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The Contemporary Aerial Warfare and International Humanitarian Law

Summary

***(Współczesna wojna powietrzna w świetle międzynarodowego prawa
humanitarnego konfliktów zbrojnych)***

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The introduction of an aircraft as a warfare tool has significantly reshaped military strategy. The air power became a crucial branch of the armed forces and, as a consequence, the air superiority started to play key role on the battlefield. However, the ideas and concepts concerning the actual use of military aircraft vary. Long-range planes offer an extraordinary capability to engage enemy behind the frontlines, including their war-sustaining elements of industry and society. This aspect of aerial warfare led to devastating outcomes during the First and Second World War. The practice of saturation bombing of city centers - e.g destruction of Wieluń, Warsaw, Coventry, Hamburg, Dresden and Tokyo - undermined the cardinal principle of international humanitarian law – the principle of distinction. Unrestricted aerial warfare was the main flywheel of the International Red Cross initiative in 1969 which enabled international community to prepare the revision and codification of existing *ius in bello* provisions.

The aviation in the contemporary era seems the most important method of the conduct of hostilities. The air campaigns from the last three decades show the increased importance of aviation as a crucial factor of success in an armed conflict. As early as at the beginning of the XXth century, the air force usage has been an object of a specific regulation in the international humanitarian law of warfare. It was due to the new tool's exceptional and unseen before ability to reach an enemy from before unattainable great distances. For the first time, the geographical zone of war has stopped to be determined by the scope of operation of field or naval artillery. The aircrafts' firepower has begun to surpass the abilities of an average soldier – with the advent of the heavy four-engine strategic bombers – to impact the enemy more importantly than any other division or army organized in the 19th Century manner. Such a military force needed restrictions, especially in the field of means causing “unnecessary harm” or “excessive suffering” or of weapons which could not be controlled in time and space.

The emergence of balloons, Zeppelins and finally airplane have opened the third element as a new space of the warfare conduct. This has been a breakthrough in so far bipolar law regime that included naval and field war. The autonomy of the aircrafts was a scientific challenge in terms of the airspace legal status. What is characteristic, as far as the civil aviation agreements dates are almost chronologically parallel to the pioneer achievements of Wright brothers or Louis Bleriot, the aerial warfare regulation process proved much longer and laborious which did not reflect the speed of the technological advances. It turned out the airplane was not only a tactical weapon but also a strategic warfare tool. The military aviation development has been influenced by the ideas of aerial warfare theoreticians. According to some of them (Douhet) civilian population was a lawful military objective. This idea

undermined a cardinal principle of the international humanitarian law, namely the principle of distinction. What made the matter worse was the lack of any binding international law instruments concerning the aerial warfare. Particularly, the 1923 Hague rules have not been ratified. This allowed the belligerents to apply the concept of the total war in the Second World War. In this aspect, the main aim of thesis is to present the applicable law during the First and Second World War. The study examines the relevant provisions of 1907 Hague conventions, including the preparatory works (*travaux préparatoires*). The results reveal that the article 25 of the Fourth Hague Convention Annex was both impractical and illogical in terms of the air bombardment. It is unknown why the delegates of 1907 Hague Peace Convention did not link two phenomenon's which were technically similar: air and naval bombardment. Despite the criticism from the international law experts, the test underlined in the article 25 of the Fourth Hague Convention Annex was applied to the air strikes. This created a state of a total ambiguity and blurriness. The Second World War practice completely disregarded any legal requirements which existed or could have existed at that time. It was not until 1970 when the major military doctrine shift has been observed. The US bombings of North Vietnam revealed that concentrating airpower on pure military objectives is more efficient than the civilian populations' attacking. This major change allowed the international community to accept a new framework of warfare limitations namely First Additional Protocol of the Geneva Convention of 1977.

The First Additional Protocol only partially codified the law of aerial warfare. Some major areas of air warfare have been still unregulated by the positive law. The thesis explores the following aspects: the status of military aircraft, the status of the aircraft crew (including the questions of their legal situation as prisoners of war, and their protection during the distress descent from an aircraft).

The thesis is divided into nine major chapters.

The first one is an attempt to explain the term "air warfare". It includes a brief history of military aviation and its development as well as its impact on battlefield. It is necessary to understand why the aerial warfare has been such an important issue for the international law.

The second chapter explores the term of the "law of aerial warfare" and its relation to the international humanitarian law. It also refers to the sources of the international law which are simultaneously sources of the law of aerial warfare.

The third chapter is dedicated towards the material and temporal scope of the “law of aerial warfare” which is interconnected with the general requirements of the international humanitarian law. It must be highlighted that in contemporary armed conflicts, the belligerents are opening the hostilities with the unexpected and undeclared air strike (e. g bombing of Wielun 1939, Pearl Harbor 1941 Iraq 1991, Serbia 1999, Iraq 2003). Usually, the first aerial operations are a part of larger military operations, which legal qualification as a armed conflict (in terms of Geneva Conventions of 1949 and First Additional Protocol) is not problematic. Nevertheless, the air power is deployed during the unilateral acts of force (e.g the Israelian air strike against Syrian nuclear site in 2007). The thesis is analyzing the context and legal consequence of those incidents in the light of the international humanitarian law. The assessment of unilateral interstate situations has consequences towards the status of the air crew.

The forth chapter is presenting the historical development of the law of aerial warfare. It focuses on the origins of rules concerning the land bombardments and presenting the first attempts to regulate the status of the air space. It includes the examination of the Hague Peace Conferences records.

The fifth chapter cross-examines the legal framework regarding the Hague rules of the aerial warfare. It includes its origin, preparatory works, commentary and its reception by the international law doctrine. Then the chapter turns to the question whether the Hague rules of the aerial warfare were a part of the customary international law before and during the Second World War. The chapter ends with presenting a decline of the legal awareness during the last World War.

Chapter six explores the contemporary framework of the law of aerial which is the First Additional Protocol (Part Four, art. 49-60). The new definition of 'military objective' and introduction of 'proportionality rule' finally is operating as an sufficient paradigm in air operations. Nevertheless, the thesis present also the fragile points of the First Additional Protocols which had been reveled during the air campaigns conducted by NATO or Western Powers in the last three decades.

Part seven of the thesis analyses the part of the law on aerial warfare which has not been codified by the First Additional Protocol. This includes the question of lawful deception, perfidy, camouflage, military aircrafts' status and their crews. Then, the analyze turn to the question of armament legality. Especially one kind of weaponry is significantly examined – the incendiary bombs.

Chapter eight presents the relevant jurisprudence which has an impact on the law of aerial warfare. This contains both international tribunals and quasi-judicial bodies. It includes the cross-examination of the International Military Tribunal judgments and the judicial decision of the International Criminal Tribunal for the former Yugoslavia.

The ninth chapter covers the most technologically advanced air systems e.g. unmanned aerial vehicles and autonomous weapon systems.

The main goal of the present work is to present the idea of the law of aerial warfare as an autonomous part of the international humanitarian law. Despite the word “contemporary” used in the thesis title, the work requires to explore a historic data. Nevertheless, those historic aspect are in fact a record of a practice, practice understood as an *usus* which is an essential part of the customary international law. In author's view, the modern law of aerial warfare cannot be understood without exploring its historic foundations. This reflection is the main core of the thesis and impacts its structure. From the author's perspective, the term *law of aerial warfare* is undefined and requires to be clarified. The development of the legal regime on the military aviation in times of aerial conflict is influenced by the aviation technological breakthroughs. The inadequacy of the article 25th of the Fourth Hague Convention resulted in a legal vacuum which might be understood as an example of *non-liquet* norm. Widespread and systematic aerial operations directed against civilian populations between 1939-1970 proved impossible to be legally qualified. Belligerents' decision to abstain from the attacks against civilian populations was based on both technical, doctrinal and legal reasons. The First Additional Protocol is only a partial codification of the rules of aerial warfare. The unregulated matter is regulated under the customary international law which is a reflection of the Hague rules of aerial warfare. The international humanitarian law does not require the usage of precision guided ammunition in every circumstances. However, the belligerent who has an advanced technology has also more wider operational possibilities. The contemporary legal framework adequately regulates the manned and unmanned military aviation, nevertheless it is not sufficient to face the challenges arising from the autonomous weapon systems.

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