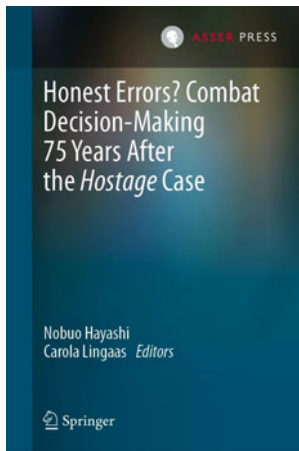


LIBRARIAN'S PICK



Honest Errors? Combat Decision- Making 75 Years after the *Hostage Case*

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On 29 October 1944, Colonel-General Lothar Rendulic, commander of the German 20th Mountain Army, ordered the complete destruction and forced evacuation of Northern Norway as his troops were retreating from the region. Tens of thousands of residents were displaced; hundreds lost their lives. Homes, barns, churches, bridges – all public and private infrastructure – were systematically

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burned or destroyed.¹ On 19 February 1948, Rendulic was acquitted of all related charges in the *Hostage* trial (officially *United States of America v. Wilhelm List et al.*), one of the later Nuremberg trials. In court, he defended his order on grounds of military necessity. The judges found him not guilty of breaching Article 23(g) of the Hague Regulations, which outlawed the destruction of enemy property unless imperatively demanded by the necessities of war. Although the devastation of Northern Norway was intended to counter a Soviet pursuit that never materialized, the judges accepted Rendulic’s defence of military necessity. They found that he had “acted within the limits of honest judgement”² based on the information available at the time. Rendulic, they ruled, had made a mistake; he had not committed a crime.

The trial is known as the origin of a well-established rule of international humanitarian law (IHL): the eponymous Rendulic Rule, or “no-second-guessing” rule. It holds that a military action or decision should be judged from the contemporaneous perspective of the actor and the information available to him or her at the time. From this rule stem both the “reasonable military commander” standard in IHL and the mistake of fact defence in international criminal law (ICL). Seventy-five years after the trial, *Honest Errors?* relitigates the case,³ interrogates its outsized legacy in IHL and ICL, and debates the legal and

1 *Honest Errors?*, p. 118.

2 *Ibid.*, p. 16.

3 The *Hostage* trial was the seventh of the twelve trials of former Nazi military and civilian leaders held before US military courts at Nuremberg from July 1947 to February 1948. These trials were conducted against lower-level defendants than the Nuremberg Trials held before the International Military

ethical implications for decision-making and accountability for mistakes in contemporary warfare. Editors Nobuo Hayashi and Carola Lingaas present the book as an anthology long in the making, with a demanding editorial process. The result is a cohesive and well-constructed volume that skilfully integrates historical research, legal analysis and ethical inquiry. Cohesive but not monolithic, the book's strength also lies in a mix of perspectives from international lawyers and ethicists on the trial's legacy.

Did Rendulic really make an honest mistake, and did the judges get it right? After an introduction that weaves together the book's main themes and findings, military historians and international lawyers re-examine Rendulic's defence strategy on the merits. All agree that the case was deeply flawed. The book finds ample evidence to challenge the commander's claim that he believed the complete destruction of Northern Norway to be justified on strictly military grounds. Through a close examination of archival sources,⁴ the authors show that Rendulic did perceive uncertain but not unlikely threats of Soviet advances or British military interventions, which some amount of destruction would impede. Yet the timing and scale of the destruction did not match the evolution of the perceived threats, strongly suggesting that other motives were at play. Stian Bones and Gunnar D. Hatlehol trace the origin of the order back to Josef Terboven, the German Nazi Party official at the head of the occupation regime, who sought to prevent the Norwegian government-in-exile from regaining influence in the area.

Demonstrating a political motive and a disproportionate response should have strengthened the prosecution's case at trial, but the case against Rendulic collapsed. In a thorough "post-mortem" of the trial, the book shows how misunderstandings, missing evidence, missed opportunities and jurisdictional disputes hindered the prosecution's work. It then highlights the judges' rejection of the Nuremberg principles, their reluctance to question Rendulic's judgement, and, crucially, their reliance on general principles of law rather than international law to ground their verdict. "Obligated to judge the situation as it appeared to the defendant at the time", they ruled that "the defendant [could not] be held criminally responsible although when viewed in retrospect, the danger did not actually exist".⁵ As to the legal sources or precedents on which this "no-second-guessing rule" was based, their ruling remained silent. In Chapter 7 of the book,

Tribunal in 1945–46, and are commonly referred to as the subsequent Nuremberg Trials. Defendants in the *Hostage* case were former German generals. They were charged with war crimes and crimes against humanity, in particular for ordering the taking of hostages and mass executions of civilians during the German campaigns in the Balkans. Charges relating to the destruction of Northern Norway were a later addition. Rendulic was acquitted of these charges but convicted and sentenced to twenty years' imprisonment (a sentence later reduced) for war crimes committed in Yugoslavia. For more information and access to primary sources, see ICRC Library, "Prosecuting War Crimes after the Second World War: The Nuremberg and Tokyo Trials", 22 May 2018, available at: <https://blogs.icrc.org/cross-files/prosecuting-war-crimes-after-the-second-world-war-the-nuremberg-and-tokyo-trials/> (all internet references were accessed in December 2024). On the *Hostage* Trial specifically, see: <https://opil.ouplaw.com/display/10.1093/law-icl/491us48.case.1/law-icl-491us48>.

4 A valuable addition, key archival sources are reproduced in the book, such as Hitler's 28 October 1944 order ("Pity with the civilian population is out of place").

5 *Honest Errors?*, p. 145.

Sean Watts – who, somewhat in opposition to other contributors, is inclined to find the acquittal justified⁶ – points out that the verdict rested on “meagre legal forensics”.⁷

The book then asks, “Can a sound legal rule come out of a factually unsound case?”⁸ The Rendulic ruling can only be described as flawed, yet the Rendulic Rule stands strong in modern IHL. Its core principle is reflected in several articles of Additional Protocol I to the Geneva Conventions, for example in the definition of military objectives and disproportionate attacks. The rule enjoys widespread support among States and is featured prominently in military manuals and training. The book does not question the rule’s legitimacy, and instead focuses its analysis on implementation issues, starting with the “reasonable commander” test in IHL. In Chapter 8, Yasmin Naqvi challenges interpretations of the Rendulic Rule as legitimizing a purely subjective test for military necessity. She argues that the judgment considered not only the sincerity of the accused’s belief but also its reasonableness, through phrases such as “limits of honest judgement” or “could honestly”. And while the judges may have erred in applying their own criteria – Rendulic’s belief that military necessity justified a scorched-earth policy in Northern Norway was arguably neither wholly sincere nor reasonable – they nonetheless established a dual requirement for the mistake of fact defence. The Rendulic Rule, Naqvi argues, incorporated an objective standard of reasonableness from the start. That standard should continue to inform assessments of the mistake of fact defence in ICL. In Chapter 10, Valentin Jeutner examines debates among IHL experts on how to define the “reasonable commander” standard, and whether the standard should be accessible to civilians at all. From what perspective should honesty and reasonableness be judged? Can the “man on the Clapham omnibus” be dropped into the war room or onto the battlefield? Jeutner argues against making the “reasonable commander” standard the exclusive prerogative of military personnel, advocating instead for a perspective rooted in the values of society at large.

What do mistakes on the battlefield look like in today’s warfare, and how do they stand up to the scrutiny of standards of honesty and reasonableness? Tae Hoon Kim, Matthew Talbert and Jessica Wolfendale tackle these questions in two chapters that read very much like a reaction to the *New York Times*’ Pulitzer Prize-winning reporting on civilian victims of air strikes in Iraq and Syria.⁹

6 It is worth noting that Sean Watts bases his assessment on the evidence presented at trial (the case as it was), whereas other contributors tend to look beyond (the case as it should have been). The book editors conclude that “the drastic actions taken in Finnmark were ... not militarily justified and, most importantly for this anthology, Rendulic did not act in honest error or good faith. Thus, the Rendulic Rule originated from a one-sided weighting of (legal) arguments presented in court” (p. 295). Watts, on the other hand, finds that “there is a clear and basic logic to the tribunal’s judgment on honest errors. ... The evidence before the tribunal fell well short of establishing beyond reasonable doubt that a motive other than imperative military necessity informed Rendulic’s orders” (p. 168).

7 *Ibid.*, p. 173.

8 *Ibid.*, p. 20.

9 The book refers to reporting by Azmat Khan published in December 2021 in the *New York Times* under the title “The Civilian Casualty Files”. This reporting further informs a must-read article by Oona A. Hathaway and Azmat Khan, “‘Mistakes’ in War”, *University of Pennsylvania Law Review*, Vol. 173,

Beyond triumphalist celebrations of technological prowess and precision warfare, Kim reminds the reader that the use of advanced information and communication technologies (ICTs) has failed to deliver on the promise of eliminating targeting errors. His case studies reveal frequent malfunctions of such technologies, as well as bias, miscalculation or outright negligence on the part of their operators.¹⁰ As a commander's decision-making process becomes increasingly mediated by advanced ICTs, there is a strong case to be made for applying the "reasonable commander" test also to their design and configuration. Particularly thought-provoking is Kim's prediction that the attention of both international criminal justice and the public at large is likely to focus more on clear-cut war crimes than on "grey zone" cases, further reducing scrutiny of mistakes in warfare and allowing systemic failures to slip through the cracks. Lack of accountability is also at the heart of the book's final chapter, which focuses on the moral, rather than strictly legal, responsibility of military commanders for civilian deaths caused by error. Matthew Talbert and Jessica Wolfendale argue that institutional factors create a culture of impunity for targeting mistakes in the US military. They challenge the notion that such mistakes can still be considered "honest" when they are made possible by an environment that disincentivizes taking responsibility for and investigating them.

While mistakes in warfare are not a new subject, they have primarily been explored in news articles or academic scholarship focusing on individual, high-profile incidents. With its determination to address institutional and systemic factors and its historical depth, *Honest Errors? Combat Decision-Making 75 Years after the Hostage Case* fills a gap in the literature. Perhaps ironically for a book dedicated to the "no-second-guessing" rule of IHL, it ultimately demonstrates time and time again the value of hindsight – and while we can agree that, as the well-established Rendulic Rule holds, hindsight should be kept out of the courtroom, it does have a place in the war room, where learning from mistakes will save lives.

No. 1, 2024 (forthcoming), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4799550. Interestingly, the article makes no reference to the Rendulic Rule.

10 In a similar vein, Shiri Krebs has previously shown how reliance on aerial visuals, despite (or even because of) their perceived objectivity, can lead to targeting errors with devastating consequences. Shiri Krebs, "Above the Law: Drones, Aerial Vision and the Law of Armed Conflict – a Social-Technical Approach", *International Review of the Red Cross*, Vol. 105, No. 924, 2023.