare as a good text which was useless as it went unsigned, unratified and unimplemented. Given this history of failures, the ICRC recognised the fact that 'the rule of proportionality contained a subjective element, and was thus liable to abuse', but it was still, in their opinion, the only way short of peace to restrict the incidental effects of attacks directed at military objectives.[154] The Swedish delegate, while supporting the idea of proportionality, cautioned that the rule in paragraph 3(b) should be tightened in order to avoid abuse. Proportionality was useful, he argued, as long as it was carefully formulated.[155] Norway went a little further, arguing that the principle of proportionality needed a substantial amendment in order to be more restrictive. Contesting the British and American arguments that stricter rules would be unrealistic, the Norwegian delegate reasoned that many modern conflicts involved one side which was technologically superior and which was not fighting for survival. It would therefore be neither unrealistic nor impossible for the technologically superior side to abide by very strict criteria providing the greatest possible protection for the civilian population.[156] In the Swedish amendment to article 46, the idea of proportionality would only apply to losses among the civilian population or to the destruction of civilian objects 'within the immediate vicinity of the military objective'.[157] For Sweden and Norway, attacks which might entail losses beyond the immediate vicinity of military objectives were absolutely prohibited.

The most remarkable fact of the debate, however, was that a much larger number of states, led by anticolonialists and socialists, vehemently opposed the inclusion of the principle of proportionality or of anything resembling it in the Additional Protocols. Those who had been on the receiving end of aerial bombing were quick to point out that proportionality had been repeatedly invoked to justify the killing of civilians. The North Korean delegate recalled the extensive bombing of his country and of Vietnam by the United States and concluded that 'acceptance of the principle of proportionality would provide war criminals with a pretext for

154 Ibid 37 (CDDH/III/SR.5).
155 Ibid 60 (CDDH/III/SR.8); 191 (CDDH/III/SR.21).
156 Ibid 59 (CDDH/III/SR.8).
157 Levie (n 120) 130 (CDDH/III/44).

their crimes'.[158] Romania, speaking for the Eastern Bloc, was one of the most consistent opponents of the idea of proportionality:

> Article 50 introduced into humanitarian law a concept which was contrary not only to humanitarian principles but to the general principles of international law. It amounted to legal acceptance of the fact that one part of the civilian population was to be deliberately sacrificed to real or assumed military advantages and it gave military commanders the power to weigh their military advantage against the probable losses among the civilian population during an attack against the enemy. Military leaders would tend to consider military advantage to be more important than the incidental losses. The principle of proportionality was therefore a subjective principle which could give rise to serious violations.[159]

Emphasising the subjective aspect of the proportionality calculus, the Hungarian delegate rejected paragraph 3 of the ICRC draft article 46 as it 'called for a comparison between things that were not comparable, and thus precluded objective judgment'.[160] Poland and East Germany weighed in, arguing that the rule of proportionality gave military commanders 'the practically unlimited right to decide to launch an attack if they considered there would be a military advantage' and that it made civilian protection 'dependent on subjective decisions taken by a single person, namely, the military commander concerned'.[161] During the sessions of Committee III, the Eastern Bloc repeatedly drew attention to the discretionary and subjective nature of the rule of proportionality.

Arab states, led by Egypt and Georges Abi-Saab, a prominent anticolonialist international lawyer, put forward an amendment calling for the deletion of the idea of proportionality from paragraph 3(b) of article 46.[162] So did the Philippines[163]. These states would have the original ICRC draft changed in the following way: '…it is forbidden: (b) to launch attacks which may be expected to entail incidental destruction of civilian objects ~~to an extent disproportionate to the direct and substantial military advantage anticipated~~'. The strong aversion to the idea of proportionality was closely connected to the anticolonialist theory of just and unjust wars. Attempts by Western states to codify this rule and to confine the meaning of civilian population within narrower limits were said to be 'tantamount to providing imperialists and colonialists

[158] 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV' (n 119) 61 (CDDH/III/SR.8).
[159] Ibid 305 (CDDH/III/SR.31).
[160] Ibid 49 (CDDH/III/SR.6).
[161] Ibid Poland 61 (CDDH/III/SR.8); East Germany 56 (CDDH/III/SR.7).
[162] Levie (n 120) 129 (CDDH/III/48/Rev.1 and Add.1).
[163] Ibid 130 (CDDH/III/51).

with a pretext for attacking the civilian population during their wars of aggression'.[164]

Whilst Western states argued that the rule of proportionality was already established in international law, needing only to be made explicit in the Protocols, Vietnam directly questioned if the United States could point out 'what documents in positive international law had provided any foundation for such an assertion'. The Vietnamese delegate joined other anticolonialists and the Eastern Bloc in pointing out that the principle of proportionality could open the door to abuses since there were no established criteria used to determine whether a direct or substantial military advantage existed. Whereas for the United States proportionality was 'as far as the law could reasonably go', for Vietnam 'the principle was a dangerous one'.[165]

Despite the diametrically opposed views expressed throughout the first two sessions of the conference, a compromise was eventually reached in the Working Group discussing the topic. At the thirty-first meeting of Committee III, on 14 March 1975, article 46 was adopted by consensus and article 50 was adopted by 66 votes to none, with 3 abstentions.[166] Both provisions incorporated the rule of proportionality, though the word 'disproportionate' which had been present in the ICRC draft was eliminated. Instead, article 46 (51 in AP-I) considered as indiscriminate and article 50 (57 in AP-I) prohibited attacks 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.[167] The change in wording, combined with the other paragraphs included in articles 51 and 57 of the Additional Protocols, proved sufficient for anticolonialists and socialist states to accept the tortuous inclusion of the idea of proportionality in those provisions. A report of Committee III explained that:

> The so-called rule of proportionality in paragraph 2(a)(iii) was found ultimately to be acceptable when it was preceded by paragraph 2(a)(i) and paragraph 2(a)(ii) which prescribe additional precautions and phrased in terms of losses 'excessive in relation to the concrete and direct military advantage anticipated', and was supplemented by paragraph 5 to make clear that it may not be construed as authorisation for attacks against civilians.[168]

Perhaps echoing the sentiment of many states who had opposed or been wary of embracing the

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[164] 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV' (n 119) China 57 (CDDH/III/SR.7).
[165] Ibid 193 (CDDH/III/SR.21).
[166] Ibid 300-303 (CDDH/III/SR.31).
[167] *Additional Protocol I* (n 13) Articles 51 and 57.
[168] 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XV' (Federal Political Department, Bern, 1978) 285 (CDDH/III/Rev.1) ('Official Records of the Diplomatic Conference Vol. XV').

rule of proportionality, the delegate from the Ivory Coast said that her delegation abstained from voting on article 50 because 'the rule of proportionality implied in that article hardly seemed valid in international law', but nonetheless the rest of the article 'met most of the desired requirements' and added to the protection of the civilian population.[169] There are few other clues in the official records of the Diplomatic Conference that explain why anticolonialists and socialists states ultimately accepted the inclusion of proportionality in the Additional Protocols. It was possibly a concession to Western states and to the ICRC draft – though by no means an easy one – when the questions of national liberation movements and the status of guerrilla fighters had been won by the anticolonialists. Another fundamental factor that led to this result was the fact that the United States prioritised the work of Committee III over all others.[170] Richard Baxter and George Aldrich, both members of the U.S. delegation, chaired the sessions of that committee and were therefore extremely influential in its outcomes. In the plenary meeting of 27 may 1977, Aldrich expressed his contentment by claiming that 'article 50 represents a major step in the reaffirmation and development of humanitarian law…not only does it codify for the first time the rule of proportionality but it also gives to military commanders uniformly recognised guidance on this responsibility to civilians and the civilian population'.[171] It was an enormous victory for Western states in a conference where they expected to succumb to the majority of Third World, Eastern and Non-Aligned states.

5.13 Conclusion

Over most of the 1970s, states struggled over the development of the laws of war while they fought wars of decolonisation and national liberation. At the Diplomatic Conference of 1974-1977, anticolonialists pressed their vision of a non-imperialist international order in which the laws of war would recognise the justice and legitimacy of wars of national liberation and of guerrilla fighters while providing strong protections for civilians against aerial bombing and other methods of war which were mostly used by imperialist states. Eager for a successful conclusion of the Additional Protocols, and pressed and limited in what they were able to argue for and achieve within the context of the Diplomatic Conference, many compromises were

[169] 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vol. XIV' (n 119) 308 (CDDH/III/SR.31).
[170] Tim McCormack, 'Negotiating the Two Additional Protocols of 1977: Interview with the Right Honourable Sir Kenneth Keith' in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law* (Cambridge University Press, 2019) 17, 25.
[171] Levie (n 120) 336 (CDDH/SR.42, Annex).

made and paradoxes overlooked in the final text of the Protocols.[172] Anticolonialists achieved many of their aims concerning the recognition of wars of national liberation as international armed conflicts and the extension of prisoner of war status to guerrilla fighters, but the provisions that regulated aerial bombing, and particularly the inclusion of the rule of proportionality, were concessions to the desires of Western military states.

If most accounts of the construction of international humanitarian law tend to underplay the role played by anticolonial discourses, looking back at the debates on aerial bombing in the 1970s gives us a much clearer sense of the different visions of humanitarian law and of international order that anti-imperialists struggled to achieve. Restricting aerial bombing and providing stronger protections for civilians was central to these visions. On this count, I argue that anticolonialists mostly failed. The definitions of civilians, civilian objects, military objectives, collateral damage and proportionality that were then extremely contested have since become accepted as universal standards against which aerial bombings are measured. Focusing on the Additional Protocols shows us that at the pinnacle of anticolonial legal activism this language of international humanitarian law had no single meaning, nor was there a shared moral consensus defined in advance.[173]

The sense of a lost opportunity for anticolonialists can also be seen with regard to the furore during the Vietnam war over weapons such napalm, cluster bombs and defoliants, which did not materialise into corresponding international legal provisions. The regulation of these weapons was ultimately omitted from the Additional Protocols and ended up instead in the 1980 Convention on Conventional Weapons (CCW), where Western powers found it easier to contain anticolonialist demands. For humanitarians, disarmament advocates and anticolonialists alike, the CCW is still seen as an 'unloved' document.[174] For all the outrage that aerial bombing combined with the use of chemical, biological and other indiscriminate weapons such as cluster bombs and anti-personnel land mines provoked during the Vietnam war, the CCW had little to show as a result. It excluded chemical, biological and nuclear weapons from its regulations. Similarly to the Additional Protocols, it also fell far short of outright prohibitions on those weapons that it did regulate (non-detectable fragments; mines and booby-traps; and incendiary weapons). Ultimately, the CCW was dismissed as full of loopholes and exceptions, and too weak

[172] Alexander (n 15) 35.
[173] Whyte (n 67) 315.
[174] Stephanie Carvin, 'Conventional Thinking? The 1980 Convention on Certain Conventional Weapons and the Politics of Legal Restraints on Weapons during the Cold War' (2017) 19(1) *Journal of Cold War Studies* 38, 38.

to make a real impact on state practice.[175] If the attempt to restrict aerial bombing during the 1970s failed, so did the attempt to ban or restrict the use of certain weapons that were closely connected to the use of air power.

In his renowned book *Just and Unjust Wars*, first published in 1977, Michael Walzer argued that those in the antiwar movement in the 1960s and 1970s found a moral doctrine ready at hand which had a shared vocabulary – a connected set of names and concepts – that everyone knew. The anger and indignation at the Vietnam war was thus shaped by the words available to express them.[176] For Walzer, one of the legacies of the Vietnam war was the realisation that 'our common moral vocabulary is sufficiently common and stable so that shared judgments are possible'.[177] This common vocabulary is a baffling mix of terms that draws from Christian theology and just war theory (double effect, collateral damage, proportionality) as well as from international law existing long before the Vietnam war (prisoners of war, necessity, aggression, intervention, neutrality). These terms, wrote Walzer, were 'like characters in a novel' which shaped the narrative and the argument in which they figured.[178]

There are two senses in which Walzer's claims about the Vietnam war and international law are misleading. The first, as pointed out by Anne Orford, is Walzer's dismissal of international law as 'a paper world which fails at crucial points to correspond to the world the rest of us still live in' and of the work of international lawyers as 'utopian quibbling'.[179] Although he recognised that his so-called 'common moral vocabulary' was similar to the language of international law, Walzer's caricature of legalism as 'a pedantic and overly scholastic concern with rules'[180] led him to believe that policy-oriented lawyers 'are in fact moral and political philosophers, and it would be best if they presented themselves that way'.[181] Looking at the debates about the laws of war and aerial bombing that led to the conclusion of the Additional Protocols shows us that Walzer's legalist approach had in fact little resemblance to what international lawyers actually did.[182]

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[175] Expanding on the topic of disarmament, the Vietnam war and the campaign against indiscriminate weapons, see Chapter 4 of Treasa Dunworth, '"What's Past Is Prologue": Humanitarian Disarmament from St Petersburg to New York' (Melbourne Law School, 2019) 90.
[176] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books, 4th ed, 2006) xix.
[177] Ibid 20.
[178] Michael Walzer, 'The Triumph of Just War Theory (and the Dangers of Success)' (2002) 69(4) *Social Research* 926, 929; cited in Whyte (n 67) 321.
[179] Orford (n 9) 85.
[180] Anne Orford, 'The Politics of Anti-Legalism in the Intervention Debate' in David Held and Kyle McNally (eds), *Lessons from Intervention in the 21st Century: Legality, Feasibility and Legitimacy* (Global Policy Journal at Smashwords, 2015).
[181] Walzer (n 176) xxi.
[182] Orford (n 9) 91.

If Walzer's caricature of international law is misleading, so is his characterisation of a common moral vocabulary shared by everyone. As the debates on the Additional Protocols show, it is important to attend to other moral vocabularies that were being invoked by anticolonialists to argue for restrictions on aerial bombing and for stronger protection of civilians. In this sense, one must take note of the terms deployed by anticolonialists and excluded by Walzer: 'imperialism', 'racism', 'colonialism', 'capitalism', 'self-determination'.[183] The Additional Protocols drew from and incorporated terms and concepts from a range of traditions. It is not a fully coherent document that can be placed neatly into a single tradition or progressive narrative. And yet, in the provisions that deal with the matter of aerial bombing, we can distinguish the influence of Walzer's vocabulary much more than that of the anticolonial vocabulary.

Writing about the first session of the diplomatic conference in 1974, Richard Baxter regretted the politicisation of the conference by developing and Eastern European countries. Against what he saw as the pursuit of short-term political objectives, Baxter defended maintaining the integrity of the law. In his view, 'international humanitarian law is human rights law, and it is the protection of individuals from death and suffering which must be the central concern of the law'. Wars of national liberation and against racist regimes had to be acknowledged, but should not influence the universality of the laws of war: 'Rhodesia and South Africa are important problems, but to introduce moral judgements and subjective criteria into the law in order to bring pressure to bear on those two countries would be a tragedy for those very persons who should be protected by the law, whatever their nationality or cause may be'.[184] It was easy for a Western military superpower to dismiss the different causes of war, as well as the different weapons and methods used by different groups, and instead proclaim the universality of humanitarian law as human rights law. The same move was made by Walzer in relation to his common moral vocabulary, which he explained as being 'in its philosophical form a doctrine of human rights'.[185]

In the aftermath of the Diplomatic Conference, a number of military powers refused to ratify Additional Protocol I. President Reagan described it as 'fundamentally and irreconcilably flawed'.[186] Yet the rules related to aerial bombing and the vocabulary of military objectives,

[183] Whyte (n 67) 321.
[184] Baxter (n 90) 25.
[185] Walzer (n 176) xxiv.
[186] Parks (n 84) 220.

collateral damage and proportionality became entrenched in the document and, like the discourse of human rights appropriated by Western states in the late 1970s, were revived in the 1990s as an apolitical consensus.[187] Part IV of Additional Protocol I on the civilian population, and containing the rules related to aerial bombing, are now seen as 'the crowning achievement of the Diplomatic Conference of 1974-1977'.[188] By looking back at the Vietnam war and the ensuing debates on the development of the laws of war, we can recapture the sense of struggle and the alternate visions of international law that were put forward, but ultimately failed, in that period.

[187] Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26(1) *European Journal of International Law* 109.
[188] International Committee of the Red Cross (n 115) 583.

6. Conclusion

> We do not know whether future technology may produce weapon systems that can out-perform humans in protecting civilians and civilian objects. It would in my view be a mistake to try to ban a technology on the basis of its current shortcomings, when in future it may actually enable the law to be complied with more reliably than now.[1]

> Now, it seems to me difficult to justify by a humanitarian motive the prohibition of the use of balloons for the hurling of projectiles or other explosive materials. We are without experience in the use of arms whose employment we propose to prohibit forever. Granting that practical means of using balloons can be invented, who can say that such an invention will not be of a kind to make its use possible at a critical point on the field of battle, at a critical moment of the conflict, under conditions so defined and concentrated that it would decide the victory and thus partake of the quality possessed by all perfected arms of localizing at important points the destruction of life and property and of sparing the sufferings of all who are not at the precise spot where the result is decided. Such use tends to diminish the evils of war and to support the humanitarian considerations which we have in view.[2]

6.1 From contestation to universalisation

On the 20th of February 1974, at the first session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed

[1] William Boothby at the 2015 CCW Meeting of Experts, see William H Boothby, 'Article 36, Weapons Reviews and Autonomous Weapons' (at the 2015 CCW Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS), Geneva, April 2015) <https://www.unog.ch/80256EDD006B8954/(httpAssets)/616D2401231649FDC1257E290047354D/$file/2015_LAWS_MX_BoothbyS+Corr.pdf>.

[2] Captain Crozier at The Hague Peace Conference 1899, in James Brown Scott (ed), *The Proceedings of the Hague Peace Conferences*, vol The Conference of 1899 (Oxford University Press, 1920) 354.

Conflicts, it would be hard to predict what would come out of the conference. On the cusp of the last decolonisation wars, and beset with deep divisions concerning international order and the role of international law, representatives of over one hundred and twenty states, national liberation movements and international organisations clashed over how to rewrite the law of armed conflict. Following the Third World campaign in the General Assembly to reinterpret the meaning of self-determination and to decolonise international law one piece at a time, the obliviousness of the laws of war to aerial bombing and to new technologies of war seemed vulnerable to a radical overhaul. If by 1977 those hopes had been dashed, it was only after a prolonged process that put technologically advanced states in a defensive position. During that period, arguments for prohibiting or severely limiting aerial bombing, as well as a number of new destructive technologies such as incendiary weapons, chemical agents, antipersonnel mines, and cluster bombs, were powerful contenders in the revision of the laws of war. The core concepts and principles of humanitarian law were openly challenged, and their codification proved to be a long and arduous process.

More recently, exactly eighty years after a commission of jurists met at The Hague to draft the first comprehensive legal code on aerial warfare (the 1923 Hague Rules of Air Warfare), another commission of mostly Western international legal experts was formed with a view to restating the law on aerial warfare. After six years of meetings led by the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) and funded by Switzerland, Germany, Norway, Belgium, Sweden, Australia and Canada, a small group of approximately thirty scholars and government experts drafted a Manual on International Law Applicable to Air and Missile Warfare.[3] The HPCR Manual has since become a reference frequently consulted by practitioners, researchers and students of the regulation of aerial bombing. It bears several resemblances to the 1923 Hague Rules, not least the fact that it was drafted by a small group of Western men from 'the leading States in the sphere of air and missile warfare'.[4] Its drafting generally excluded 'the bombed', which often coincides with the Third World and with those not represented by states or prestigious universities. Like the 1923 Hague Rules, the HPCR Manual is a non-binding document in the form of a legal code. That does not mean we should

[3] Program on Humanitarian Policy and Conflict Research, *Manual on International Law Applicable to Air and Missile Warfare* (Program on Humanitarian Policy and Conflict Research at Harvard University, 2009).
[4] With the exception of one woman and one scholar from China, the 'core group of experts' was made up exclusively of Western white men, and included air power fanatics W. Hays Parks and Charles J. Dunlap Jr. See full list of experts in Program on Humanitarian Policy and Conflict Research (ed), *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (Program on Humanitarian Policy and Conflict Research at Harvard University, 2010) Appendix I, 8.

not be worried about its normative authority. As the history of aerial bombing and international law shows, draft codes, declarations and non-binding documents serve to consolidate concepts and doctrines in legal discourse, often avoiding the politics of treaty-making.

The clashing visions of what the laws of war should be and the sense of contestation from the 1970s is hardly seen today. Instead, the more common scene is a group of Western experts drafting among themselves model legal codes on the laws of war. In this sense, the HPCR Manual on Air and Missile Warfare is well accompanied by a number of other manuals whose names indicate the many places where a small group of experts have met: San Remo, Tallinn, Leuven, and more recently Woomera.[5] The proliferation of law of war manuals is often described as having the sole aim of systematically capturing the law as it is, absolving the drafters from policy considerations.[6] At the same time, drafters claim the manuals 'will serve as a valuable resource for armed forces in the development of rules of engagement, the writing of domestic military manuals, the preparation of training courses and – above all – the actual conduct of armed forces in combat operations'.[7] It is hard to avoid the conclusion that, at a policy level, the effort to restate the laws of war and to draft all these manuals is an effort to strengthen their authority (and of a certain interpretation of those rules) and to forestall contestation.

An overhaul of the Geneva Conventions and its Additional Protocols seems unimaginable to most people in the field of international humanitarian law today. Instead, the concepts and principles which evolved in tandem with the development of aerial bombing and of military doctrines of air power have become naturalised and depoliticised. There is abundant contestation about the customary status of certain rules and about their interpretation, such as what amounts to a 'direct participation in hostilities' for determining the loss of civilian

[5] International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, ed Louise Doswald-Beck (Cambridge University Press, 1995); NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, ed Michael N Schmitt (Cambridge University Press, 2013); Terry D Gill et al, *Leuven Manual on the International Law Applicable to Peace Operations* (Cambridge University Press, 2017); Michael N Schmitt, Charles HB Garraway and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict* (International Institute of Humanitarian Law, 2006); 'The Woomera Manual on the International Law of Military Space Operations' <https://law.adelaide.edu.au/woomera/system/files/docs/Woomera%20Manual.pdf>.

[6] 'the sole aim has been to systemically capture in text the *lex lata* as it is. Since the authors of the *HPCR Manual* have no power to legislate, it is freely acknowledged that the emerging restatement must be evaluated not on the basis of logic or policy considerations. The only test is whether the text of the *HPCR Manual* is an accurate mirror-image of existing international law.' in Program on Humanitarian Policy and Conflict Research (n 4) 2.

[7] Ibid 3.

protection.[8] But what is rarely contested is the universality of the central concepts in IHL.[9]

In one of the most insightful recent studies on the effectiveness of IHL to regulate aerial bombing by the United States, Janina Dill argues that IHL is constitutive of the definition of legitimate targets but is not normatively successful in restraining bombing.[10] Central to her argument is the problem of law's indeterminacy, particularly concerning the definition of a legitimate target of attack and of the principle of proportionality. According to Dill, 'the existing degree of procedural insecurity of IHL is puzzling' given the difficulty of decision making in the circumstances of war, and 'it is a fundamental misconception that indeterminate legal obligations do justice to individuals in situations in which their moral agency is strained'. This misconception is, in her words, 'the birth defect of the API'.[11] Dill looks at the history of Additional Protocol I and concludes that 'a historical interpretation does not significantly reduce the law's indeterminacy'.[12] In this thesis, I looked at the history of IHL not to try to dispel any indeterminacy but to provide a better understanding of the stakes behind the use of the language and central concepts of IHL. Dill is right in arguing that proportionality's indeterminacy is problematic, but assuming that this is based on the misconception that indeterminate language is needed to do to justice to individual choice in situations of armed conflict is taking at face value the arguments of Western states who adduced the principle of proportionality as a governing rule against proposals which would have done away with proportionality and restricted aerial bombing to a much larger extent.[13]

This thesis shows that the problem is not that IHL as it is today fails to restrict aerial bombing because it is indeterminate, incomplete or because it obscures considerations of military necessity in the language of humanitarianism. Rather, some of the core concepts of IHL developed explicitly as a reflection of the emergence of aerial bombing and of air power doctrines. It is the success in universalising and depoliticising this discourse that should worry

[8] Adil Ahmad Haque, 'Misdirected: Targeting and Attack under the DoD Manual' in Michael A Newton (ed), *The United States Department of Defense Law of War Manual* (Cambridge University Press, 1st ed, 2019) 225.
[9] Recent work on the history of IHL has been important in questioning the universality narrative, see: Vasuki Nesiah, 'Human Shields/Human Crosshairs: Colonial Legacies and Contemporary Wars' (2016) 110 *AJIL Unbound* 323; Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and Its Others* (Cambridge University Press, 2006) 265; Boyd van Dijk, '"The Great Humanitarian": The Soviet Union, the International Committee of the Red Cross, and the Geneva Conventions of 1949' (2019) 37(1) *Law and History Review* 209.
[10] Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (Cambridge University Press, 2015) 14–15.
[11] Ibid 306.
[12] Ibid 105.
[13] See RR Baxter, 'Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law' (1975) 16 *Harvard International Law Journal* 1, 22.

us. This is particularly important in relation to the law of targeting and attack, often recognised as the 'moral core' of the law of war.[14] There are many ways in which one can interpret and apply the concept of proportionality – 'the most elusive concept in the law of war' –[15] but it is worth questioning how we came to talk about proportionality in the first place and whether we should continue to do so. The vocabulary of proportionality, now part of perhaps every kind of law in a globalised world as a technique of pragmatic governance by standards of reasonableness, presupposes some minimum consensus around community objectives and values that cannot exist in aerial warfare – the kind of warfare that is closest to 'purely a war of destruction'.[16]

The early history of aerial bombing and international law shows that the laws of war can not only determine the extent to which new technologies of war can operate, but also that new technologies can negotiate the boundaries of legality through their operation. In this sense, the determination of lawful and unlawful targets and the boundaries of legitimate acts of violence have always been a reflection of the possibilities and limits of certain technologies to materialise the epistemological universe needed for the operation of the laws of war.[17] What is lost in most contemporary debates, and what this history brings back, is the link between certain concepts and certain technologies and the politics of who used such technology, for which purposes and against whom. In other words, history can help us understand where the epistemological universe of the contemporary laws of war comes from, how it came to be and whom it serves.

6.2 Aerial violence and the promises of technology

In Chapter 2, exploring the first aerial bombing campaign and the first attempts at regulating aerial warfare, I argued that the rise of aerial bombardment was experienced by international lawyers as a technological crisis event that called for an international regulatory response. This

[14] Adil Ahmad Haque, *Law and Morality at War* (Oxford University Press, 2017) 5.
[15] Ibid 17.
[16] For a broader critique of the language of proportionality and reasonableness in international humanitarian law, linking it to a more general turn in global law to antiformal standards, see Martti Koskenniemi, 'Occupied Zone - "a Zone of Reasonableness"?' (2008) 41(1–2) *Israel Law Review* 13, 17; on a related point, critiquing how law turns into 'expert' governance of issue-areas (in this case, military operations) see David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016) ('*A World of Struggle*'); the quote at the end of the sentence is from Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, tr GL Ulmen (Telos Press, 2006) 317.
[17] See the insightful re-description of the principle of distinction and its relation to technologies of visualisation in Amin Parsa, 'Knowing and Seeing the Combatant: War, Counterinsurgency and Targeting in International Law' (Doctoral Thesis, Lund University, 2017) 31.

response came in two interrelated forms. First, the invention of the airplane led international lawyers to rethink the question of 'who owns the air?', and in doing so to create the idea of aerial territory. Second, international lawyers had to contend with the issue of whether aerial bombing should be prohibited or regulated, and, in the latter case, whether the then existing concepts of the laws of war could be applied to aerial bombing. These initial debates were put to rest within the first two decades of the twentieth century. International law not only determined that the new technology of aerial bombing could operate extensively but was itself transformed by this new technology through the incorporation of concepts originating in doctrines of air power.

In the process of establishing aerial territory, sovereignty was not only divided horizontally between states, empires, colonies and protectorates, but also vertically. Spaces where war and its laws would previously not have reached were opened up for the exercise of aerial violence. Legally and spatially constructing aerial territory, international law played an important role in consolidating airspace as an essential locus of international interventions. In the 1910s and 1920s this occurred in the form of the 'pacification' of Libya and of other peripheral spaces. Today, international law continues its practices of territorialisation and deterritorialisation of the air, reproducing spaces of divisible sovereignty subject to aerial violence structured in similar patterns to the colonial and imperial systems of the early twentieth century.[18]

The first debates on whether to ban aerial bombing or to regulate that emerging technology hold important lessons for contemporary debates on new technologies of war and international law. At the outset, they show that technological change is not a new type of challenge for the laws of war and that, despite the acceleration in the rate of technological change, the argument that the laws of war are in a precarious situation is an old one.[19] Going beyond the crude question of whether the law is bound to always play catch-up with emerging military technologies, the history of aerial bombing uncovers the politics behind the arguments which were put forward in order to legitimise the new technology. Two main arguments played a role in changing lawyers' views of aerial bombing as something horrific which should be banned into something which should be accepted and legalised. The first was that new technologies such as airplanes were essential to maintaining (European) domination over other peoples. The

[18] On the idea of divisible sovereignty see Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge University Press, 2002) 95; See also Mark Neocleous, *War Power, Police Power* (Edinburgh University Press, 2014).
[19] Rain Liivoja, 'Technological Change and the Evolution of the Law of War' (2015) 97(900) *International Review of the Red Cross* 1157, 1173.

second was that, from a humanitarian standpoint, airplanes would be perfected and aerial bombing would be more precise than other destructive technologies. These arguments, traced back to The Hague Conferences, have become common tropes in almost every subsequent debate on the regulation new technologies of war.[20] The idea that new weapons, or better technology, will diminish the evils of war and support humanitarian considerations is a contradiction that runs through the history and the structure of the field we now call international humanitarian law.

Whilst most legal debates on international law and new technologies of war centre on how to apply the core principles and concepts of IHL to the use of those technologies – whether they are drones, cyber-weapons or autonomous weapons systems – little attention is paid to how these principles and concepts emerged, were transformed and whether they should be contested. As a result, international humanitarian law is taken as something fixed and unchanging, as something universal to which any new technology must conform. Conventional debates on new military technologies and the laws of war thus tend to overlook the effect of these technologies in transforming the law. Furthermore, by reifying legal concepts, these debates project onto IHL an autonomy and a rationality that serves to conceal the traces of its fundamental nature as a relation between peoples.[21]

Ultimately, then, the exaggerated focus on questions of compatibility between the rules of IHL and uses of new military technologies reinforces the mystification of IHL as a depoliticised field and blinds us to alternative legal arrangements by naturalising the existing legal framework as inevitable.[22] This is perhaps most clearly evident in narratives of 'humanisation through precision'[23] which, as shown in Chapter 2, emerged with the advent of aerial bombing. In contemporary debates on the regulation of autonomous weapons, these same narratives are

[20] As a sample, see Michael N Schmitt and Jeffrey S Thurnher, "'Out of the Loop": Autonomous Weapon Systems and the Law of Armed Conflict' (2013) 4 *Harvard National Security Journal* 231; Michael N Schmitt, 'Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics' (2013) Features *Harvard National Security Journal* 1; Jack Beard, 'The Principle of Proportionality in an Era of High Technology' in Christopher M Ford and Winston S Williams (eds), *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (Oxford University Press, 2019) 261; Kenneth Anderson and Matthew C Waxman, 'Debating Autonomous Weapon Systems, Their Ethics, and Their Regulation under International Law' in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press, 2017) 1097 <http://oxfordhandbooks.com/view/10.1093/oxfordhb/9780199680832.001.0001/oxfordhb-9780199680832-e-33>.

[21] The idea of reification is taken from Lukács: György Lukács, 'Reification and the Consciousness of the Proletariat' in *History and Class Consciousness: Studies in Marxist Dialectics* (MIT Press, 1971) 83, 83.

[22] Douglas Litowitz, 'Reification in Law and Legal Theory' (2000) 9 *Southern California Interdisciplinary Law Journal* 401, 401.

[23] Ioannis Kalpouzos, 'Double Elevation: Autonomous Weapons and the Search for an Irreducible Law of War' [2020] *Leiden Journal of International Law* 1, 14.

taken to the point where scholars even talk of making autonomous weapons systems 'not only permissible, but also legally or ethically obligatory'.[24] When the relation of new technology to law is reduced to one of compatibility of the former to the latter, and the basic concepts and principles of the law are reified and naturalised, the politics of who uses such technology and against whom is left out – a question which is as much legal as it is political.[25] The history of aerial bombing and international law urges us instead to ask a different question: 'who is destroying whom in the technologically revolutionised relations of destruction developed by modern industrial societies?'[26] – and how is international law implicated in these relations?

6.3 Distinction: no civilians in the peripheries

One way in which international law is implicated in the distinction between legitimate and illegitimate violence is through the definition of who is a combatant, and therefore a legitimate target, and who is a civilian, and hence immune from attack. The principle of distinction is considered the cornerstone of the laws of war: 'it is the foundation on which the codification of the laws and customs of war rests'.[27] Such is its importance that it is often confused with timelessness by some international lawyers.[28] Yet recent research on the history of the civilian and on the concept of civilians in international law has shown that, far from being an established, timeless and universal idea, it is a contested and unstable category.[29] Significantly, as Chapter 3 reveals, the idea of the civilian embedded in international humanitarian law is a

[24] Natalia Jevglevskaja and Rain Liivoja, 'Balancing the Lopsided Debate on Autonomous Weapon Systems', *The Strategist* (20 December 2019) <https://www.aspistrategist.org.au/balancing-the-lopsided-debate-on-autonomous-weapon-systems/>; in the same vein see Marco Sassóli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to Be Clarified' (2014) 90 *International Law Studies* 308 and; Michael N Schmitt, 'Regulating Autonomous Weapons Might Be Smarter Than Banning Them', *Just Security* (10 August 2015) <https://www.justsecurity.org/25333/regulating-autonomous-weapons-smarter-banning/>.

[25] This view of law and politics as inevitably interconnected draws from the classic works of Martti Koskenniemi: Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006); M Koskenniemi, 'The Politics of International Law - 20 Years Later' (2009) 20(1) *European Journal of International Law* 7.

[26] Wolfgang Streeck, 'Engels's Second Theory: Technology, Warfare and the Growth of the State' [2020] (123) *New Left Review* 75, 82.

[27] International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) 598.

[28] Leslie C Green, *The Contemporary Law of Armed Conflict* (Manchester University Press, 2000) 229.

[29] See especially the works of Helen Kinsella and Amanda Alexander on this topic: Helen Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press, 2011); Helen M Kinsella, 'Discourses of Difference: Civilians, Combatants, and Compliance with the Laws of War' (2005) 31(S1) *Review of International Studies* 163; Helen M Kinsella, 'Gender and Human Shielding' (2016) 110 *AJIL Unbound* 305; Amanda Alexander, 'The Genesis of the Civilian' (2007) 20(02) *Leiden Journal of International Law* 359; see also Richard Shelly Hartigan, *The Forgotten Victim: A History of the Civilian* (Precedent Publishing, 1982).

peculiar way of conceptualising non-combatants that emerged in parallel with the advent of aerial bombing and was strongly influenced by military doctrines of air power and by the practice of aerial bombing.

As Amanda Alexander has argued, the bombardment of large populations centres far from the front transformed the characterisation of non-combatants from dangerous citizens who might pick up arms at any time to helpless civilians who were concurrently and paradoxically victims deserving legal protection and primary targets in modern industrialised wars.[30] It was only once the civilian population was established as a target that international lawyers described it as group deserving protection or a group that was already protected.[31] Even then, international law during the interwar period did little to protect civilians from aerial bombing. Indeed, aerial bombardment of civilians was then seen as compatible with the idea of a good war and with international law.[32] While Alexander traces the 'narrative that suggested that a war against civilians could be an appropriate way of waging war' from a cultural account of the First World War that was established toward the end of the 1920s in the literature and the memory of that conflict,[33] I complement that account with a focus on the practice of aerial bombardment in the peripheries of empires. My argument is that, at a time when European powers had made a routine of bombing civilians in the colonies and mandated territories, it was that material experience and its legal repercussions, more than a cultural narrative about the Great War, that explains the readiness with which aerial bombing came to be accepted.

Focusing on the theory and practice of colonial bombing is therefore necessary to explain why international law failed to restrict air power in any meaningful way during the interwar period. At a time of unparalleled enthusiasm for progress in international law and international institutions, the practice of colonial bombing precluded the success of ideas such as aerial disarmament or a comprehensive prohibition of bombing civilians. At the same time, bombing in the peripheries of empires demonstrated how unstable the category of civilians is. In places such as Iraq, Syria, Morrocco, Afghanistan or Somalia, the idea of distinguishing between combatants and civilians was never just about wearing a uniform, carrying a gun, or being part of the military or of a militia. In these places, racist assumptions and narratives created by Europeans about peoples resisting colonisation or imperial expansion made errors more

[30] Alexander (n 29) 359–360.
[31] Ibid 360.
[32] Amanda Alexander, 'The "Good War": Preparations for a War against Civilians' [2016] (first published online on May 31, 2016) *Law, Culture and the Humanities* 1, 3.
[33] Ibid.

tolerable and public perception acquiescent.[34] Qualifying as a civilian depended not so much on an individual's or group's actions as on the social and cultural perceptions of the bombers and on the limits of aviation technology.

If international lawyers and international institutions mostly overlooked the application of the laws of war to the bombing of civilians in the peripheries of empires, in the few occasions where it was taken into account the principle of distinction did little to protect those civilians. When faced with the scandal of the bombing of Damascus by the French in 1925, the Permanent Mandates Commission of the League of Nations summoned concepts from the laws of war and deployed them as standards which justified the repression of rebellions and of anticolonial wars. In doing so, it reinforced the gendered and racist stereotypes which informed the application of the principle of distinction in a colonial setting.

Understanding this history, we are able to comprehend how air power was presented in the interwar period as a more efficient, cheaper and humane form of warfare – entirely compatible with the principle of distinction and the laws of war – just as armed drones are today marketed as a clean humanitarian weapon that promises strict adherence to the principle of distinction and more precision in targeting.[35] Looking at the history of aerial bombing during the interwar period also helps us to see how the seductive qualities of aerial bombing, its promises of professionalised adherence to distinction and proportionality on one end and of zero casualties on another, are always at least partially betrayed.[36] Besides, as the experience of the Mandates Commission in applying the laws of war in its oversight of the suppression of rebellions shows, the promise of legality in relation to aerial bombing 'can't deliver us from the evil of the object's misuse'.[37] This exaggerated reliance on the principle of distinction to restrict aerial bombing,

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[34] On this point see the work of Priya Satia: Priya Satia, 'The Defense of Inhumanity: Air Control and the British Idea of Arabia' (2006) 111(1) *The American Historical Review* 16; Priya Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (Oxford University Press, 2008); Satia, 'The Defense of Inhumanity: Air Control and the British Idea of Arabia'.

[35] As Harold Koh stated, 'advanced technologies have helped to make our targeting even more precise' in Harold Hongju Koh, 'The Obama Administration and International Law, Annual Meeting of the American Society of International Law' (U.S. Department of State, 25 March 2010) <//2009-2017.state.gov/s/l/releases/remarks/139119.htm>; or as the former CIA Director argued, 'It's this surgical precision - the ability with laser-like focus to eliminate the cancerous tumor called an al-Qaida terrorist, while limiting damage to the tissue around it, that makes this counterterrorism tool so essential.' in 'John Brennan Delivers Speech On Drone Ethics', *NPR* <https://www.npr.org/2012/05/01/151778804/john-brennan-delivers-speech-on-drone-ethics>; se also Philip Hammond, 'In Defence of Drones | Philip Hammond', *The Guardian* (online, 18 December 2013) <https://www.theguardian.com/commentisfree/2013/dec/18/in-defence-of-drones-keep-civilians-troops-safe>.

[36] Ioannis Kalpouzos, 'Armed Drone' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press, First Edition, 2018) 118, 129.

[37] Ibid 126.

leading to calls for more transparency on civilian casualty statistics,[38] masks the experience of daily terror and constant threat of those on the receiving end of aerial bombing.[39]

6.4 Military objectives: everything is a target

One of the most momentous transformations of the laws of war prompted by the emergence of aerial bombing was the decline of concepts based on land warfare and the ensuing rise of concepts based on the 'view from above'.[40] The spatial revolution in warfare led to a conceptual one in the laws of war, where concepts such as zone of military operations, fortified cities, and undefended places went into decline and gave way to the concept of military objectives. For air forces, and not long after for international lawyers, there would henceforth only be targets and non-targets.[41] This new spatiality of the laws of war was intensified during World War II as a result of the carpet bombing of entire cities. During the last year of the war, the obliteration bombing of Dresden and Tokyo, aside from the atomic bombs dropped over Hiroshima and Nagasaki, substantiated how widely the concept of military objectives could be stretched. Enemy territory became porous and fragmented, and when mapped by the adversary and classified into areas with varying priorities for bombing,[42] the implication was that, in a sense, it was 'in fact always already occupied'.[43]

In Chapter 4, I looked at the legal arguments for the area bombing campaigns over Germany and Japan and traced the expansion of the category of legitimate targets for aerial bombing in British and American justifications. While the British initially, and at least externally, professed

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[38] Amnesty International, *'Will I Be next?' US Drone Strikes in Pakistan* (2013) 49; Reprieve, *Opaque Transparency: The Obama Administration and Its Opaque Transparency on Civilians Killed in Drone Strikes* (2016).

[39] Against the narrow focus of international humanitarian law on civilian deaths, see: Alex Edney-Browne, 'The Psychosocial Effects of Drone Violence: Social Isolation, Self-Objectification, and Depoliticization' (2019) 40(6) *Political Psychology* 1341; see also International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* (September 2012) <http://chrgj.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf>.

[40] On the broader topic of social space and the view from above see: Jeanne Haffner, *The View from above: The Science of Social Space* (MIT Press, 2013); see also Peter Adey, Mark Whitehead and Alison Williams (eds), *From Above: War, Violence, and Verticality* (Oxford University Press, 2014).

[41] Arguably, contemporary technologies of visualisation operating in the context of counterinsurgency have shifted the binary logic of targets and non-targets to one with grades and degrees of targetability. See: Parsa (n 17) 32.

[42] For instance, the famous 'Blue Books' organised by Arthur Harris, the head of British Bomber Command. See: Uta Hohn, 'The Bomber's Baedeker -Target Book for Strategic Bombing in the Economic Warfare against German Towns 1943–45' (1994) 34(2) *GeoJournal: spatially integrated social sciences and humanities* 213; Tami Davis Biddle, 'Bombing by the Square Yard: Sir Arthur Harris at War, 1942-1945' (1999) 21(3) *The International History Review* 626.

[43] William Rankin, *After the Map: Cartography, Navigation, and the Transformation of Territory in the Twentieth Century* (University of Chicago Press, 2016) 282.

that civilians were not targeted, they qualified the distinction between civilians and combatants by arguing that industrial workers were somewhere between these two categories, as 'quasi-combatants' or as 'civilian warriors'.[44] Killing German workers and destroying their dwellings became a deliberate tactic rather than an unintended effect of bombing. The United States, on the other hand, never claimed to be targeting workers themselves and emphasised precision bombing of strategic military objectives. Yet by the end of the war they were resorting to area bombing to the same extent of the British, destroying Japanese cities from the air at an extraordinary pace. The legal justifications for these bombing campaigns centred on the gradual broadening of the concept of military objectives, which came to include large industrial cities. Once vast urban areas were considered military objectives, there was little else that could not potentially fall within the scope of this concept.

The justifications of area bombing signalled a move from distinction between individuals to one focused on objects and economic resources. If contemporary drone wars have shifted the focus of distinction back to individuals through targeted killings and signature strikes, what remains unchanged is how there is always a possible overlap between distinguishing individuals and distinguishing objects and areas. As a practical matter, civilians located in or near military objectives are unlikely to be protected by the principle of distinction as 'incidental harm to such civilians will seldom prove excessive in relation to the concrete and direct military advantage of totally or partially destroying those military objectives'.[45] The definition of military objectives and the extent to which it can demarcate what is a legitimate target is therefore crucial for any effort to restrict aerial bombing.

During World War II, it became evident that concessions in the direction of total war were easily accommodated in the concept of military objectives. Once these concessions were made, they were never really rolled back. The concept was later codified in article 52(2) of Additional Protocol I to the Geneva Conventions as '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 neutralisation, in the circumstances ruling at the time, offers a definite military advantage'.[46] This definition, which has been widely accepted as customary law,[47] has been

[44] JM Spaight, 'Legitimate Objectives in Air Warfare' [1944] (21) *British Yearbook of International Law* 158, 162.
[45] Haque (n 8) 237.
[46] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Opened for Signature 8 June 1977, 1125 UNTS 3 (Entered into Force 7 December 1978)* article 52(2) ('*Additional Protocol I*').
[47] Jean-Marie Henckaerts et al (eds), *Customary International Humanitarian Law*, vol I (Cambridge University Press, 2005) 29–32.

criticised as too 'abstract and generic'[48] and as 'so sweeping that it can cover practically anything'.[49] Every object, every area, every person is a potential military objective. International humanitarian law as we know it today is still partly a product of total war, and a number of practitioners and scholars keep on recycling the arguments of air power fanatics of the past.[50] Any reform of the laws of war that sought to restrain aerial bombing in future conflicts would do well to begin with the definition of military objectives.

6.5 The politics of proportionality: justifying the means of destruction

The principle of proportionality has been recognised as an undisputed norm and identified by the ICRC as a rule of customary international humanitarian law.[51] Contestation concerning the proportionality of aerial bombing campaigns happens today not in relation to whether or not the principle exists but rather to how it is to be applied.[52] The principle, as codified in articles 51(5) and 57(2) of Additional Protocol I,[53] has been frequently criticised for imposing two apparently conflicting demands: the balancing of the incommensurable values of civilian lives and military advantage and the symmetrical application to all parties to every conflict regardless of the *jus ad bellum* status of their causes.[54] Instead of going into debates on the application of the principle of proportionality, in Chapter 5 I argued that throughout the 1970s a large number of states, led by anticolonialists and socialists, strongly opposed the inclusion of the principle of proportionality or of anything resembling it in the Additional Protocols. Rather than framing it as a universal and timeless concept which was finally codified in a treaty, my goal was to bring back the politics behind the concept.

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[48] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2004) 83.
[49] Antonio Cassese, *International Law* (Oxford University Press, 2001) 339; For a monograph exclusively dedicated to this concept see: Agnieszka Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice* (Routledge, 2015).
[50] Charles J Dunlap Jr., 'Clever or Clueless? Observations about Bombing Norm Debates' in Matthew Evangelista, Henry Shue and Tami Davis Biddle (eds), *The American Way of Bombing: Changing Ethical and Legal Norms, from Flying Fortresses to Drones* (Cornell University Press, 2014) 109, 114–120; see also the references to the arguments of Hays Parks in the US Department of Defense (DoD) Law of War Manual: Haque (n 8).
[51] *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law* (International Expert Meeting, International Committee of the Red Cross, 2016) 8; Jean-Marie Henckaerts et al (eds), *Customary International Humanitarian Law*, vol II (Cambridge University Press, 2005) Ch. 4.
[52] *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, 13 June 2000) 19.
[53] *Additional Protocol I* (n 46) articles 51(5) and 57(2).
[54] Haque (n 14) 175.

At a time when a number of liberation movements had defeated colonial powers and denounced their atrocities, many of which had been perpetrated through bombing combined with the use of new military technologies, the argument that this form of waging war was cleaner and more precise had little purchase. Third World countries, with support from the Eastern European socialist bloc, pushed the idea that all incidental losses among the civilian population should be prohibited. Those who had been on the receiving end of bombs were quick to point out that proportionality had been repeatedly invoked to justify the killing of civilians. Seeing this as a threat to air power and to their supremacy in that area, the United States and its NATO allies presented the principle of proportionality as a way to defuse more radical proposals.[55] And unlike the concessions made to the Third World concerning the recognition of wars of national liberation as international armed conflicts and the expansion of the category of combatants, the Additional Protocols ultimately incorporated much of what these Western states had argued for when it came to aerial bombing.

Seen from this perspective, the 1970s and the Additional Protocols mark the failure of more radical challenges to the laws of war and the closure of a historical moment that had made a vision of anticolonial worldmaking possible. Since then, debates concerning aerial bombing and targeting in international law have centred around the interpretation and application of the principle of proportionality, a point which is often seen as a progressive and perhaps inevitable move. But to come to this set of conclusions is to evade reckoning with the highly contested character of this concept and of its initial deployment against proposals for a more radical reform of IHL which would have afforded stronger protections to civilians. In this sense, revisiting the Vietnam war and the debates that led to the Additional Protocols might serve as a reminder that what appeared to be the moment of closure in a long path towards the codification of rules on aerial warfare was also a staging ground for an anticolonial and egalitarian version of what the laws of war could be.

In a world where air power and modern weapons technology resulted in 'the formation of a social mode of extermination distinct from the social mode of production, with its own dynamics of development complementing that of capitalism',[56] the principle of proportionality has served to uphold the legitimacy and superiority of states which rely on and can resort to aerial bombing. On a practical level, those responsible for applying it in combat operations are

[55] Baxter (n 13) 21–22.
[56] Streeck (n 26) 80.

often confident that 'it is nearly impossible to prove disproportionality', and no indictment for causing expected excessive civilian losses has yet withstood appeal.[57] When it comes to aerial bombing and international law, we are still living in the shadow of the events leading up to the 1970s: the concepts that were then contested and challenged have become naturalised and depoliticised through the expansion of the discourse of international humanitarian law. We live in a world where the international regulation of air power 'immerses its addresses in a world of military calculations and ensures that proportionality will always be weighed on the military's own scales'.[58] It is a world where international law plays an important role in upholding and in challenging the technologically revolutionised relations of destruction inaugurated by aerial bombing. As international lawyers, we do not choose or control the concepts, doctrines and arguments transmitted from the past. Yet we have some measure of choice over which of those transmitted inheritances we sustain and which we attempt to undo.[59] The task ahead, as inheritors of the concepts of international humanitarian law analysed in this thesis, is to take responsibility for upholding or attempting to transform them, conscious of the fact that 'the past is never dead. It's not even past'.[60]

[57] Dill argues that 'international criminal jurisprudence has been more successful in achieving and upholding indictments for unlawful attack based on violations of the principle of distinction': Dill (n 10) 210.
[58] Anne Orford, 'The Passions of Protection: Sovereign Authority and Humanitarian War' in Didier Fassin and Mariella Pandolfi (eds), *Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions* (Zone Books, 2010) 335, 339.
[59] Adil Hasan Khan, 'International Lawyers in the Aftermath of Disasters: Inheriting from Radhabinod Pal and Upendra Baxi' (2016) 37(11) *Third World Quarterly* 2061, 2072.
[60] William Faulkner, *Requiem for a Nun* (Chatto & Windus, 1919) 85.

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