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THE BIRTH AND LIFE OF THE DEFINITION OF MILITARY OBJECTIVES

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Abstract The forgotten story of the birth and life of the definition of 'military objectives' is relevant to the ongoing discussion about the need to adapt the law to asymmetric warfare. This definition, authored by a West German law professor and former member of the Nazi party, was driven by a Western effort to privilege regular armies while curbing the actions of guerrilla fighters and exposing their civilian supporters to harm. The Non-Aligned Movement turned the tide by burdening regular armies while exempting irregular combatants from the consequences of disregarding the law. It was only through judicial intervention—grounded in an imagined history of the linear progress of humanity—that civilians on both sides of asymmetric conflicts would ultimately become entitled to receive adequate protection.

Keywords: public international law, international humanitarian law, *Institut de Droit International*, military objectives, the principle of distinction, asymmetric warfare, guerrilla warfare.

I. INTRODUCTION

The 1960s evoke memories of students vibrantly challenging political and academic authority. Even if these agitations included violent moments, notably in France in May of 1968 and in West Germany in the autumn of that year, they soon morphed into explorations of new ideas about peace and love, as captured by the iconic Woodstock music festival of August 1969. But, for some, Woodstock's message was seen as part of an ominous slippery slope that began with the communists' manipulation of the young and descended into confrontations and urban guerrillas threatening the political and social order in the West.[1] Among those harbouring such fears was Friedrich August Freiherr (Baron) von der Heydte (hereafter: Heydte), a

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[1] R Gildea, 'The Global 1968 and International Communism' in J Fürst, S Pons and M Selden (eds), *The Cambridge History of Communism, Volume 3: Endgames? Late Communism in Global Perspective, 1968 to the Present* (Cambridge University Press 2017) 43; RL Merritt, 'The Student Protest Movement in West Berlin' (1969) 1 Comparative Politics 516. C Belton, *Putin's People: How the KGB Took Back Russia and Then Took on the West* (Farrar, Straus and Giroux 2020) 35–42; JO Koehler, *Stasi: The Untold Story of the East German Secret Police* (Westview Press 1999) 387–8 (both describing the KGB and the Stasi's support for the Red Army Faction and other urban terrorists).

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member of the *Institut de Droit International* (hereafter: *Institut*). To him, the transformative events of 1968 signified a new type of war against the West, possibly more perilous than a nuclear one, because '[n]uclear wars are avoided, if possible; irregular wars, as a rule, are waged [… and they] give the "have nots" … the possibility of successful resistance also against a "rich" nuclear power'.[2] In his view, the spread of 'false ideals' among the young constituted a crucial first step in irregular warfare.[3]

While Woodstock's sounds of freedom were still reverberating, Heydte was on his way to Edinburgh, where the 1969 Session of that selective body of international lawyers was about to take place. In that Session, he would oversee the adoption of a Resolution he had authored, which offered a distinction between lawful military objectives and unlawful civilian objectives.[4] Heydte's text provided a comprehensive response, potentially covering all possible types of military conflicts: symmetric and asymmetric, international and civil, while protecting only the civilians who belonged to nations using regular armies equipped with discerning weapons. Heydte's aim was not only to resolve a century-old effort to protect civilians during hostilities. His primary goal was to develop what he envisioned as a broader legislative response, 'the international law of tomorrow', to protect the Western order.[5] The Resolution's definition of 'military objectives' would distinguish between lawful, Western-style attacks and unlawful irregular warfare that thrives on erasing the divide between soldiers and civilians, a war devoid of frontiers, soldiers and military bases.[6] The Resolution would render such wars prohibited acts, on the basis that they were 'designed to terrorize the civilian population'.[7] It would also, by implication, render the irregulars' sympathisers and their dwellings legitimate targets.[8]

The 1969 Resolution was remarkable not only because it achieved a definition of military objectives which had eluded the various actors seeking to modernise the laws of war for years. It was remarkable also because Heydte, the author of the Resolution, was not only a prominent law professor in West Germany, but also had an illustrious career as a daring, high-ranking commander in the army of the Third Reich (the *Wehrmacht*), who had joined the Nazi party in 1933.[9]

The current scholarly narrative attributes the codification of the laws of war (or IHL, for International Humanitarian Law) to a series of successful

[2] FA Freiherr von der Heydte, *Modern Irregular Warfare* (G Gregory trans, New Benjamin Franklin House 1986 [originally published in 1972]) 64.

[3] In a 1986 interview (ibid xix–xxvii), the author offers the student unrest in 1968 as 'evidentiary proof by the barrel-full' that the USSR was 'waging irregular warfare against us'.

[4] 'The Distinction Between Military Objectives and Non-Military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction' (Resolution adopted by the *Institut de Droit International* at its Session of Edinburgh, 9 September 1969, reprinted in (1969) 53(2) Annuaire de l'Institut de Droit International 375) ('Edinburgh Resolution').

[5] Heydte, *Modern Irregular Warfare* (n 2) 234.

[6] ibid 73–82.

[7] Edinburgh Resolution (n 4) art 6.

[8] See Pt III.D below.

[9] See Pt III.B below.

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campaigns of civil society, led by entrepreneurial Red Cross leaders—from Henry Dunant and Gustave Moynier to Jean Pictet.[10] There are also several realistic explanations emphasising various motivations, from the wish to ensure reciprocity during combat,[11] to promoting discipline among the non-professional soldiers in large European armies.[12] More critical voices have proposed that the laws of war reflected the desire of the powerful European nations to privilege military necessity,[13] enabling armed forces and their political superiors to 'avoid the hit to [their] reputation that atrocity stories caused'.[14] Those who hold to this interpretation regard the laws of war as deflecting domestic opposition to the use of force, especially during drawn-out 'forever wars', and also allowing 'humanitarian and military professionals' to avoid exercising ethical and moral judgment.[15]

This article describes alternative motives for developing the laws of war: first to protect the political order within Europe by discouraging civilians—at home or in the colonies—from taking up arms,[16] and thereafter, to challenge that order. As this author and Doreen Lustig have shown elsewhere, the codification of IHL to protect the established order was a long-standing motive and the driving force behind the first codification of the laws of war, in 1874.[17] Almost a century later, the *Institut*'s 1969 Resolution can be seen as a similar reaction to what was perceived then as a major, sustained challenge to incumbent regimes. The definition of lawful military objectives was deemed to be necessary to erect an entry barrier for participants in the modern battlefield, privileging those who could employ costlier and more

[10] On this narrative, see E Benvenisti and D Lustig, 'Revisiting Solferino: The Myth and its Histories in the Narrative on the International Laws of War' in A Bianchi and M Hirsch (eds), *International Law's Invisible Frames* (Oxford University Press 2021). See also A Roberts, 'Foundational Myths in the Laws of War: The 1863 Lieber Code, and the 1864 Geneva Convention' (2019) 20 MelbJIntlL 158.

[11] E Posner and A Sykes, *Economic Foundations of International Law* (Harvard University Press 2013) Ch 11; J Morrow, *Order within Anarchy: The Laws of War as an International Institution* (Cambridge University Press 2014).

[12] E Benvenisti and A Cohen, 'War Is Governance: Explaining the Logic of the Laws of War from a Principal–Agent Perspective' (2014) 112 MichLRev 1363.

[13] See eg C Jochnick and R Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 HarvIntLJ 49.

[14] S Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (Farrar, Straus and Giroux 2021) 214.

[15] D Kennedy, *Of War and Law* (Princeton University Press 2006) 83–6, 167.

[16] This preoccupation is reminiscent of the earlier exclusion of colonial resistance from the law's protection: F Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in A Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 265, 299ff; C Wilke, 'How International Law Learned to Love the Bomb: Civilians and the Regulation of Aerial Warfare in the 1920s' (2018) 44 Australian Feminist Law Journal 29; P Satia, 'Drones: A History from the British Middle East' (2014) 5 Humanity 1.

[17] E Benvenisti and D Lustig, 'Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874' (2020) 31(1) EJIL 127.

discerning weapons. Irregular combatants whose crude weapons could not properly distinguish among targets would breach international law by using them, and consequentially take away their PoW status and expose them to criminal charges. Branding them as lawbreakers would also undercut the appeal of their fight to easily-swayed youngsters deemed subject to Soviet propaganda.[18] Guerrilla fighters, even the illustrious Che Guevara, would become 'terrorists'.[19]

But the guerrilla fighters would have their own victory in 1977 with the adoption of the two Additional Protocols to the Geneva Convention. Although the first Additional Protocol to the Geneva Convention of 1977 (API)[20] adopted Heydte's definition of 'military objectives', it effectively retooled the definition to constrain regular armies while relieving irregular combatants of any consequence for ignoring it. This part of the article joins several recent studies of the codification of the laws of war during the 1970s which have focused on the success of the emerging Afro-Asian world in shaping the law to suit its political ends.[21] While some authors pointed out the victory of the Non-Aligned Movement in expanding the definition of wars to include wars of national liberation, and the definition of prisoners of war (PoW) as encompassing certain irregular combatants,[22] this article highlights the Movement's decisive success in shaping the law on the conduct of hostilities.

The proper balance, protecting all civilians equally, would ultimately be achieved through the intervention of judges of international criminal tribunals

[18] Heydte, *Modern Irregular Warfare* (n 2) xix.

[19] The term 'terrorism' appears in Article 6 of the 1969 Resolution (prohibiting 'any action whatsoever designed to terrorize the civilian population'). This remains the only existing legal definition for terrorism: F Kalshoven, 'Guerrilla and Terrorism in Internal Armed Conflict' (1983) 33 AmULRev 67, 76; see also J von Bernstorff, 'The Battle for the Recognition of Wars of National Liberation' in J von Bernstorff and P Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford University Press 2019) 69.

[20] Art 52(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

[21] G Mantilla, 'Social pressure and the making of wartime civilian protection rules' (2020) 26 European Journal of International Relations 443; G Mantilla, 'The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols' in M Evangelista and N Tannenwald (eds), *Do the Geneva Conventions Matter?* (Oxford University Press 2017); J Whyte, 'The "Dangerous Concept of the Just War": Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions' (2018) 9 Humanity 313; A Alexander, 'A Short History of International Humanitarian Law' (2015) 26 EJIL 109 (on the conflicting goals of the participants in the 1974–77 negotiations); G Mantilla, *Lawmaking under Pressure: International Humanitarian Law and Internal Armed Conflict* (Cornell University Press 2020).

[22] von Bernstorff (n 19); HM Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press 2011) 132. The same view was shared by political and legal commentators who denounced the Protocol as 'law in the service of terror' (quoted in E Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (Oxford University Press 2015) 43).

in the 1990s and 2000s. They would do so by invoking the revered narrative about the linear progression of humanity that is reflected in customary international law. According to this rendition of history, 'The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law.'[23]

The forgotten story of the birth and life of the definition of military objectives is relevant to the ongoing discussion about the need to adapt the law to asymmetric warfare. This article shows that the various codification efforts since the 1960s were driven by concerns about asymmetric warfare and reflected a battle between the 'haves' and the 'have nots'. The former used the revered *Institut*—a West-European body at the time—to pursue their vision of the law applicable in asymmetric warfare, and so did the 'have nots' when they could control the agenda of the diplomatic conferences leading up to the 1977 Additional Protocols. Hence, the often-heard argument that the existing law did not intend to restrict action during asymmetric warfare[24] is plainly erroneous. Although this type of conflict tests the limits of the law because 'both sides are convinced that they cannot win the war without violating or at least "reinterpreting" IHL'[25] and the observation, invoking the St Petersburg Declaration of 1868,[26] that 'the very philosophy of humanitarian law is challenged by such conflicts',[27] the codification of the principle of distinction was all about asymmetric warfare.

Part II of this article provides some historical background concerning the lacuna at the heart of IHL—the missing definition of lawful 'military objectives'. Part III uncovers the untold story of the birth of the test for military objectives and of its unsung hero, Professor/Brigadier-General Heydte. Part IV outlines further twists in the winding road toward the inclusive application of Heydte's test. It explains why the Afro-Asian nations that dominated the deliberations over API in the 1970s endorsed this Eurocentric definition of military objectives, and notes the ultimate step—the subsequent judicial extension of the definition also to non-international armed conflicts (NIACs) during the early 2000s. Part V concludes.

[23] *Prosecutor v Kupreškić et al* (Judgment) IT-95-16-T (14 January 2000) para 521.

[24] eg EA Posner and AO Sykes, *Economic Foundations of International Law* (Harvard University Press 2013) 196 ('there is a difference between saying that the laws of wars can apply to states fighting terrorists and saying that the existing laws of war—those that have evolved to deal with limited wars between roughly equal states—will apply'); T Pfanner, 'Assymetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action' (2005) 87 IRRC 149, 158 ('It is debatable whether the challenges of asymmetrical war can be met with the current law of war.').

[25] M Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges' (2007) 10 Yearbook of International Humanitarian Law 45, 58.

[26] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (St Petersburg, 29 November/11 December 1868) (GF de Martens, *Nouveau Receuil Général de Traités et autres actes relatifs aux rapports de droit international* (Gottingue, 1ère sèrie 1843–75) vol XVIII, 474–5).

[27] Sassòli (n 25) 58.

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II. BACKGROUND: THE QUEST TO CODIFY A DEFINITION OF 'MILITARY OBJECTIVES', 1874–1969

The principle of distinction—according to which, during times of war, combatants must direct their attacks only against military objectives while sparing the civilian population—has a long and distinguished pedigree in morality and law. Initially framed in 1762 by Jean-Jacques Rousseau ('[w]ar … is a relation, not between man and man, but between State and State … and individuals are enemies only accidentally'),[28] it developed into the so-called Rousseau–Portalis doctrine, which stipulated that 'the law of nations does not permit the right of war … to affect peaceful and unarmed citizens'.[29] This doctrine was widely recognised throughout the European wars of the early-to-mid-nineteenth century and, as late as 1870, instructed the Prussian Army's invasion of France. As famously articulated by King William of Prussia on 11 August 1870: 'I conduct war with the French soldiers, not with the French citizens'.

But that doctrine failed to be reflected in the legal code and would soon be abandoned in practice. The rise of nationalism in Europe, the Civil War in the United States and, more generally, the industrialisation of warfare blurred the distinction between military objectives and entirely civilian targets. This retreat from the strict distinction between States and individuals was reflected first in the Lieber Code of 1863, which regarded a 'citizen or native of a hostile country [as] thus an enemy'.[30] The invading Prussian Army soon had to face tenacious civilian resistance, to which it responded harshly. Inspired by the Lieber Code and alarmed at the ugly confrontations with the French *francs-tireurs*, the German delegates to the 1874 Brussels Conference adamantly opposed the traditional distinction as legally unworkable and unjustified. 'The goal of any war', they pronounced, 'is to crush the enemy, rob him of the means of resistance, and thereby to force his submission. When nations clash and put all their resources in the balance of the battle, it is difficult to determine the limits of warfare.'[31] Hence, the Rousseau–Portalis formula, which had become one of the prominent principles informing the invitation to the Brussels Conference by Russia (the Chair),[32] disappeared from the

[28] JJ Rousseau, *The Social Contract* (GDH Cole trans, first published 1762, Dover Publications 2003) 6.

[29] Talleyrand to Napoleon (20 November 1806) cited by AW Heffter, *Das Europäische Völkerrecht der Gegenwart* (EH Schroeder 1844) para 119, fn 3.

[30] *Instructions for the Government of Armies of the United States in the Field (Lieber Code)* (24 April 1863) art 21.

[31] See 'Report of the German Ministry of War' sent by Georg von Kameke, German Minister of War, to Bismarck (18 July 1874) (Folder R 901/ 28961 No 46; the German Foreign Office, National Archives in Berlin) (discussed in Benvenisti and Lustig, 'Monopolizing War' (n 17) 146).

[32] The original draft included an opening statement of 'General Principles', the second of which reads: 'The operations of war must be directed exclusively against the forces and the means of warfare of the enemy state, and not against its subjects, so long as the latter do not take part themselves in the war activities.' These principles were not included in the final draft of the

final text of the Declaration.[33] The sole *explicit* prohibition in the text of the Declaration relating to civilian targets stipulated that 'undefended towns' were immune from attack.[34] That was hardly sufficient: it left open the question of what was meant by this term for an army with long-range artillery. It was also unnecessary, as armies of the time would not spend precious ammunition on targets with little military value.

A group of determined international lawyers sought to rectify this lacuna and, more generally, redeem its humanitarian dimension, under the auspices of the *Institut*, founded, inter alia, to contribute 'either to the maintenance of peace, or to the observance of the laws of war'.[35] Their first major effort in that regard was the so-called *Oxford Manual* of 1880. But the *Institut*'s subtle innovations failed to make a significant impact on the evolution of the law.[36] The Hague Regulations of 1899 (and subsequently, those of 1907) followed the 1874 Brussels text quite closely,[37] maintaining the limited protection of civilians only in 'undefended towns'.[38]

With the onset of aerial bombardment a few years later, it became clear that the insulation of 'undefended towns' was devoid of 'any practical value' and civilians were left at the mercy of attacking forces.[39] Nevertheless, after the war, no effort was made to address this problem. While aerial bombardments rekindled pity in some quarters toward civilians as their helpless victims,[40] others saw them as fully responsible for their governments' choices, and a

Brussels Declaration: see *Actes de la Conférence de Bruxelles de 1874, sur le projet d'une convention internationale concernant la guerre* (Librairies des Publications Législatives, Paris: A Wittersheim & Cie 1874) Protocols 1, 4 (Brussels Conference Protocols). Benvenisti and Lustig, 'Monopolizing War' (n 17) 163.

[33] In fact, an appeal by the inhabitants of Antwerp to declare civilians immune from attack was rebuffed. Instead of acknowledging civilian immunity as an integral part of the Declaration, an annex invoked the Rousseau–Portalis formula but only so far as local circumstances and the necessities of war permitted: 'Projet de réponse à la pétition des habitants d'Anvers présente dans la séance du 1er août, par M. le président de la conférence' in Brussels Conference Protocols (n 32) Annex 4, 55–6. Benvenisti and Lustig, 'Monopolizing War' (n 17) 163–4.

[34] Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874) (Brussels Declaration) art 15.

[35] Statute of the *Institut*, adopted at the Conférence Internationale Juridique (Ghent, 10 September 1873) art 1(2)(d).

[36] E Benvenisti, 'The Contribution of the *Institut de Droit International* to the Development of International Humanitarian Law' in J Salmon (ed), *The Contribution of the Institut de Droit International to the Development of International Law* (2023 forthcoming).

[37] As can be observed from the annex produced by the Second Subcommission to the 1899 Hague Regulations comparing both documents: 'Twelfth Meeting, July 1, 1899, Annex D' in JB Scott (ed), *The Proceedings of the Hague Peace Conferences, Translation of the Official Texts: The Conference of 1899* (Oxford University Press 1920) 564–78. On the limited impact, see also JB Scott, *The Hague Peace Conferences of 1899 and 1907*, vol 1 (The Johns Hopkins Press 1909) 37–8; Alexander, 'A Short History' (n 21) 115–16.

[38] 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) Annex to the Convention: Regulations respecting the Laws and Customs of War on Land, art 25.

[39] JM Spaight, 'Air Bombardment' (1923–24) 4 British Yearbook of International Law 21, 22.

[40] A Alexander, 'The Genesis of the Civilian' (2007) 20 LJIL 359 (arguing that the concept of the civilian as the object of the law's attention can be traced to World War I).

prevalent proposition suggested that 'modern warfare … means that every able-bodied civilian plays a definite part in the battle of production'.[41] In the inaugural volume of the British Yearbook of International Law (1920–21), an anonymous article offered a series of arguments against any attempt by the League of Nations to explore this question further.[42] This view was widespread and was shared by leading scholars such as Lassa Oppenheim and Wolfgang Friedmann.[43] Consequently, planners of strategic bombings could claim that every town and village behind enemy lines was 'defended' and, as such, a legitimate target.[44] We now know that, in the view of the Royal Air Force (RAF) since its very inception, harming public morale was regarded as a legitimate and effective military goal. Hence, as Sir Hugh Trenchard, Marshal of the RAF, commented in May 1928, 'air attacks will be directed against any objective which will contribute effectively towards the destruction of the enemy's means of resistance and the lowering of his determination to fight'.[45] The German approach was similar.[46]

An effort to have military objectives defined by a commission of jurists comprising delegates from leading countries (the United States, France, Great Britain, Italy, Japan and the Netherlands) failed to gain traction. Instead, they authored the Hague Rules of Air Warfare of 1923,[47] which contained only an abstract definition[48] followed by a list of specific examples (military forces, military works, etc). The definition distinguished between the bombardment of towns 'not situated in the immediate vicinity of the operations of the land forces'[49] which was forbidden, and civilian areas in the vicinity of the operation of land forces, whose bombardment was legitimate if 'the military concentration [was] important enough to justify' it.[50] These rules were

[41] KVR Townsend, 'Aerial Warfare and International Law' (1942) 28 VaLRev 516, 526. See also A Alexander, 'The "Good War": Preparations for a War against Civilians' (2019) 15(1) Law, Culture and the Humanities 227, 242 (describing how 'narratives told about the Great War helped to establish the bombardment of civilians during World War II as an ethical, military and legal possibility').

[42] Anonymous, 'The League of Nations and the Laws of War' (1920–21) 1 British Yearbook of International Law 109. See JL Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision' (1951) 45 AJIL 37, 39.

[43] Alexander, 'The "Good War"' (n 41) 242.

[44] Captain BM Carnahan, 'The Law of Air Bombardment in its Historical Context' (1975) 17(2) Air Force Law Review 39, 43.

[45] Sir C Webster and N Frankland, *The Strategic Air Offensive against Germany*, vol IV (Her Majesty's Stationery Office 1961) 74.

[46] KA Maier, 'Total War and German Air Doctrine before the Second World War' in W Deist (ed), *The German Military in the Age of Total War* (Berg 1985) 212; RJ Ovary, 'Hitler and Air Strategy' (1980) 15 Journal of Contemporary History 405, 411.

[47] 'Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare' (drafted by a Commission of Jurists at The Hague, December 1922–February 1923) <https://ihl-databases.icrc.org/ihl/INTRO/275>.

[48] ibid art 24(1): a 'military objective' is 'an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent'.

[49] ibid art 24(3).

[50] ibid art 24(4).

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'misinterpreted as being too strict'[51] and, at the same time, judged to be impractical.[52] The convening parties did not pursue the matter further.

After World War II, under the shadow of the atomic bomb, Anglo–American resistance to addressing this question in the drafting of the Geneva Conventions of 1949 led to their limited scope: instead of regulating the conduct of hostilities, the ICRC opted to focus only on the regulation of the *hors de combat*. Boyd van Dijk shows how the two Western powers (with air-power superiority) successfully blocked communist and ICRC proposals to place limits 'upon virtually unrestrained air power and *Hungerblockade*'.[53] In the early 1950s, almost simultaneously, the ICRC and the *Institut* embarked on their respective projects seeking to address the 'state of chaos'[54] of the laws on the conduct of hostilities. Although not directly cooperating (or even coordinating their activities), these two bodies were aware of each other's work, and certain individuals served in both. That the road toward codification was fraught with political tensions can be inferred from the fact that the newly-constituted International Law Commission decided not to include the laws of war on its agenda.[55]

The latest initiative of the ICRC was overambitious. Its stated aim was to take 'all steps to reach an agreement on the prohibition of atomic weapons, and in a general way, of all non-directed missiles'[56] by making 'the necessary additions to the [1949] Conventions … to protect civilian populations from the dangers of atomic, chemical and bacteriological warfare'.[57] Although the ICRC instructed

[51] HM Hanke, 'The 1923 Hague Rules of Air Warfare' (1993) 12 International Review of the Red Cross 19. For such a critical view, see eg FE Quindry, 'Aerial Bombardment of Civilian and Military Objectives' (1931) 2 JAirL&Com 474, 489–98; E Colby, 'Laws of Aerial Warfare' (1926) 10 MinnLRev 309; Townsend (n 41) 526 (rejecting the possibility of drawing 'a line between military requirements and useless civilian damage … No damage can be pointed to as "useless" or "unnecessary" if wars are to be won or lost on the assembly line'.

[52] JW Garner, 'International Regulation of Air Warfare' (1932) 3 AirLRev 103, 124; JW Garner, 'Proposed Rules for Aerial Warfare' (1924) 18 AJIL 56, 74–5.

[53] B van Dijk, *Preparing for War: The Making of the Geneva Conventions* (Oxford University Press 2021) 201.

[54] JPA François, 'Exposé préliminaire – Annex I' (1957) 47(1) Annuaire de l'Institut de Droit International 367, 367. See also C Chaumont, 'Cours général de droit international public (Vol 129)' in Hague Academy (ed), *Collected Courses of the Hague Academy of International Law* (1970) <http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789028616622_05> ('*Le droit de la guerre (jus in bello) est en crise*').

[55] H Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 BYBIL 360, 360, fn 2.

[56] ICRC, 'Atomic Weapons and Non-Directed Missiles: ICRC Statement, 1950' (1950) <https://www.icrc.org/en/doc/resources/documents/article/other/5kylur.htm>.

[57] ICRC, 'The Protection of the Civilian Population in Atomic, Chemical and Bacteriological Warfare' (1954) 7 Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge, Supplement, 213, 213–14. See also MF Siordet's presentation of the Draft Rules: ICRC, 'Verbatim Records of the Meeting of the International Humanitarian Law Commission Devoted to Discussion of the Draft Rules' XIX International Conference of the Red Cross (New Delhi, October–November 1957) (1958) 3, 7–8.

a group of non-government experts to discuss 'the possibility of giving the civilian population increased protection, by a development of international law, against the dangers of war from the air and the use of blind weapons',[58] the threat to nuclear States was significant. The ICRC's Draft Rules were first presented in 1955,[59] then replaced with a 'less far-reaching' draft a year later,[60] and were ultimately discussed at the ICRC's 1957 conference in Delhi.[61] It was here that the initiative came to a standstill. The aspiration to subject nuclear weapons to 'the demands of humanity' and to international law spelled its end.[62] The ICRC acknowledged that there was minimal governmental support overall, and no support from the governments of the major powers.[63] This ICRC project was shelved for the next decade.[64]

Not only was it politically infeasible to arrive at an acceptable definition of military objectives. From a purely technical perspective, the selected group of jurists also found it impossible to articulate a workable formula. Article 7 of the Delhi text offered a question-begging definition, according to which '[o]nly objectives belonging to the categories of objective which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives'.[65] The definition was complemented by an Annex offering a casuistic list of targets (such as 'telephone and telegraph exchanges of fundamental military importance'),[66] and it was suggested that the list 'be reviewed at intervals of not more than ten years by a group of Experts composed of persons with a sound grasp of military strategy and of others concerned with the protection of the civilian population'.[67] The task of capturing the essential elements of military objectives was left to the lawyers at the *Institut*.

[58] ICRC, 'The Protection of the Civilian Population in Atomic, Chemical and Bacteriological Warfare' (n 58) 213. See JL Kunz, 'The 1956 Draft Rules of the International Committee of the Red Cross at the New Delhi Conference' (1959) 53(1) American Journal of International Law 132, 134. For more details on this meeting, see CICR, 'Réunion des représentants de sociétés nationales' (1954) 36 Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge 961. [59] Kunz, 'The 1956 Draft Rules' (n 58) 134. [60] ibid. [61] ibid.

[62] ibid 136. See also JL Kunz, 'The Laws of War' (1956) 50(2) AJIL 313; F Bugnion, 'The International Committee of the Red Cross and the Development of International Humanitarian Law' (2004) 5 Chicago Journal of International Law 191, 202–3; RR Baxter, 'The Evolving Laws of Armed Conflicts' (1973) 60 MilLRev 99, 108–9; G Mantilla, *Lawmaking Under Pressure* (n 21) 109–12.

[63] ICRC, 'The Lot of the Civilian Population in War-Time' (February 1966) 6 International Review of the Red Cross 79, 80–1.

[64] Bugnion (n 62) 202–3; T Dunworth, *Humanitarian Disarmament: An Historical Inquiry* (Cambridge University Press 2020) 77. See also H Levie, 'An International Law of Guerrilla Warfare: the Global Politics of Law-Making, by Keith Suter' (1985) 9 Maryland Journal of International Law 249, 251; W Solf, 'Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I' (1986) 1 AmUIntLRev 117, 124.

[65] Draft Rules (n 57) 9. [66] ibid 72.

[67] ibid 73. See also Mantilla, *Lawmaking Under Pressure* (n 21).

III. THE EDINBURGH RESOLUTION OF 1969: A CONSERVATIVE LEGAL BREAKTHROUGH

That crucial, comprehensive and effective definition of a military objective would ultimately be fleshed out by the *Institut* at its 1969 meeting in Edinburgh.[68] This Part tells the story of the meandering path taken by the *Institut* toward that momentous Resolution. Here, the article dwells on the persona of the author of the Resolution because his identity and ideology offer a key to understanding the motivation for its adoption.

Heydte does not conform to the archetype of the humanistic visionary associated with the development of the laws of war and the founding of the Red Cross and the *Institut*. Combining two illustrious careers—as a prominent law professor and conservative public intellectual, and as a paratrooper who had fought the most daring battles of World War II as a commander in an elite unit of the *Wehrmacht* and later joined the *Bundeswehr* as a Brigadier-General—Heydte devoted his post-war life to fending off what he saw as a communist onslaught on the fabric of Christian Europe. This Resolution would be yet another chapter in his lifelong mission. For Heydte, 'preparing for battle' was in his blood. A proud descendant of (French and German) families who had fought for or against European monarchs for generations, he remained committed to protecting the *Vaterland* against all evil. Tellingly, his autobiography ends with his family's timeworn poem which begins with 'I must strive, I want to die, to die for my Fatherland'.[69]

By the late 1960s, the *Institut* was the last international-law bastion of the West. By 1969, this august, self-selecting body had elected only six members from Asian and African nations[70] to its 81-strong group of experts. In contrast, the Red Cross movement had been transformed during those years from an almost exclusively West-European impulse that consulted predominantly Western 'highly qualified experts' in the laws of war in 1954,[71] to a much more inclusive body. The 1969 Istanbul Conference of the International Committee of the Red Cross (ICRC) saw delegates representing 77 countries and 83 National Committees participating in its effort to develop the laws of war.[72]

[68] Edinburgh Resolution (n 4).

[69] FA Freiherr von der Heydte, '*Muss ich sterben – will ich fallen …*' (Kurt Vowinckel-Verlag 1987) 246.

[70] In 1961 (Singh, India; Yaseen, Iraq), 1963 (Mbanefo, Nigeria), 1965 (Feliciano, the Philippines), 1967 (El- Erian, Egypt), 1969 (Elias, Nigeria).

[71] ICRC, 'Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War 1957' (ICRC 1956) art 7 and Annex <https://www.loc.gov/rr/frd/Military_Law/pdf/RC_Draft-rules-limitation.pdf>. In addition to His Excellency YD Gundevia, Ambassador of India in Switzerland, this group included only one non-Westerner: Dr Radmilo Jovanovic, Medical General in the Yugoslavian Armed Forces. See also RJ Wilhelm, 'Legal Protection of the Civilian Population – Advisory Working Party of Experts delegated by National Red Cross Societies' (1956) 9 Revue Internationale de la Croix-Rouge, Supplement, 93.

[72] The ICRC, 'The XXIst International Conference of the Red Cross' (1969) 9 International Review of the Red Cross 599.

During that period, the United Nations' International Law Commission had also begun to reflect the emerging new world, with more than a third of its membership coming from Asian and African nations.[73] The *Institut*, then, still unaffected by decolonisation, provided the optimal venue for Heydte's mission.

Recently initiated to the *Institut* as an Associate Member, he took up the task of codifying the principle of distinction in international and internal armed conflicts to tackle what he saw as a menacing challenge for the West. His intellectual brilliance and his deep understanding of the battlefield enabled him to conceptualise what had eluded his predecessors and express it in brief, elegant prose. Within weeks, Heydte's test would be embraced by the ICRC at its Istanbul Conference later that month, and would become a crucial pillar of API.

A. Initial Steps, 1952–59

The *Institut*'s initiative to study the laws surrounding the conduct of hostilities commenced in 1952, with a study led by Frederic Coudert, Jean Pierre Adrien François and Hersch Lauterpacht.[74] They trod cautiously. Lauterpacht had expressed doubts earlier concerning the creation of new law that was 'not necessarily related to any existing generally recognized legal principles'.[75] In his view, at that time, the Rousseau–Portalis doctrine had become a 'hollow phrase' and a 'relic of the past', due to the increased reliance on civilians engaged in work of direct military importance, the growth of the destructive power of aircraft, and the growing role of the economic weapon, 'which render[ed] practically impossible, in this respect, a differentiation between civilians and combatants'.[76] The 1954 report by Coudert, François and Lauterpacht[77] stated that the laws of war were outdated and not reflective of contemporary means of warfare.[78] The authors highlighted the difficulty of limiting the rights of belligerents out of humanitarian concerns but nevertheless suggested that a commission be formed to examine certain principles that, if necessary, could serve as a starting point for the codification of the laws of war.

The report convinced the *Institut* to form the twenty-fifth Commission on the 'Reconsideration of the Principles of the Law of War',[79] whose interim report

[73] International Law Commission, 'Present and Former Members of the International Law Commission (1949–present)' <https://web.archive.org/web/20141224035638/http://legal.un.org/ilc/guide/annex2.htm>.

[74] 'Avant-Propos' (1952) 44(2) Annuaire de l'Institut de Droit International xi.

[75] Lauterpacht, 'The Problem of the Revision of the Law of War' (n 55) 379.

[76] ibid 364.

[77] F Coudert, JPA François and H Lauterpacht, 'La révision du droit de la guerre – Rapport' (1954) 45(1) Annuaire de l'Institut de Droit International 555, 555–8.

[78] François, 'Exposé préliminaire – Annex I' (n 54) 367–9. See also JPA François, 'Reconsidération des principes du droit de la guerre – Rapport définitif' (1957) 47(1) Annuaire de l'Institut de Droit International 491.

[79] 'Deuxième Séance Administrative – Session D'Aix' (1954) 45(2) Annuaire de l'Institut de Droit International 23.

was presented at the *Institut*'s 1957 session.[80] Reflecting the members' acute sense of the politically feasible, the 1954 report sought to evade the challenge of directly regulating nuclear weapons. Whereas '[a]n agreement on the limitation or prohibition of these weapons [was] necessary', for the time being, it would be feasible to emphasise that 'the use of these weapons should be limited to military objectives'.[81] Hence the report proposed a strengthening of the distinction between military and non-military objectives by revising the definition adopted in the Hague Rules of 1923.[82]

But even that was a difficult mission. In the Commission's plenary discussions of 1959,[83] François and others sensed that the situation was not yet ripe for attempting to draft a resolution. More time and effort were needed. The *Institut* therefore resolved to form three new commissions to further study certain aspects: one dealing with the equal application of the rules of the law of war to aggressor and victim alike, one addressing the problems posed by the existence of weapons of mass destruction, and one (the Fifth Commission) devoted to the distinction between military and non-military objectives.[84] With the first two being subsequently discontinued, the Fifth Commission was the only one to produce a resolution.

B. The Appointment of Heydte as Rapporteur, 1959

The *Institut* elected Heydte as the Rapporteur of the Fifth Commission.[85] In many respects, he was particularly apt for this task, his rich legal background being matched by his military expertise. At the time, he was the Head of the Institute for Military Law at the University of Würzburg, as well as an active member of the *Bundeswehr*. In 1955, at the behest of the West German Government, Heydte helped build Egypt's paratrooper and airborne forces,[86] and in 1962 he was promoted to the highest rank of Brigadier General in the Reserves. A descendant of a family of warriors, a conservative for whom democracy was 'Christian in its essence' and entailed a '[d]emocratic responsibility [that can] only [be] fulfilled in the community',[87] Heydte

[80] JPA François, 'Reconsidération des principes du droit de la guerre – Rapport provisoire' (1957) 47(1) Annuaire de l'Institut de Droit International 323. [81] ibid 340.
[82] JPA François, 'Reconsidération des principes du droit de la guerre – Rapport définitif' (n 78) 515–16.
[83] JPA François, 'Deuxième Question - Reconsidération des Principes du droit de la guerre' (1959) 48(2) Annuaire de l'Institut de Droit International 178.
[84] 'Neuvième séance plénière: mercredi 9 septembre 1959 (après-midi)' (1959) 48(2) Annuaire de l'Institut de Droit International 231.
[85] 'Dixième séance plénière: jeudi 10 septembre 1959 (matin)' (1959) 48(2) Annuaire de l'Institut de Droit International 295, 300. [86] Heydte, '*Muss ich sterben'* (n 69) 79–80.
[87] FA Freiherr von der Heydte, 'Was ist, nützt und leistet die Demokratie?' (Easter 1953) 14 Rheinischer Merkur 4.

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regarded his by-and-large lone effort to develop the neglected field of the laws of war[88] as a calling that combined his two disciplines.

Heydte's academic trajectory could have been different. When the Nazis came to power, he was about to study for a *habilitation* (a second doctorate) with Hans Kelsen.[89] But Kelsen was dismissed, and his successor, Carl Schmitt, did not trust Heydte.[90] Even Heydte's joining the Nazi Party (NSDAP) the day after Kelsen's removal[91] did not change Schmitt's view, perhaps because Heydte campaigned publicly for his teacher.[92] Heydte went on to study with Alfred Verdross in Vienna, but an altercation with some Nazi Party members forced him to flee and join the *Wehrmacht*. He would become one of the most committed, daring and accomplished commanders of the *Wehrmacht* throughout the war. Despite his disillusionment with the Nazi regime, 'The Rosary Paratrooper', as Hermann Göring would cynically dub him, was assigned to lead the most ambitious last-ditch attack in the Ardennes.[93] He is said to have abided by the laws of war and even acted chivalrously, at one point returning captured American paramedics to enable them to resume their duties among wounded US troops, and hoping this gesture would be returned if the need arose.[94] But he was well aware of

[88] D Schindler, 'Moderne Entwicklungen Im Kriegsvölkerrecht' (1986) 66 Die Friedens-Warte 205, 208, 215. Based on a lecture to celebrate Heydte's 80th birthday.

[89] ibid 40; see also HH-K Rechenberg, 'Nachruf für Friedrich August Freiherr Heydte' (1995) 33 Archiv des Völkerrechts 425; H Kipp, F Mayer and A Steinkamm, 'Zum Lebensweg des Jubilars' in H Kipp, F Mayer and A Steinkamm (eds), *Um Recht und Freiheit. Festschrift für Friedrich August Freiherr Heydte zur Vollendung des 70. Lebensjahres* (Duncker & Humblot 1977) vol 2, 1509.

[90] V Conze, *Das Europa der Deutschen. Ideen von Europa in Deutschland zwischen Reichstradition und Westorientierung (1920–1970)* (Oldenbourg Wissenschaftsverlag 2005) 65.

[91] Kelsen was dismissed on 30 April 1933, and Heydte joined the Nazi party on 1 May 1933 (and remained a member until 1945): 'Verzeichnis der Professorinnen und Professoren der Universität Mainz: Friedrich August Freiherr Heydte' (*Gutenberg Biographics*)<http://gutenberg-biographics.ub.uni-mainz.de/id/b1f96b5d-13d5-499a-b6ed-590400801f5a>. See also Conze (n 90) 67, discussing Heydte's party membership and effort to build bridges between the party and the Catholic Church. Heydte took part in the Third Sociological Congress of the Catholic Academic League, whose task was to build a bridge between German Catholics and the National Socialist regime: FA Freiherr von der Heydte, 'Die Katholiken im neuen Deutschland. Dritte soziologische Tagung des katholischen Academikerverbandes in Maria Laach vom 21. bis 23. Juli 1933' (1933) 8 Schönere Zukunft 1133; FA Freiherr von der Heydte, 'Katholismus, Nazionalsozialismus und Reichsidee, zur dritten soziologischen Tagung des katholischen Akademikerverbanes' (1933) 1 Zeit und Volk 207, 208–9, which ends with a reflection on the participants' 'effort to overcome liberal thinking … and the purposeful will to serve the Volk and to serve the Reich in the National Socialist State'. See also E-W Böckenförde, 'German Catholicism in 1933: A Critical Examination (1961)' in E-W Böckenförde, M Künkler and T Stein (eds), *Religion, Law, and Democracy: Selected Writings* (Oxford University Press 2020) 92, fn 41; LE Jones, 'Franz von Papen, Catholic Conservatives, and the Establishment of the Third Reich, 1933–1934' (2011) 83 Journal of Modern History 272, 298.

[92] According to the faculty historiography: C Benkert, *Die Juristische Fakultät der Universität Würzburg 1914 bis 1960. Ausbildung und Wissenschaft im Zeichen der beiden Weltkriege (Würzburger rechtswissenschaftliche Schriften. Bd. 62)* (Ergon Verlag 2005) 175.

[93] J Lucas, *Hitler's Enforcers: Leaders of the German War Machine 1933–1945* (Arms and Armour Press 1996) 26, 27, 35–9.

[94] M Blumenson, *Breakout and Pursuit* (Center of Military History 1961) 84.

prevalent violations. In the late 1990s, it came to light that, during the war, Heydte had known about the systematic gassing of Jews[95] and about atrocities committed against Polish Jews[96] and Russian villagers.[97]

Just before his election to the *Institut* on 11 April 1956,[98] Heydte was embroiled in a highly-publicised parliamentary crisis that saw him resign from the chairmanship of the *Abendländische Akademie* (Occidental Academy),[99] an institution regarded by many in West Germany as anti-constitutional as it sought to transform West Germany 'into a clerical, authoritarian and monarchist corporate state'.[100] That Academy perceived communism as a threat to Europe's survival; and, to counter it, it promoted a conservative vision of 'democracy'—one that sought to emulate Franco's Spain and Salazar's Portugal. And, indeed, during a speaking tour across Spain, Heydte called for a collective Christian effort against liberal values.[101] In 1956, Heydte was also busy leading a constitutional challenge against the dismantling of the denominational-schools system in Lower Saxony, seeking to preserve exclusionary religious schools in Germany.[102] As a public intellectual, Heydte rejected the liberal–individual vision of democracy and criticised the Basic Law's rejection of federalism as a palliative against the 'instinctuality of the masses', preferring respect for 'divine moral law' and individual freedom as necessarily defined by Christian community.[103]

Throughout his association with the *Institut*, Heydte remained a controversial figure in the German-speaking community. In 1961, his formal offer to succeed Verdross in Vienna was intercepted by the Socialist Party of Austria (SPÖ).[104] In 1962, he triggered the infamous '*Der Spiegel* affair' (when he accused news

[95] S Neitzel, *Tapping Hitler's Generals: Transcripts of Secret Conversations, 1942–45* (G Brooks trans, Frontline Books 2007) 222. In his autobiography, Heydte denies knowing about the true nature of the death camps that he had seen from the outside: Heydte, 'Muss ich sterben' (n 69) 79–80.

[96] S Neitzel and H Welzer, *Soldaten: On Fighting, Killing, and Dying* (Jefferson Chase trans, Alfred A Knopf 2012) 140.

[97] Neitzel, *Tapping Hitler's Generals* (n 95) 418.

[98] 'Avant-propos' (1956) 46 Annuaire de l'Institut de Droit International v, vi.

[99] Letter quoted in A Schildt, *Zwischen Abendland und Amerika, Studien zur westdeutschen Ideenlandschaft der 50er Jahre* (Oldenbourg Wissenschaftsverlag 1999) 70–1.

[100] ibid 71 (according to an extracts of their manifesto printed by *Der Spiegel* on 10 August 1955).

[101] B Aschmann, *'Treue Freunde'?: Westdeutschland und Spanien, 1945 bis 1963* (Franz Steiner Verlag Stuttgart 1999) 428, 430, fn 231, citing a report to the West German Foreign Office from the consulate in Bilbao from 4 November 1955. Aschmann also describes the formal ties between the Abendländische Akademie and Spanish conservative politicians, as well as Heydte's own ties. On these ties, see also S Weichlein, 'Antikommunismus im westdeutchland Katholizismus' in N Frei and D Rigoll (eds), *Der Antikommunismus in seiner Epoche: Weltanschauung und Politik in Deutschland, Europa und den USA* (Wallstein Verlag 2017) 124, 131–2.

[102] Heydte co-directed this constitutional challenge, which asserted the validity of the 1933 *Reichskonkordat* between the Vatican and Hitler's government, which Heydte had supported (n 87): ME Ruff, *The Battle for the Catholic Past in Germany, 1945–1980* (Cambridge University Press 2017) 88, see also 48–85.

[103] FA Freiherr Heydte, 'Was ist, nützt' (n 87). See also FA Freiherr Heydte, *Das Weiß-Blau-Buch zur Deutschen Bundesverfassung und zu den Angriffen auf Christentum und Staatlichkeit der Länder* (Josef Habbel 1948) 120.

[104] Rechenberg (n 89) 427.

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magazine *Der Spiegel* of high treason following its publication of sensitive military information), which developed into a major political scandal and a serious legal crisis.[105] He was also a target of students' ire—for example, in a protest in the Freie Universität Berlin against inviting this 'clerical-fascist-thinking' professor to give a public lecture.[106]

Heydte was preoccupied with the threat posed by irregular warfare to Western civilization. In his view, the Christian West was fighting for survival against the USSR's turn to irregular means of warfare, which included implanting 'false ideals' in young European minds. He regarded the 1968 students' revolution as nothing but a consequence of the successful irregular warfare fought by the Soviets against Europe.[107] Heydte saw his fight as part of his life's mission to save European civilisation from communism, which, he believed, was relentlessly seeking to destroy it through irregular warfare.[108]

In 1961, he wrote about atomic and guerrilla warfare as the two primary challenges to the international law of the time—in particular, the blurring of the distinction between civilian and military objectives.[109] These challenges, in his view, required lawyers to redefine the law's basic rules. 'Every war brutalizes those who participate in it as fighters; but no war leads to brutalization in the same way as modern irregular war.'[110] Arguing that 'normal international law' was incapable of halting that brutalisation because it regulated only the overt part of irregular combat, Heydte wished for the 'international law of tomorrow' that would regulate also the covert dimension of irregular combat.[111] That new type of war required utmost attention as it encompassed various insidious tactics, such as propaganda that could affect the minds of Western youths, as it did in 1968.[112] Heydte urged his generation to meet its obligation: those who sought peace had a duty to prepare the law for the future war.[113] The early 1970s saw Heydte writing a book exploring the challenges of contemporaneous irregular warfare for Europe, convinced that such a war 'could break out tomorrow'.[114] Therefore,

[105] See T Birkner and S Mallek, 'The Spiegel-Affair, 1962: The Incident that Changed German Journalism History and Mediatized Politics' in EC Tandoc Jr, J Jenkins, RJ Thomas and O Westlund (eds), *Critical Incidents in Journalism: Pivotal Moments Reshaping Journalism around the World* (Routledge 2021).

[106] 'Dokument 403 Den Leuten paßt die Richtung nicht. Fu-Spiegel sprach mit Erich Kuby' in S Lönnendonker and T Fichter (eds), *Freie Universität Berlin: Hochschule im Umbruch. Teil IV Die Krise 1964–1967* (Freie Universität Berlin 1975). See also B Mercer, 'Specters of Fascism: The Rhetoric of Historical Analogy in 1968' (2016) 88 Journal of Modern History 96, 104.

[107] See Heydte, 'Modern Irregular Warfare' (n 2).

[108] ibid.

[109] FA Freiherr von der Heydte, 'Grundbegriffe des modernen Kriegsrechts' (1961/66) 56 Die Friedens-Warte 333, 342.

[110] See Heydte, 'Modern Irregular Warfare' (n 2) 234.

[111] ibid.

[112] See text to (n 4). On propaganda as means of covert irregular warfare, see Heydte, 'Modern Irregular Warfare' (n 2) 150–64.

[113] 'si vis pacem, para leges': Heydte, 'Grundbegriffe' (n 109) 343.

[114] Heydte, 'Modern Irregular Warfare' (n 2) xxxvi.

he warned, '[*N*]*ew* international law norms must be found … before it is too late for our generation, and for our home, Europe.'[115]

C. The Adoption of the Definition: Edinburgh, 1969

As noted earlier,[116] the *Institut*, still very much a West European Institution, provided Heydte with an amenable venue for his mission. When Heydte's Fifth Commission was established, the *Institut* lacked members from Afro-Asian nations, and the members of the Commission were mostly West Europeans.[117] It took ten years for Heydte and his Commission to complete their mission. The first several years saw internal debate over whether or not it should even pursue its mission.[118] Heydte was clearly in favour (noting that his fellow commanders in the *Bundeswehr*, who wished to comply with the laws of war, were waiting for the current 'gross uncertainty' to be clarified).[119] A preliminary report in 1961[120] was followed by a provisional report in 1964,[121] with a final report and draft resolution presented to the 1967 session.[122] That draft resolution (subject to some modifications) was adopted in 1969 with overwhelming support.

The debate at the *Institut* reflected concerns about military freedom of action more than humanitarian matters. American members were endeavouring to make sure that the decision did not affect the legality of nuclear weapons. Others, notably Röling (the Netherlands) and Tunkin (USSR), expressed reservations about the idea that victims would be as constrained by the law as aggressors and suggested that the former be spared the obligation to target only combatants.[123]

Heydte's final speech was animated. In support of his proposal, he invoked several recent developments:[124] the request made in late 1966 by the United Nations (UN) General Assembly to the Secretary-General to study the consequences of using nuclear weapons;[125] the Secretary-General's report

[115] ibid 235.

[116] See text to (nn 71–73).

[117] Accioly (Brazil), Andrassy (Yugoslavia), Brüel (Denmark), Castrén (Finland), Eustathiades (Greece), Giraud (France), de Luna (Spain) and Ruegger (Switzerland).

[118] 'Onzième séance plénière: jeudi 14 septembre 1967 (après-midi)' (1967) 52(2) Annuaire de l'Institut de Droit International 527, 527–8.

[119] 'Septième séance plénière: mardi 8 septembre 1959 (après-midi)' (1959) 48(2) Annuaire de l'Institut de Droit International 209, 212–13.

[120] 'Annex I: Exposé préliminaire présenté par le Baron Heydte le 13 mars 1961' (1967) 52(2) Annuaire de l'Institut de Droit International 73.

[121] 'Le problème que pose l'existence des armes de destruction massive et la distinction entre les objectifs militaires et non militaires en général – Rapport Provisoire présenté par le Baron von der Heydte le 25 octobre 1964' (1967) 52(2) Annuaire de l'Institut de Droit International 1.

[122] 'Rapport définitif présenté par le Baron Heydte' (1967) 52(2) Annuaire de l'Institut de Droit International 155.

[123] 'Première séance plénière: vendredi 5 septembre 1969 (matin)' (1969) 53(2) Annuaire de l'Institut de Droit International 48, 65–6.

[124] Heydte, 'Rapport Provisoire' (n 121) 50.

[125] UNGA Res 2162 A (5 December 1966) UN Doc A/RES/2162(XXI) A.

submitted a year later[126] and approved by the Assembly;[127] the subsequent 1968 session of the General Assembly, which called for complete nuclear disarmament,[128] and articulated the obligation to protect human rights during armed conflict;[129] and the 1968 Tehran Declaration on Human Rights, which called for the eradication of '[m]assive denials of human rights, arising out of aggression or any armed conflict'.[130] Heydte also noted the fact that, in the meantime, the ICRC—itself buoyed by these developments at the UN—had restarted its codification efforts by launching its twenty-first International Conference, to be held a few weeks later. Heydte framed these developments as reflecting 'the legal opinion of the whole world on the subject'.[131] In his view, leaving aside the question of the legality of weapons of mass destruction, 'the limitations on conventional weapons are now evident'.[132] He concluded his address with a plea to the *Institut* to face the challenge once and for all: 'take a stand on the question of the fate of humanity. To remain silent on this matter would be to betray the sacred mission of the law of nations'.[133]

The proposed definition and the Resolution in its entirety were embraced enthusiastically. The vote was 60 in favour, one against (Jessup), and two abstentions (Gros and Feliciano).[134] The debate reflected the points of view of established powers. Only a handful of Associate Members represented the developing world at the *Institut* in 1969, and all but one (who spoke against the definition but abstained at the vote) remained silent.[135] At the behest of Ruegger (an *Institut* member who was a former President of the ICRC and

[126] UN Secretary-General, 'Effects of the Possible Use of Nuclear Weapons and the Security and Economic Implications for States of the Acquisition and Further Development of These Weapons' (10 October 1967) UN Doc A/6858 <https://www.un.org/disarmament/wp-content/uploads/2017/04/A-6858.pdf>.

[127] UNGA Res 2342 (XXII) A (19 December 1967) UN Doc A/RES/2342 (XXII) A.

[128] UNGA Res 2456 (XXIII) (20 December 1968) UN Doc A/RES/2456 (XXIII).

[129] UN Res 2444 (XXIII) (19 December 1968) UN Doc A/RES/2444 (XXIII).

[130] Final Act of the International Conference on Human Rights (Tehran 22 April–13 May 1968) UN Doc A/CONF.32/41, art 10.

[131] 'Première séance plénière: vendredi 5 septembre 1969 (matin)' (1969) 53(2) Annuaire de l'Institut de Droit International 48, 50.

[132] ibid 50.

[133] ibid 51.

[134] 'Sixième séance plénière: mardi 9 septembre 1969 (matin)' (1969) 53(2) Annuaire de l'Institut de Droit International 115, 124–5. Jessup (USA), Gros (France) and other members had earlier managed to remove from the draft a prohibition indirectly questioning the legality of nuclear weapons: 'Cinquième séance plénière: lundi 8 septembre 1969 (après-midi)' (1969) 53(2) Annuaire de l'Institut de Droit International 95, 98–108. Gros also expressed reservations regarding the possible prohibition on '*la levée en masse, la guerre populaire, la défense de l'Etat village par village*': 'Troisième séance plénière: samedi 6 septembre 1969 (matin)' (1969) 53(2) Annuaire de l'Institut de Droit International 70, 74. Florentino Feliciano (the Philippines) expressed reservations concerning the definition. In his view, '[i]f the military advantage is substantial, a non-military objective turns into a military objective': 'Cinquième séance plénière: lundi 8 septembre 1969 (après-midi)' (1969) 53(2) Annuaire de l'Institut de Droit International 95, 102.

[135] Of the six Associate Members from the Third World, the only one who expressed views on this Resolution during the Edinburgh Session was Feliciano, who abstained; Sir Lewis Mbanefo and Yasseen voted in favour (El-Erian, Elias and Singh did not take part in the meeting).

remained an active ICRC Committee member), the results were immediately transmitted to the ICRC, just in time for the momentous Istanbul Conference.[136]

D. The Definition and its Significance

Heydte's final report included an elegant distillation of the variety of military objectives into an abstract and comprehensive formula:

> There can be considered as military objectives only those that, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them.[137]

Heydte was not coy about his impressive achievement, which, he said, had been 'the most difficult to resolve' and had eluded international lawyers since the end of World War I.[138] The major innovation that synthesised different objects into such a workable formula was its insistence on the 'very nature or purpose or use' of the target as a condition for identifying a target as military, rather than solely focusing on the military advantage anticipated from the attack.[139] This abstract formula was immediately perceived to be sufficiently comprehensive and clear, and hence capable of limiting the discretion of military planners as well as fighters on the ground.

What helped Heydte secure the support of the *Institut* for the definition? What was the true impact of his definition? To answer these questions, it is necessary to pay attention to the evolving global political landscape. As Heydte himself, acknowledged,[140] 1969 was an opportune moment for his mission, with its rare confluence of different initiatives to restrain combat that harmonised into the new definition and its adoption. On the one hand, the newly-freed 'third world' had seized the so-called 'International Year of Human Rights' (1968) as an impetus for seeking to delegitimise the military use of nuclear weapons and otherwise setting limits to the overwhelming power of colonial nations. On the other hand, similar to the previous codification moment almost a century earlier,[141] this impulse of resistance to power was successfully eclipsed at that moment by the dominant powers, concerned about the rise of

[136] 'Sixième séance plénière: mardi 9 septembre 1969 (matin)' (1969) 53(2) Annuaire de l'Institut de Droit International 115, 125–6.

[137] Edinburgh Resolution (n 4) art 2. The Rapporteur's original version was slightly different ('4. Peuvent seuls être considérés comme objectifs militaires ceux qui, de par leur nature même, par leur destination ou par leur utilisation militaire, contribuent effectivement à l'action militaire ou présentent un intérêt militaire généralement reconnu, de telle sorte que leur destruction totale ou partielle procure, dans les circonstances du moment, un avantage militaire substantiel, concret et immédiat à ceux qui sont amenés à les détruire'): 'Première séance plénière: vendredi 5 septembre 1969 (matin)' (1969) 53(2) Annuaire de l'Institut de Droit International 48, 53.

[138] Heydte, 'Rapport Provisoire' (n 121) 17–18. [139] ibid 22–3. [140] ibid 50.

[141] Benvenisti and Lustig, 'Monopolizing War' (n 17).

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irregular warfare or 'the democratisation of the means of destruction'.[142] The 1960s was also a period rife with wars of national liberation threatening the West. Irregular combatants found themselves prosecuted as criminals and executed for planting bombs in malls and otherwise targeting civilians.[143] Yet, a third impulse was the opposition within the West to the US bombings in Vietnam, which began in 1965,[144] ultimately prompting the Americans to use the law to clarify the legality of their operations.[145]

But Heydte's motivation was different. In his writings, he describes what haunted him: the grave concern about intensifying irregular warfare against the established order. We might recall that Heydte had widely expressed his profound worry about the threat of irregular warfare and had called for the development of 'new international law' to address it. Heydte's goal—of using international law to limit irregular warfare—is also evident in his responses to comments during the Edinburgh session. The proposed definition, he emphasised, distinguished between the *resistance* characterised by World War II (which targeted military assets and, hence, was lawful) and the contemporary irregular fighters, who did not distinguish between military and civilian targets.[146] The application of the rule, Hydte explained, would doubly burden guerrilla forces: they would have to be discerning in their attacks, lest they be regarded as terrorists and treated as war criminals, stripped of POW status. But they themselves, their supporters and sympathisers, would be deemed lawful targets, and their hideouts qualify under the definition as military objectives. He pointed out that the nature of guerrilla warfare necessitates a wide definition of combatants: 'the active groups that constitute the core of the guerrilla forces … [include] sympathizers, who are also combatants in the classic sense of the term, since they carry out reconnaissance operations, transmit information, ensure communications and transmissions, supply the guerrilla forces with arms and food and hide the insurgents'.[147] But he declined to attempt to offer a clear definition of 'combatants' in the Resolution. Although one could not separate the two questions, Heydte explained, the Resolution's aim was to define 'military objectives', and not to specify who a combatant is. In his view, it sufficed that the Resolution asserted without further elaboration the general principle that there is an obligation to respect the distinction between

[142] E Hobsbawm, *The Age of Extremes: The Short Twentieth Century, 1914–1991* (Abacus 1995) 560–1.

[143] *Bin Haji Mohamed Ali and Another v Public Prosecutor* [1968] UKPC 14 (Judicial Committee of the Privy Council [UK], 29 July 1968).

[144] W Hays Parks, 'Rolling Thunder and the Law of War' (1982) 33(1) Air University Review 2. The pressure by public opinion is reflected in Col H DeSaussure 'The Laws of Air Warfare: Are There Any?' (1971) 5 The International Lawyer 527, 536.

[145] Moyn, *Humane* (n 14) 173ff.

[146] 'Première séance plénière: vendredi 5 septembre 1969 (matin)' (1969) 53(2) Annuaire de l'Institut de Droit International 48, 66.

[147] ibid 56.

'persons participating in the hostilities and members of the civilian population'.[148]

As the deliberations made clear, the definition of military objectives and the general reference to civilians 'participating' in hostilities privileged countries that observed a neat separation between combatants and civilians. Other participants understood the implications. Quincy Wright remarked that applying the definition to irregular forces did not restrain their opponents, the regular armies. After all, 'it was practically impossible to distinguish the civilian population from guerrilla forces'.[149]

Heydte's definition would rebrand irregular warfare that targets civilians as 'terrorism'.[150] Indeed, the *Institut*'s definition would be the first text to offer a definition of what terrorism is, albeit indirectly. It would also be the only such text. Subsequent attempts to define 'terrorism' would fail to bridge the gap between subjective conceptions of terrorism.[151]

Key to Heydte's counterterrorism mission was his emphasis on the applicability of the 1969 Resolution also to non-international armed conflicts, as a matter of existing law. The preamble states that 'the following rules form part of the principles to be observed in armed conflicts by any *de jure* or *de facto* government, or by any other authority responsible for the conduct of hostilities'.[152] Heydte took pains to emphasise that the Resolution reflected customary international law. Opposing Quincy Wright's assertion that the Resolution went 'much further' than the Charter of the United Nations but was a 'necessary innovation',[153] Heydte insisted that the principle of distinction was one of the fundamental principles applicable to any armed conflict.[154] This position was accepted. Article 1 asserts that '[t]he obligation to [distinguish] *remains* a fundamental principle of the international law in force',[155] and the text of the Resolution is replete with references to prohibitions found in 'existing international law'.[156]

The definition served the US's interests well in the early 1970s. If, in 1965, the US military had an arguable case[157] to claim that, in planning for attacks,

[148] Edinburgh Resolution (n 4) art 1. See 'Première séance plénière: vendredi 5 septembre 1969 (matin)' (1969) 53(2) Annuaire de l'Institut de Droit International 48, 58–9.

[149] 'Première séance plénière: vendredi 5 septembre 1969 (matin)' (1969) 53(2) Annuaire de l'Institut de Droit International 48, 56.

[150] Edinburgh Resolution (n 4) art 6. In the deliberations, Kunz referred to attacks directed exclusively against the civilian population as 'terror attacks' (Heydte, 'Rapport Provisoire' (n 121) 41).

[151] See (n 19).

[152] See Edinburgh Resolution (n 4).

[153] 'Première séance plénière: vendredi 5 septembre 1969 (matin)' (1969) 53(2) Annuaire de l'Institut de Droit International 48, 55.

[154] ibid.

[155] The reference to 'remains' instead of 'is' was suggested by the President of the *Institut*, 'pour montrer l'immanence de la règle', ibid 59 (emphasis added).

[156] Arts 4, 6, 7 and 8 begin with '[e]xisting international law prohibits …'.

[157] W Hays Parks, 'The Protection of Civilians from Air Warfare' (1997) 27 Israel Yearbook of Human Rights 65; Captain BM Carnahan, 'Protecting Civilians under the Draft Geneva Protocol: A Preliminary Inquiry' (1976) 18(4) Air Force Law Review 32, 33; Carnahan, 'The Law of Air Bombardment in its Historical Context' (n 44) 43.

there was no rule that would require the minimisation of civilian casualties,[158] the failures of US bombing campaigns in Indochina and the massacre in My Lai[159] led even US military lawyers to acknowledge that targeting civilians or causing them excessive collateral harm should be prohibited. When US Senator Edward Kennedy demanded a clarification from the Department of Defense about the legality of the US bombing in Indochina, he asked specifically whether the Department accepted the Edinburgh Resolution 'as an accurate restatement of international law'.[160] The response reflected a nuanced retreat of the US military lawyers from their initial rejection of the principle of distinction as legally required,[161] and portended the definition accepted in API. Referring to the Edinburgh Resolution, the response critiqued only the demand that 'there must be an "immediate" military advantage', as failing to 'reflect the law of armed conflict that has been adopted in the practices of States.'[162] Obviously, by now, the US Government and military endorsed Heydte's formula, appreciating its usefulness for their cause.[163]

E. Heydte's Definition Codified, 1969–77

The Edinburgh Resolution's breakthrough moment was timely, from the perspective of the ICRC. Buoyed by the 'United Nations human rights community'[164] and the UN Secretary-General's Report on 'Respect for Human Rights in Armed Conflicts',[165] which may have created 'a certain spirit of rivalry and of competition for primacy' between the UN and the ICRC,[166] the ICRC was now able to integrate Heydte's definition of military objectives into its renewed effort to transform the Hague law as part of the new vision of IHL.[167] As noted by Page Wilson, it was at the Istanbul Conference that the ICRC expanded its remit to include the 'reaffirmation

[158] W Hays Parks, 'Rolling Thunder' (n 144) 17 ('the air campaign should be conducted with only those minimum constraints to avoid indiscriminate killing of population').
[159] Carnahan, 'Protecting Civilians' (n 157).
[160] Edward M Kennedy, 'Letter to Secretary of Defense Melvin R Laird May 3, 1972' (Problems of War Victims in Indochina Part IV: North Vietnam, Hearing Before the Subcommittee to Investigate Problems Connected with Refugees and Escapees of the Committee on the Judiciary United States Senate Ninety-Second Congress Second Session, 28 September 1972) Annex I, 58.
[161] J Fred Buzhardt, 'Response of the Department of Defense to Correspondence from the Subcommittee Chairman, Senator Edward M Kennedy, September 22, 1972' (ibid n 160) Annex I.
[162] ibid. [163] ibid. See also Carnahan, 'The Law of Air Bombardment' (n 44) 59–60.
[164] WA Solf, 'Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I' (1986) 1 AmUIntlLRev 117, 125.
[165] UNGA, 'Respect for Human Rights in Armed Conflicts: Report of the Secretary-General' (20 November 1969) UN Doc A/7720. [166] RR Baxter (n 62) 101.
[167] P Wilson, 'The Myth of International Humanitarian Law' (2017) 93 International Affairs 563, 568–71. On efforts to include references to human rights in the 1949 Geneva Conventions, see B van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions' (2018) 112 AJIL 553.

and development of the laws and customs applicable in armed conflict',[168] beyond the Geneva law that applied *hors de combat*. Drawing on Heydte's strict definition, the ICRC was able to position humanitarianism as the overriding consideration for IHL.[169]

Once adopted by the ICRC at the Conference, Heydte's formula became the basis for the ICRC's preparations for the Diplomatic Conference (1974–77),[170] convened to deliberate and develop the Additional Protocols. The ICRC's version followed the formula, while some of the modifiers were replaced ('substantial, specific and immediate' military advantage was replaced by 'definite' advantage), reflecting some countries' concerns.[171] This formula was ultimately adopted, without too much debate,[172] as Article 52(2) of API. Leslie Green was one of the few who noted the 'major significance' of the Edinburgh Resolution.[173] Dieter Schindler regarded the 1969 definition as 'the essential basis' in substance and form of the corresponding definition in API.[174] However, the ICRC Commentary on the Additional Protocols fails to acknowledge the significant influence of the *Institut* on the definition adopted in API. Regarding API, it mentions the 1969 definition, albeit as part of a 'study [of] weapons of mass destruction',[175] while on the Additional Protocol II concerning non-international armed conflicts (APII) it simply states that '[t]he fundamental principles of protection which the [ICRC 1957] draft laid down were subsequently reaffirmed, first in a number of resolutions of the International Conference of the Red Cross, and later by those of the United Nations'.[176] It is interesting to note that Heydte, himself, did not mention the 1969 Resolution in his subsequent writings on the topic[177] or in his autobiography.

[168] ICRC, 'Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts: Report Submitted to the 21st International Conference of the Red Cross' (ICRC 1969) 1 (quoted in Wilson (n 167) 568).

[169] ibid 7. On the political forces shaping the drafting of the Additional Protocols, see the excellent book by Mantilla, *Lawmaking Under Pressure* (n 21).

[170] The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict (Geneva 1974–77).

[171] For the US position, see Fred Buzhardt, 'Response' (n 161); HW Briggs, 'The Institut De Droit International: Session of Zagreb' (1972) 66 AJIL 352, 354 (the 1969 definition 'probably goes beyond existing international law').

[172] Alternative, more expansive, definitions were proposed by France and by several Arab States ('Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva (1974–1977)' (Federal Political Department 1978) vol III, 209, 211 <https://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-3.pdf>).

[173] LC Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester University Press 2008) 58.

[174] Schindler (n 88) 209. See also Carnahan, 'Protecting Civilians' (n 157) 47 ('The definition of military objectives in [draft] Article 47 apparently originated in a 1969 resolution of the Institute of International Law').

[175] Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary on the Additional Protocols* (Martinus Nijhoff 1987) 633.

[176] ibid 1444.

[177] FA Freiherr von der Heydte, 'Air Warfare' in R Bernhardt (ed), *The Encyclopedia of Public International Law*, vol 1 (Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht 1992).

IV. THE AFTERLIFE OF THE 1969 RESOLUTION: A HAPPY ENDING TO A TORTUOUS TRAJECTORY

The adoption of Heydte's definition by the parties to the Diplomatic Conference on API raises a puzzle: how could a multi-party process that involved not only assertive Afro-Asian nations challenging the Western agenda but also several national liberation movements (NLMs),[178] which openly rejected the very feasibility of distinction during irregular warfare,[179] embrace Heydte's Eurocentric lawfare-grounded definition? The answer, as this Part will show, lies in the fact that, while the definition was adopted, it was effectively retooled by API to constrain regular armies while relieving irregular combatants of any consequence for ignoring it, both in international and non-international armed conflicts. But there is a happy ending to this twisting tale: with the rise of international criminal adjudication in the late 1990s and early 2000s, the definition was finally extended to protect all civilians who may be affected by battles of all types.

The context of API transformed Heydte's formula to a burden applicable exclusively to regular armies, whereas irregulars were effectively exempted from the responsibility to abide by it. This was achieved by tightening the rules on targeting in a number of ways. Civilian 'sympathisers' of irregulars would no longer be considered legitimate targets, since API strictly limited the scope of combatants only to those 'taking direct part in hostilities';[180] API further required that an attack should be called off if it was likely to 'excessively' harm civilians;[181] and, during attacks, 'constant care' and 'reasonable precautions' would have to be taken to spare civilians.[182] Complying with these requirements would prove a tall order for armed forces fighting irregular forces from that point onward.

Moreover, in what some considered a 'serious blow to the humanitarian cause',[183] the definition of military objectives was excised from APII, which instead provided a paltry provision admonishing parties against attacking civilian objectives, but without defining them.[184] States emerging from decolonisation had little appetite for international norms restricting their responses to internal challengers. Some of them even argued that 'the objectives attacked in non-international conflicts may not necessarily be "military" ones'.[185]

The final swing of the pendulum toward the decolonising world came with the recognition of NLM fighters as entitled to PoW status even if they

[178] For the list, see 'Official Records' (n 172) vol II, 351ff.

[179] E Davey 'Decolonizing the Geneva Conventions National Liberation and the Development of Humanitarian Law' in A Dirk Moses, M Duranti and R Burke (eds), *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics* (Cambridge University Press 2020) 390–1.

[180] Art 51(3) API; cf art 1 Edinburgh Resolution (n 4) including civilians 'participating' in hostilities as lawful targets. [181] Art 55(5)(b) API. [182] Art 57 API.

[183] Statements on Protocols I and II 63. Mr Ofstad (Norway), 'Official Records' (n 172) vol VII, 206. [184] Art 13(2) APII. [185] 'Official Records' (n 172) vol III, 211, vol V, 364.

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disregarded the definition. This outcome was the result of the exclusion of the definition from the list of 'grave breaches' of API that would expose PoWs to war crimes charges.[186] During preparatory sessions with the ICRC,[187] and during the meetings of the Diplomatic Conference, NLM representatives explicitly eschewed the principle of distinction as incompatible with their strategy. George Silundika of the Zimbabwe African People's Union asserted that 'the very nature of an anti-colonial war is that you are fighting an enemy that deprives you of any possibilities of fighting in the conventional manner'.[188] Mr Armaly, the representative of the Palestine Liberation Organization, asserted that 'there were situations in which, owing to the nature of the hostilities, it was not possible to distinguish between combatants and the civilian population'.[189]

Ultimately, then, Heydte's mission not only failed but even backfired. In subsequent years, he would continue to emphasise the pressing need to develop new international law to fight terrorism.[190] Perhaps the only solace for concerned Europeans such as Heydte was the implied proposition that urban guerrilla activities threatening the European metropole remained unlawful: the reference in the Additional Protocols to 'armed' conflicts meant that '"wars of national liberation" can only be legitimated under international law if fought mainly by military means, ie by acts of combatancy against military targets belonging to an enemy's armed forces'.[191]

The ICRC and other active promoters of the two Additional Protocols were not blind to the asymmetric outcome that posed inordinate risks for civilians.[192] But they were hoping that the successful adoption of two sets of rules would allow them to incrementally reshape how the Additional Protocols were widely understood. The ICRC's Commentaries add gloss to the adopted texts by referring to the definition of military objectives among the rules applicable in NIACs,[193] as well as the definition of 'grave breaches' under API, thereby exposing irregular combatants to war crimes charges.[194]

The proper balance, protecting all civilians equally, was ultimately reached with the turn to international criminal adjudication. The 'stunning'[195] decision by the International Criminal Tribunal for the former Yugoslavia (ICTY) in

[186] Art 44(3) API together with art 86(3) API (the list of 'grave breaches').
[187] Detailed in Davey (n 179). [188] ibid. [189] 'Official Records' (n 172) vol XV, 184.
[190] See Heydte's 1986 interview (n 3).
[191] S Oeter, 'Terrorism and "Wars of National Liberation" from a Law of War Perspective: Traditional Patterns and Recent Trends' (1980) 49 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 445, 475.
[192] M Veuthey, 'Guérilla et droit humanitaire' (1976) 58 International Review of the Red Cross 325.
[193] Sandoz, Swinarski and Zimmermann (n 175) 1451, para 4779, fn15 (referring to art 52 in connection with art 13(2) APII).
[194] Sandoz, Swinarski and Zimmermann (n 175) 995, para 3475 (referring to art 52 in connection with art 85(3)(b) API).
[195] W Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2001) 42. See also AM Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War' (2006) 59 VandLRev 1.

1995 to extend the customary laws of war to NIACs[196] meant that the consequences of ignoring the definition would be equally felt on all sides. Although States Parties to the Rome Statute of the International Criminal Court were unable to reach agreement on referring to the definition as an element of a crime in NIACs, it was referred to in several amended treaties.[197] The ultimate explicit endorsement of the definition as applicable to regular and irregular combatants fighting both types of war was rendered by the ICTY in 2005,[198] followed by the ICC in 2010.[199]

V. CONCLUSION

The forgotten story of the birth of the definition of military objectives is relevant to the ongoing discussion that started with the events of 11 September 2001, about the need to update the laws of war to adapt them to irregular warfare, better known today as 'asymmetric warfare'.[200] It cannot be ignored, however, that the challenges of asymmetric warfare were already well-known to the law's codifiers, who saw the law as a suitable response to them. Whether or not its authors were correct, and whether the law now needs refinement, are questions that call for constant reassessment, but the argument that the existing law did not intend to restrict action during asymmetric warfare, and instead was designed to 'deal with limited wars between roughly equal states' is plainly erroneous.

The *Institut*'s 1969 Resolution marked a watershed in the history of the codification of the laws of war. It provided one of the key provisions of the Additional Protocol I of 1977—a general, comprehensive and objective criterion for distinguishing between military and non-military objectives. This test would single out irregular fighters' choice of targets as 'terrorism' that is subject to criminal sanctions, while allowing attacks by established powers on civilian neighbourhoods that would give them shelter. But that was only the first salvo in a battle of definitions that ultimately ended by judicial fiat.

The history of the codification of the principle of distinction is a microcosm of the larger history of the codification of the laws of war since the mid-nineteenth century. This is a story of how the laws of war were codified not only with the humanitarian mission in mind, but also, for some key actors, with the intention

[196] *Prosecutor v Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995).

[197] Protocols II and III to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, amended 1996 and 2002 respectively, and Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999).

[198] *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-A (17 December 2004) para 53.

[199] *Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 February 2010) para 89.

[200] eg (n 24).

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to use the law to address internal challenges to the incumbent governments of Western Europe. This is also an institutional story about the importance of venue and the implication of inclusion or exclusion of relevant voices. Heydte's achievement was possible only in the exclusive venue of the *Institut*, which still carried a heavy Western bias in 1969. The rise of the Non-Aligned Movement subsequently upended Heydte's achievement. Only judicial intervention a generation later would achieve a balanced outcome.

While the 1969 Resolution and its aftermath may be imagined as a battle between two adversaries to draft the shared rules, struggling for control of the pen, ultimately it was the judge who decided, as is often the case. The judges did so by imagining a history of linear progress of the evolution of norms constantly striving for more humane treatment in war. Such 'discipline optimism'[201] empowered judges to assert that '[t]he protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law'[202] while expanding the scope of applicability of the 1969 definition as if it had always reflected customary international law.

[201] O Diggelmann, 'The Periodization of the History of International Law' in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 1008.

[202] *Prosecutor v Kupreškić et al* (n 23) para 521.

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