

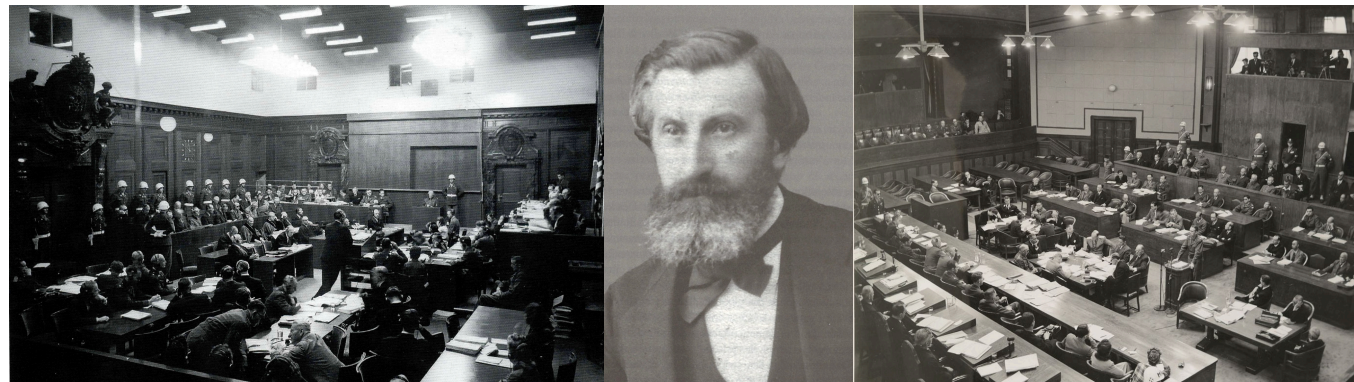
“How to...!”: Legal debates on the punishment of violations of the laws of war, war crimes and crimes against humanity in the period between the Franco-Prussian War and the beginning of the Cold War (1869–1949)

Military Justice in the Modern Era, 1850–1945

Conference 2022 at the Institute for Japanese Studies, Freie Universität Berlin

Daniel Marc Segesser

July 28, 2022



“How to...!”: Legal debates on the punishment of violations of the laws of war, war crimes and crimes against humanity 1869 – 1949

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Introduction

An Overview

- Gustave Moynier, Joseph Hornung and the way to the revised Geneva Convention of 1906
- Louis Renault, Hugh Bellot and the punishment of war crimes in the First World War
- Henri Donnedieu de Vabres, Vespasien Pella and the quest for an Inter-

- national Criminal Tribunal in the interwar period
- Jurists in exile and the United States and the punishment of war crimes
- IMT, IMTFE, NMT and the Geneva Conventions of 1949
- Conclusions

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Gustave Moynier, Joseph Hornung

and the way to the revised Geneva Convention of 1906

Garibaldi meets Vittorio Emanuele



Wars of the 1860ties

- Italian War of Independence: Battles of Magenta and Solferino 1859, Garibaldi's Expedition of the Thousand 1860; Battle of Custoza 1866.
- German Wars of Unification against Denmark (1864) and Austria (1866)
- American Civil War (1861–1865)
- Wars outside Europe

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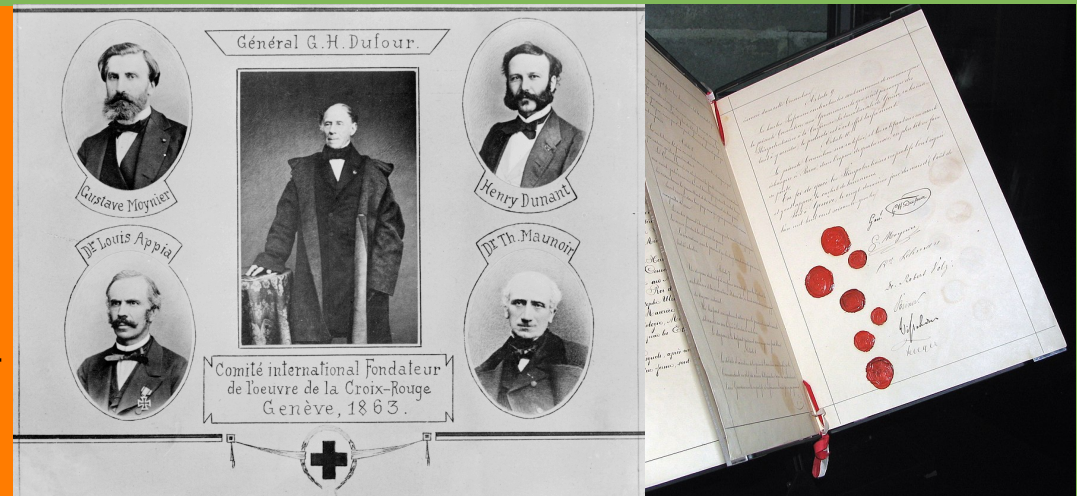
Gustave Moynier, Joseph Hornung

and the way to the revised Geneva Convention of 1906

International legal regulations of war

in the 1860ties

- Geneva Conference 1863: Foundation of the Geneva Committee
- Geneva Convention 1864
- Additional Articles to Geneva Convention 1868
- Declaration of St. Petersburg regarding explosive projectiles



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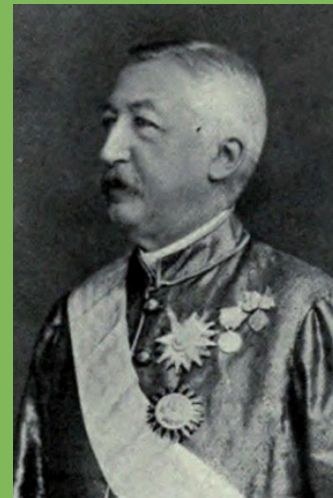
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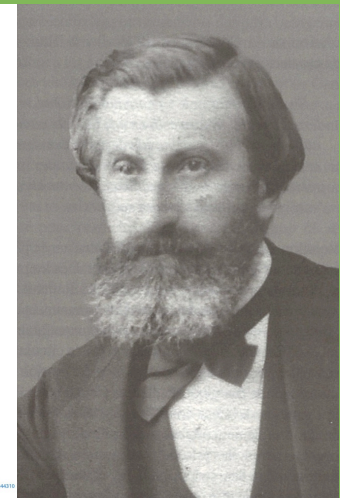
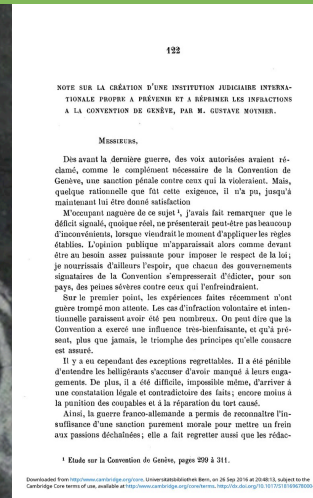
Gustave Moynier (1872)

- January 1872: Proposal for the creation of an international judicial body to try violations of the Geneva Convention
- affected national sovereignty
- no large zeal to punish perpetrators within a states' own armed forces.

Note sur la création...



Gustave Rolin-Jaequemyns



Gustave Moynier

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Gustave Moynier, Joseph Hornung

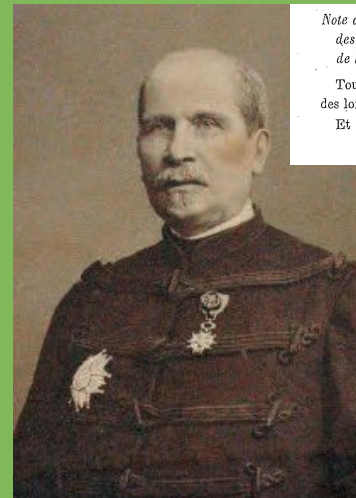
and the way to the revised Geneva Convention of 1906

Eugène Arnaudeau, Gustave Moynier

- Declaration of Brussels 1874
- Russo-Turkish War in 1877–1878
- Oxford Manual 1880

“It is more profitable to impose self-proclaimed obligations on one’s own side than to have to do so as a consequence of complaints made by someone else” (Joseph Hornung)

Joseph Hornung & the Oxford Manual



Eugène Arnaudeau

Note de M. Hornung sur la répression des délits contre le droit des gens et plus spécialement sur celle des délits contre les lois de la guerre.

Tout en me référant au rapport de M. Moynier, sur la question des lois de la guerre, je désire insister sur les points suivants.

Et d’abord, je me range tout-à-fait à l’idée de M. Rolin,

MANUEL DES LOIS DE LA GUERRE SUR TERRE. 187

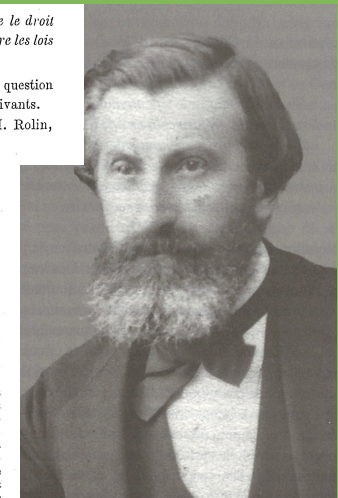
Les lois de la guerre sur terre.

Manuel publié par l’Institut de droit international.

AVANT-PROPOS.

La guerre tient une grande place dans l’histoire, et il n’est pas présumable que les hommes parviennent de sitôt à s’y soustraire, — malgré les protestations qu’elle soulève et l’horreur qu’elle inspire, — car elle apparaît comme la seule issue possible des conflits qui mettent en péril l’existence des États, leur liberté, leurs intérêts vitaux. Mais l’adoucissement graduel des mœurs doit se refléter dans la manière de la conduire. Il est digne des nations civilisées, de chercher, comme on l’a fort bien dit, « à restreindre la force destructive de la guerre, tout en reconnaissant ses inexorables nécessités. »

Ce problème n’est pas facile à résoudre ; cependant on y est déjà parvenu sur quelques points, et, en dernier lieu, le projet de déclaration de Bruxelles a été comme une attestation solennelle du bon vouloir de tous les gouvernements à cet égard. On peut dire qu’indépendamment des lois internationales existantes, en cette matière, il y a aujourd’hui un certain nombre de principes de justice qui dirigent la conscience publique, qui se manifestent même par des coutumes générales, mais qu’il serait bon de fixer et de rendre obligatoires. C’est ce que la conférence



Gustave Moynier

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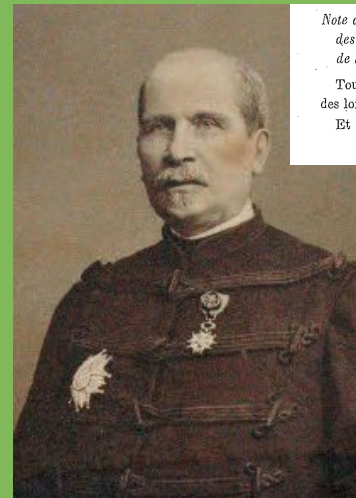
and the way to the revised Geneva Convention of 1906

Eugène Arnaudeau, Gustave Moynier

- Declaration of Brussels 1874
- Russo-Turkish War in 1877–1878
- Oxford Manual 1880

“offenders [...] are liable to the punishment specified in penal law [...] after a judicial hearing, by the belligerent in whose hands they are”
Article 84 of Oxford Manual

Joseph Hornung & the Oxford Manual



Eugène Arnaudeau

Note de M. Hornung sur la répression des délits contre le droit des gens et plus spécialement sur celle des délits contre les lois de la guerre.

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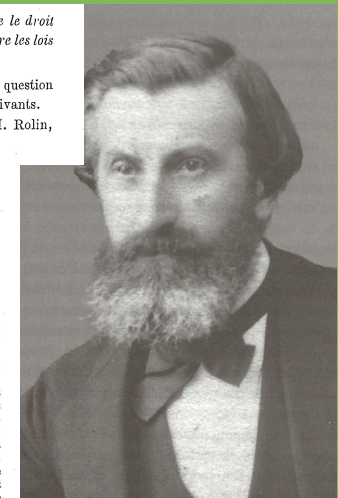
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Gustave Moynier

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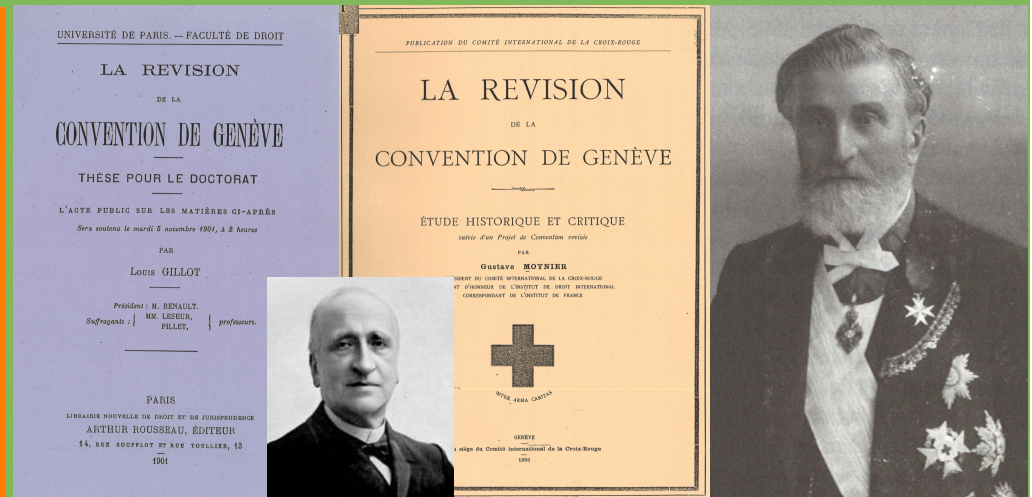
and the way to the revised Geneva Convention of 1906

Gustave Moynier, Louis Renault

- Moynier’s attempts in 1890ties
- PhD Louis Gillot 1901
- Hague Rules of Land Warfare

“in the event of their military penal laws being insufficient, the signatory governments [...] engage to take, or to recommend to their legislatures, the necessary measures to suppress, in the time of war” violations of the rules of the new convention (Art. 28 Geneva Convention 1906)

and the Geneva Convention of 1906



Louis Renault

Gustave Moynier 1906

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Louis Renault, Hugh Bellot

and the punishment of war crimes in the First World War

1914

Inspite of the Wars in the Balkans legal scholars trust the fact that the political and military authorities would do what they should to check violations of the laws of war.

few sceptics

“The experience of [...] war seems to indicate that respect for the international law of war among European Powers is still very deficient, and that there is great need of an international tribunal to check international aggression.”

Law Journal 46 (1911)

“How to...!”: Legal debates on the punishment of violations of the laws of war, war crimes and crimes against humanity 1869 – 1949



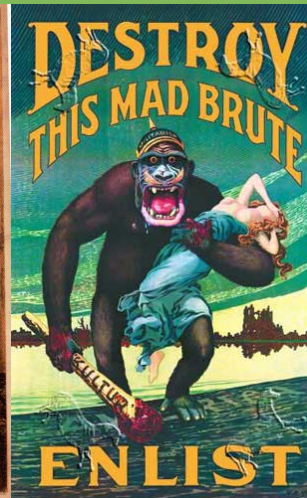
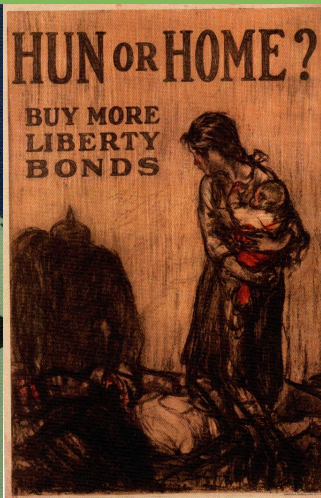
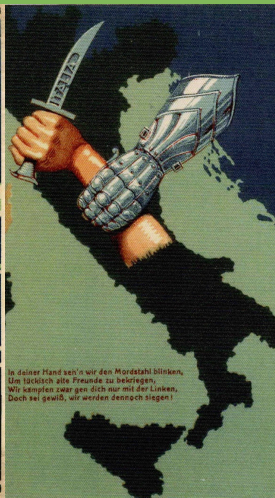
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Louis Renault, Hugh Bellot

and the punishment of war crimes in the First World War

Propanda all over the globe

the enemy is the absolute evil



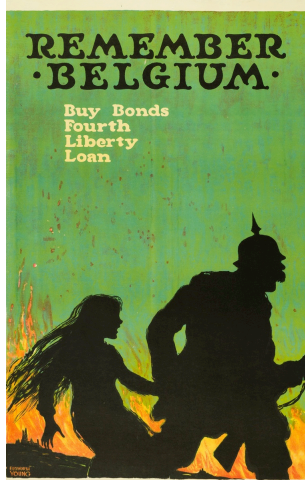
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Louis Renault

Gustave Moynier 1906

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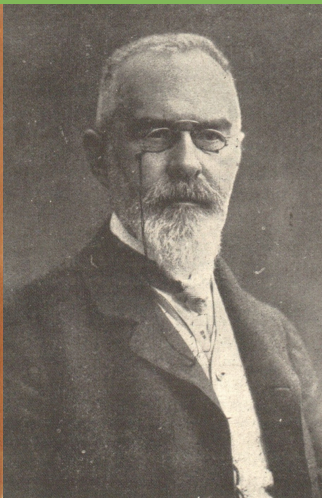
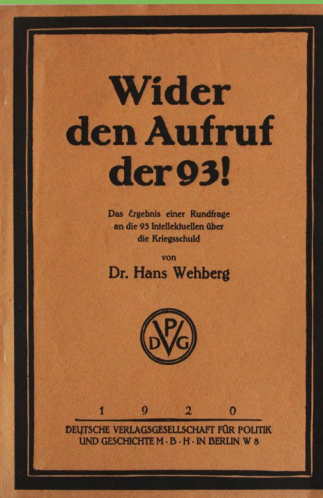
and the punishment of war crimes in the First World War

Choose

your side



Hans Wehberg



Heinrich Lammasch

To hold a middle ground was almost impossible.
Most of the jurists took the side of their country and used their knowledge to bolster legal claims, not least in regard to alleged violations of the laws of war

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Louis Renault, Hugh Bellot

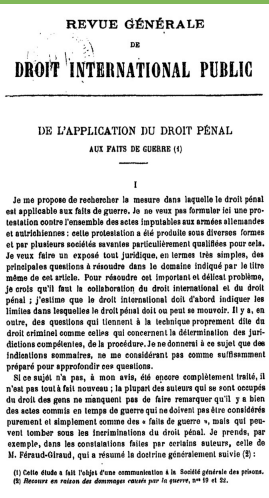
and the punishment of war crimes in the First World War

Louis Renault

1914 and 1915



Louis Renault



Henri Joly



André Weiss

- Laws apply to war and that there are restrictions in warfare
- All violations of the laws of war are crimes that can be punished
- Article 28 of the Geneva Convention of 1906 is therefore nothing more than a specific application of this general principle

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Louis Renault, Hugh Bellot

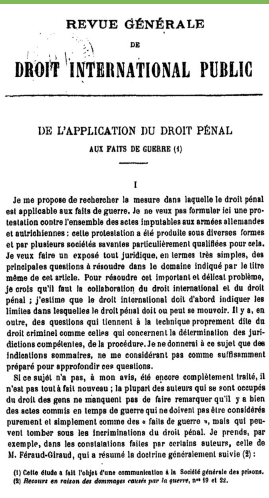
and the punishment of war crimes in the First World War

Louis Renault

1914 and 1915



Louis Renault



Henri Joly



André Weiss

- Henri Joly and André Weiss proposed to set up an international criminal court
- This proposal did not find large scale support
- Renault's views remained unchallenged until 1918

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Louis Renault, Hugh Bellot

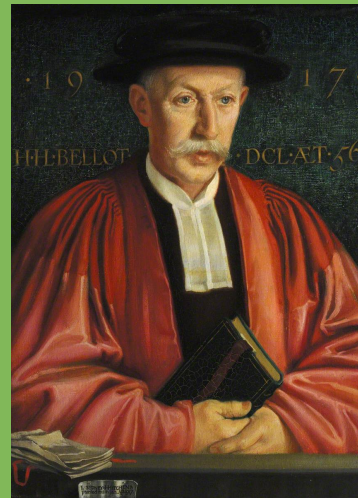
and the punishment of war crimes in the First World War

Hugh H. L. Bellot

The Entente Powers are entitled to try and punish all offenders against the established laws and usages of war by court-martial. (Bellot 1916)

Bellot would have preferred a court composed of eminent civilian judges versed in criminal law and practice,

and the discussion in Great Britain



Hugh H. L. Bellot

WAR CRIMES: THEIR PREVENTION AND PUNISHMENT.

BY

HUGH H. L. BELLOT, D.C.L. (OXON).

THE subject of war crimes, their prevention or punishment, is, I feel very strongly, one which should engage the close and earnest consideration of the general public. By war crimes I mean those acts of the armed forces of a belligerent against the person or property of the enemy, combatant or non-combatant, which are deemed contrary to the established usages of war. These I shall particularise later. For the moment I wish to examine, and if possible refute, some doctrines, equally dangerous to humanity and civilisation, by which many of the outrages committed during the present war are excused or attempted to be justified, not only by the Governments responsible, but by organised and unorganised opinion in all countries.

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Louis Renault, Hugh Bellot

and the punishment of war crimes in the First World War

Hugh H. L. Bellot, Louis Renault

Bellot and Renault had described an amplification of law enforcement to try the German Kaiser Wilhelm II as “futile”, “bold” or as having “no equivalent in positive law”

The political situation, however, had changed



and the post-war discussion in Paris

Art. 227&228 Treaty of Versailles

Art. 174 Treaty of St. Germain,

Art. 119 Treaty of Neuilly

Art. 158 Treaty of Trianon

Art. 227 Treaty of Sèvres

Hugh H. L. Bellot

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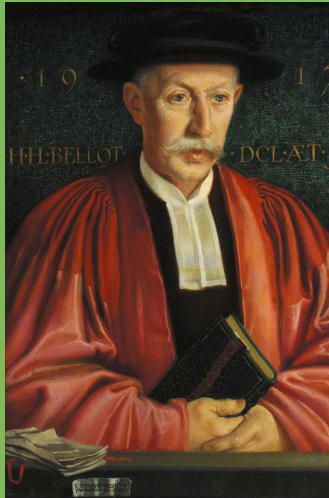
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Henri Donnedieu de Vabres, Vespasien Pella

and the quest for an International Criminal Tribunal in the interwar period

Proposals for an

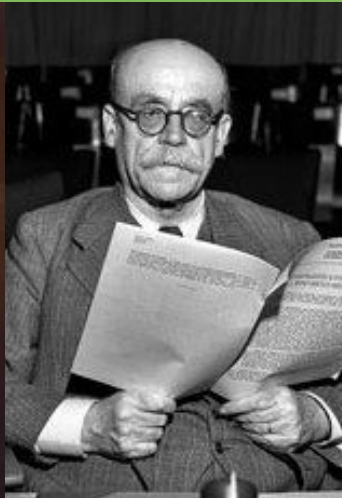
International Criminal Tribunal



Hugh H. L. Bellot



Vespasien Pella



Henri Donnedieu de Vabres

- 1922 Bellot proposal
- 1924 Donnedieu de Vabres proposal
- 1928 Pella proposal adopted and passed on to the League of Nations
- 1937 Convention for an International Criminal Court to fight terrorism

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Jurists in exile and in the United States

and the punishment of war crimes

A mixed choir of jurists in exile



Jaroslav Stransky

Georg Schwarzenberger

Marcel de Baer

Declaration of St. James (1942)

The undersigned [...] government[s] place among their principal war aims the punishment, through the channels of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them.

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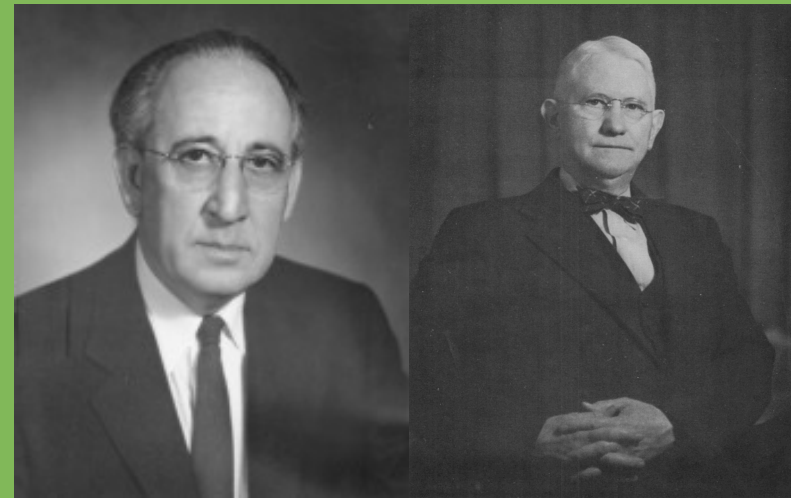
Jurists in exile and in the United States

and the punishment of war crimes

Reason's for an Int. Criminal Court

- Crimes against civilians and soldiers of different allied nations
- Crimes of commander active on several fronts
- Crimes ordered by civilian or military authorities
- Crimes that national courts prefer not to deal with

Sheldon Glueck



Sheldon Glueck

Manley O. Hudson

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Jurists in exile and in the United States

and the punishment of war crimes

Lively debate

with differing views



Quincy Wright



Hans Kelsen

PUNISHMENT OF WAR CRIMINALS BY THE UNITED NATIONS

The United Nations have committed themselves, though not as a collective group, to undertake the trial and punishment of Axis war criminals. They have the power to do so, whether as victors or as military occupant peoples nor others of the United Nations too and *ex post facto* punishments, but they believe in Axis military forces are crimes, and should be, in fact, enough precedents in the law of war principles of law recognized by civilized nations' legal procedure. The establishment of such precedents, by past precedents, is embarrassed by limited precedents, by past precedents. On the other hand, it should be a re-

THE
UNIVERSITY OF CHICAGO LAW REVIEW
VOLUME 12 JUNE 1945 NUMBER 4

CRIMINAL RESPONSIBILITY OF INDIVIDUALS
AND INTERNATIONAL LAW*

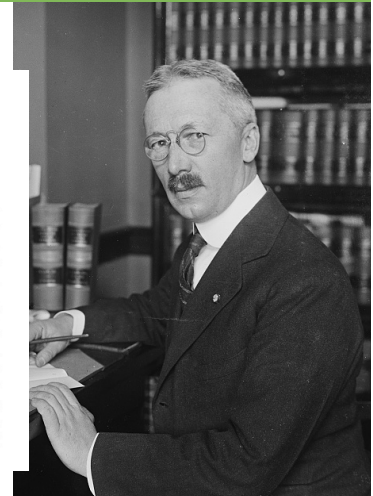
Author: G. D. Levy†

THE LEGAL NATURE AND PUNISHMENT OF CRIMINAL ACTS OF VIOLENCE CONTRARY TO THE LAWS OF WAR

By GEORGE MANNER

Instructor in Political Science, University of Illinois

On January 13, 1942, eight governments-in-exile and the Free French National Committee adopted at London a resolution which pledges them to postwar punishment of every person guilty and responsible for certain criminal acts of violence committed by the German armies and their accomplices in occupied territories contrary to the law of war as formulated, in particular in the Fourth Hague Convention of 1907 concerning land warfare, as generally understood by the civilized world. Several of the signers of the document spoke of the acts in question as social or international crimes and intimated that new legal conceptions would govern responsibility for and punishment of them.¹ It seems opportune, therefore, to reexamine the established legal principles relating to these issues and to inquire whether any rules of international law have been accepted recently with regard to the nature and punishment of criminal acts of violence committed by members of the armed services of a nation contrary to the laws and customs of



Charles Cheney Hyde

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IMT, IMTFE, NMT

and the Geneva Conventions of 1949

Major challenge for

keep up legal principles, while
at the same time delivering
swift justice

Henry Stimson & Murray Bernays



Murray Bernays



George Marshall & Henri Stimson

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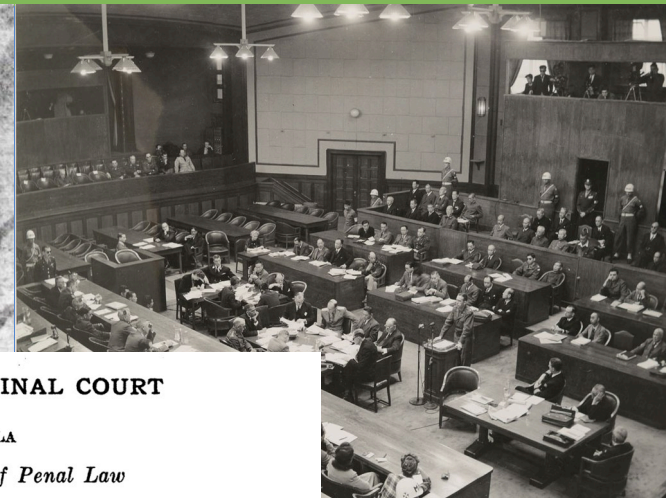
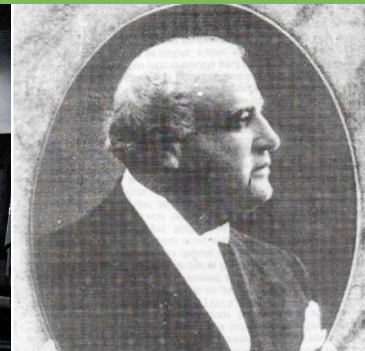
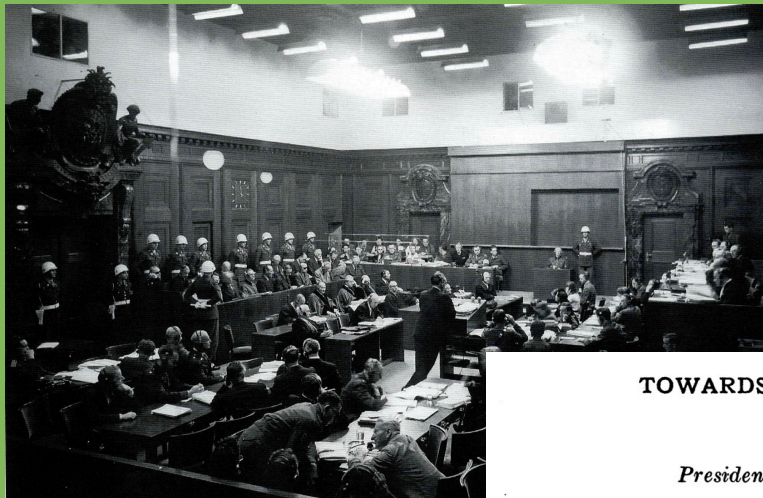
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IMT, IMTFE, NMT

and the Geneva Conventions of 1949

Vespasien Pella

and the post war trials



TOWARDS AN INTERNATIONAL CRIMINAL COURT

BY PROFESSOR VESPASIAN V. PELLA

President of the International Association of Penal Law

“How to...!”: Legal debates on the punishment of violations of the laws of war, war crimes and crimes against humanity 1869 – 1949



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IMT, IMTFE, NMT

and the Geneva Conventions of 1949

Article 49



Signing of the Geneva Conventions in 1949

Geneva Convention (I) 1949

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention [...].

Each High Contracting Party shall be under the obligation to search for per-

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IMT, IMTFE, NMT

and the Geneva Conventions of 1949

Article 49



Signing of the Geneva Conventions in 1949

Geneva Convention (I) 1949

sons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also [...] hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.

“How to...!”: Legal debates on the punishment of violations of the laws of war, war crimes and crimes against humanity 1869 – 1949

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Conclusions

- Trying potential violations of the laws of war – or war crimes and crimes against humanity as they became later known – was always a great challenge, not least for legal scholars, who dealt with the issue
- The first option available was a trial in a national (military) court, the problem being that it could be too lenient on soldiers of its own side and too harsh on soldiers of the enemy
- Ever since Gustave Moynier’s proposal in 1872 legal scholars have submitted proposals for a legally appropriate international solution for the dilemma of trials in national (military) courts, but in any case the solution found was nothing but a compromise leaving state actors in the driving seat

Thank you very much
for your attention

Daniel Marc Segesser

July 28, 2022

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