"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





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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 Custozza 1866.
- German Wars of Unification against Denmark (1864) and Austria (1866)
- American Civil War (1861–1865)
- Wars outside Europe



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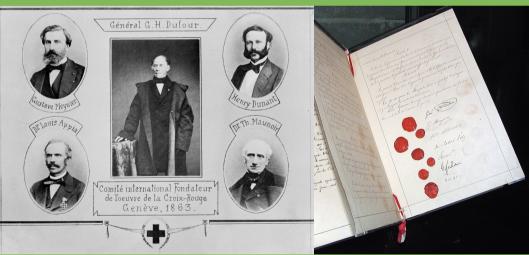
# Gustave Moynier, Joseph Hornung

and the way to the revised Geneva Convention of 1906

#### International legal regulations of war

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

#### in the 1860ties





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# Gustave Moynier, Joseph Hornung

and the way to the revised Geneva Convention of 1906

#### **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...



Massueu

Des avant la deruière guerre, des voix autorisées avalent réclamé, comme le complément nécessaire de la Corrention de Genève, une sanction pénale contre cenx qui la voléeraient. Mais, quelque rationnelle que fut cette exigence, il n'a pu, jusqu'à maîntenant int être donné satisfaction

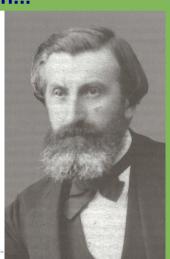
and treatment of compared to engine I, Javala fail researching engine de consigle I, Javala fail researching engine de la delicit signalit, a longue reid, as principatential pendering and paramond, discouverientes, burque viedental le moment d'agalquier les reject delicités. L'opinion publique in hyposymentait abne commes deraut étre au hessin assez paissante pour imposer le respect de la loi, in outrains d'allustres l'espoir, que chacun des gouvernes signataires de la Couvention s'empresserait d'éditete, pour son pays, des peloss solvers contre ours qu'internidantes.

Sur le premier point, les expériences faites récemment n'ou guére trompé mon atteole. Les cas d'infraction volontaire et intentionnelle paraissent avoir été peu nombreux. On peut dire que le Convention a exercé une influence très-hienfaissante, et de consent, plus que jamais, le triomphe des principes qu'el peut sent, plus qui jamais, le triomphe des principes qu'el ce est assuré.

d'entendre les belligierants s'accuser d'avoir manqué à leurs eugsgements. De plus, il a été difficile, impossité même, d'arriver su une constatation légale et contradictoire des faits; encore meius à la pamition des coupalises et à la réparation du tort causé. Ainsi, la guerre franco-allemande a permis de reconsaltre l'insuffisance d'une sanction parement morale pour mettre un frein aux nassions déchalinées: elle a fait reprettes massi que les réches.

<sup>1</sup> Etude sur la Convention de Genève, pages 299 à 311.

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**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 selfproclaimed 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**

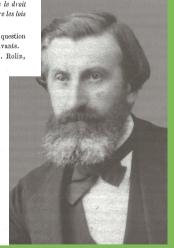
Note de M. Hornung sur la répression des délits contre le droit des gens et plus spécialement sur celle des délits contre les lois de la guerre.

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,



La guerre tient une grande place dans l'histoire, et il riest pas présumable que les hommes parvienent de sicit à 4 y sons-traire, — malgré les protestations qu'elle soulère et l'horreur qu'elle inapire, — car elle apparat comme la seule issue possible des conflits qui mettent en péril l'existence des États, leur l'hierd, leurs intrétés vistum. Mais l'Acoloxiesment graduel des mourrs dois se refléter dans la manière de la conduire. Il est digne des autons civilisées, de chercher, comme on (011 fe for bien dis, « à restreindre la force destructive de la guerre, tout en reconnissant ses incorables nécessités n

Ce probleme riest pas facie à résoudre; copendant on y est délà parvent sur quédques points, et, en dernier lieu, le projet de déclaration de Bruxelles a décomme une attestion solonnelle du hon vouloir de tous les gouvernements à cet égard. On peut dire qu'indépendamment des lois internationales existants « en cette matière, il y a sujourd'hui un certain noubre de principes de justice qu'i dirigent la conosience publique, qui se manifestent même par des coutames générales, mais qu'il servit hon de futer et le cardes oblications. Cleat ce mue la profésence



**Gustave Moynier** 

Eugène Arnaudeau



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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

"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**

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 querre.

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nansam ses mexoruouse nocessutes. As condro; copendant on y est deja parvent sur qualques points, et, en dernier lieu, le projet de déclaración de Bruxelles a décomme um estateution sodon-salle da bon vouloir de tous les gouvernements à cet égand. On peut dire qu'indépendamment des los internationales existants en este matière, il y a aujourd'hui un certain nombre de principes de justice qui dirigent la conscience publique, qui se manifestant même par des coutames générales, mais qu'il serait bon de fixe et de rendre obligations. Ceste on une la conférence



**Gustave Moynier** 

Eugène Arnaudeau



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# Gustave Moynier, Joseph Hornung

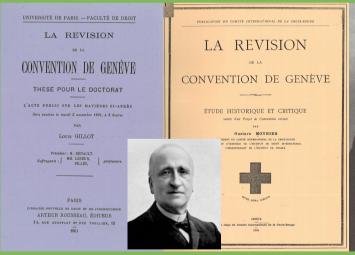
and the way to the revised Geneva Convention of 1906

#### **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



# 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)



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# Louis Renault, Hugh Bellot

and the punishment of war crimes in the First World War





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# Louis Renault, Hugh Bellot

and the punishment of war crimes in the First World War

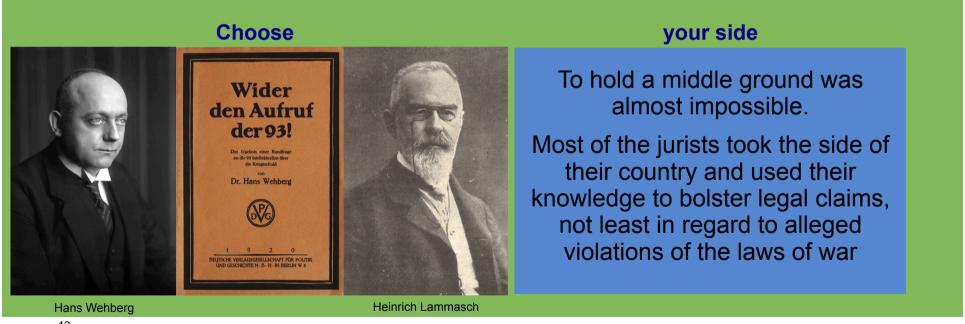




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# Louis Renault, Hugh Bellot

and the punishment of war crimes in the First World War





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# Louis Renault, Hugh Bellot

and the punishment of war crimes in the First World War

#### **Louis Renault**

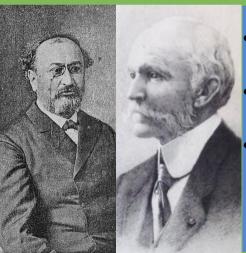
# REVUE GÉNÉRALE DROIT INTERNATIONAL PUBLIC

DE L'APPLICATION DU DROIT PÉNAL AUX PAITS DE GUERRE (1)

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prégaré pour approbndir ese quations. Si ce sujút à ny sa, a mou avis, de ésporce complétement traité, in n'aut pas tout à fui souveux i. la pleque des auteurs qui se sont compléte non la participation de la compléte de la compléte de la compléte de la compléte des satés commis en temps de gazer que la dévient pas éties considérés parsenent et simplément comme de se fuit de guerre », mais qui pur vent tombre sons les fornimisations du droit jetai. Le president exemple, dans les consistations fuites par certains suteux, celle M. Fernachitants qui a némme la doction régistrations suivivé (f):

Cette étude a fait l'objet é'une communication à la Société générale des p
 Recourz en raizon des dommages causés par la guerre, nº 19 et 22.



Henri Joly

André Weiss

#### 1914 and 1915

- 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**

REVUE GÉNÉRALE

#### DROIT INTERNATIONAL PUBLIC

DE L'APPLICATION DU DROIT PÉNAL AUX FAITS DE GUERRE (1)

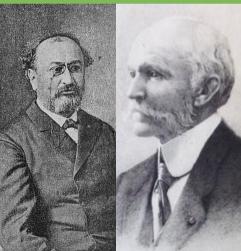
cat applicable sux filts de guerre. Je no evez pas formaine el tue opersationico contro Frenzenbie des sette impulsale sux ameste al elemande et autrichiences: este protestation a sié prociule sous diverses formas per plusium section sevates parcialisment qualificament qualificament qualificament qualificament qualificament principles qualificament a resultant de desaite infiquie par a little principles qualificament resultant des desaites infiquie par a little principles qualificament a resultant de desaites infiquie par a little principles qualificament a resultant de desaites infiquie par a little principles qualificament a formation de destinations de desaites principles qualificament de desaite de la contrata de desaites de la catara, des quanticas qui literanta à la fechnique prosperment diste dictions compléments, de la procédure, le ne donnesti e la exujet que des cidentations semanures, se ma escalariem pas comme uniformation de distalations semanures, se ma escalariem pas comme uniformation designations desirations a

prepare pour apprecionar nes quantosa.

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No exquit à na part, a mon et si, del entre cineme qui ex control de co

 Celte étude a fait l'objet d'une communication à la Société générale des pris (2) Recourz en reizon des dommages causés pur la querre, nº 19 et 22.



Henri Joly

André Weiss

#### 1914 and 1915

- 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



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.

Hugh H. L. Bellot



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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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# Henri Donnedieu de Vabres, Vespasien Pella

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

#### **Proposals for an**



**International Criminal Tribunal** 

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

Marcel de Baer

# $u^{^{\scriptscriptstyle b}}$

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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

Georg Schwarzenberger

#### **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.

Jaroslav Stransky



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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

# $oldsymbol{u}^{\scriptscriptstyle b}$

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#### Jurists in exile and in the United States

#### and the punishment of war crimes

#### **Lively debate**

#### with differing views

#### 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 un

have the power to do so, whether as victors um the application of the law of war by their n through their authority as military occupant peoples nor others of the United Nations loo and ex post facto punishments, but they believe in Axis military forces are crimes, and should are, in fact, enough precedents in the law of we ciples of law recognized by civilized nations' legal procedure. The establishment of such embarrassed by limited precedents, by past the nicalities. On the other hand, it should be a re-

#### THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 12

JUNE 1945

CRIMINAL RESPONSIBILITY OF INDIVIDUALS AND INTERNATIONAL LAW\*

Albert 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

icular in the Fourth Hague Convention of 1907 concerning land warfare, s generally understood by the civilized world. Several of the signers of document spoke of the acts in question as social or international crimes intimated that new legal conceptions would govern responsibility for and ishment of them.¹ It seems opportune, therefore, to reëxamine the esished legal principles relating to these issues and to inquire whether any rules of international law have been accepted recently with regard to the lanture and punishment of criminal acts of violence committed by memory of the armed services of a nation contrary to the laws and customs of



Charles Cheney Hyde

**Quincy Wright** 

Hans Kelsen



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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

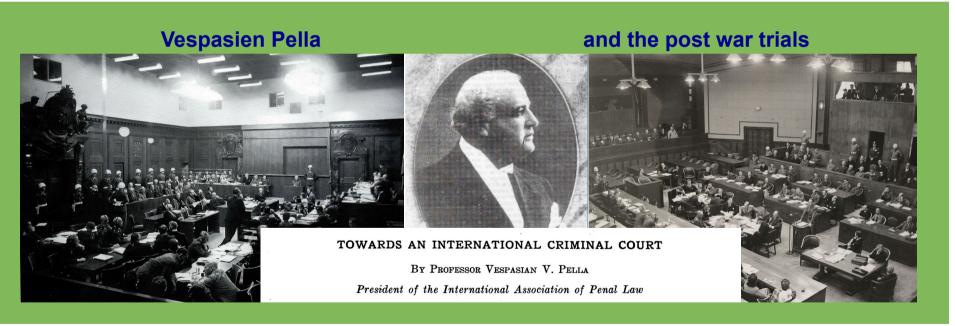
George Marshalll & Henri Stimson

# $u^{^{\scriptscriptstyle b}}$

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# IMT, IMTFE, NMT

and the Geneva Conventions of 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.

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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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