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National and International Means of (Military) Justice: Four Circles of a Legal Debate on the Punishment of Violations of the Laws of War in the Period Between the Franco-Prussian War and the Beginning of the Cold War (1864–1949)

Introduction

That violations of the laws of war need to be punished is a maxim that many dealing with these issues have accepted as being in force for a very long time.[1] From the sixteenth and seventeenth centuries onwards legal scholars, such as Francisco de Vitoria, Alberico Gentili, Francisco Suarez, Hugo Grotius, or Samuel Pufendorf, not only discussed the issue of confining the means of warfare legally and thereby protecting as well as shielding civilians as much as possible from the impact of war, but they also talked about the means of punishing violations of such laws of war.[2] This debate continued in the eighteenth and early nineteenth centuries, although the focus at that time was more on the content of the laws of war than on the issue of punishment.[3] In the few cases that finally went to court, ei-

1 Timothy L. H. McCormack, "From Sun Tzu to Sixth Committee: The Evolution of an International Criminal Law Regime", in *The Law of War Crimes: National and International Approaches*, ed. Timothy L. H. McCormack and Gerry J. Simpson (Den Haag: Kluwer Law International, 1997), 32–37; Michael Stolleis, "Der Historiker als Richter – der Richter als Historiker," in *Geschichte vor Gericht: Historiker, Richter und die Suche nach Gerechtigkeit*, ed. Norbert Frei, Dirk van Laak and Michael Stolleis (Munich: C.H. Beck, 2000), 173. For a contrary opinion, see Reinhard Merkel, "Nürnberg 1945, Militärtribunal: Grundlagen, Probleme, Folgen," *Rechtshistorisches Journal* 14 (1995): 494.

2 Benjamin B. Ferencz, *Enforcing International Law – A Way to World Peace: A Documentary Analysis*, 2 Vols. (London: Oceana Publications, 1983), Vol. 1, 7–17; M. Cherif Bassiouni, *International Criminal Law: A Draft International Criminal Code* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), 5–6; Gerald Hartung, "Von Grotius zu Pufendorf: Die Herkunft des säkularisierten Strafrechts aus dem Kriegsrecht der Frühen Neuzeit," in *Samuel Pufendorf und die europäische Frühaufklärung*, ed. Fiametta Palladini and Gerald Hartung (Berlin: Akademie Verlag, 1996), 123–136.

3 Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Weidenfeld & Nicholson, 1980), 31–74.

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ther such punishment was administered by courts martial or by national tribunals. In many cases no trial was conducted. In 1815, for example, the allied countries could not agree on how to proceed in the case of Napoleon Bonaparte and therefore he was banished to St. Helena without a trial.[4] In the context of the revolutions of 1848, the national idea began to play a greater role for conservatives as well as for liberals, but this also meant that (legal) rules for international relations and war gained greater relevance, even if ideas for a congress of nations that Arnold Ruge proposed never materialised.[5] At about this point in time, an academic debate on the content of such rules began and that is therefore the moment at which this chapter will start, looking first at the development of the legal debate on the punishment of the laws of war in between the Geneva Convention of 1864 and its revised version of 1906. This debate formed a first circle of arguments on national and international means of (military) justice. A second circle, dealing with the timespan between the beginning of the wars on the future of the Ottoman possessions in North Africa and the Balkans in 1911 and the Paris Peace Conference in 1919, forms the next section. The third part will discuss a third circle that began in Buenos Aires in 1922 and lasted until the creation of the International Military Tribunal in Nuremberg in 1945. The fourth and last part then looks at why the International Military Tribunal in Nuremberg and the International Military Tribunal for the Far East in Tokyo remained the only international criminal trials at the end of the Second World War and why national means of (military) justice still dominated in the revised Geneva Conventions of 1949.

1 From Geneva to Geneva: A First Circle in the Debate on the Punishment of Violations of the Laws of War, 1864 to 1906

For legal scholars of the mid-nineteenth century, the return of war to international relations in Europe at first made it essential to get a clearer view as to the exact rules that guided warfare. In this context, Johann Caspar Bluntschli, a Swiss

4 Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 37–57; Hugh H. Bellot, "The Detention of Napoleon Buonaparte," *Law Quarterly Review* 39 (1923): 170–192.

5 Best, *Humanity*, 128–215; Jörg Detlef Kühne, "Revolution und Rechtskultur: Die Bedeutung der Revolutionen von 1848 für die Rechtsentwicklung in Europa," in *Die Revolutionen von 1848 in der europäischen Geschichte: Ergebnisse und Nachwirkungen*, ed. Dieter Langewiesche (Munich: R. Oldenbourg Verlag, 2000), 68–71.

jurist serving as professor of constitutional law in Heidelberg, published two books on the laws of war on the one hand and on international law in general on the other.[6] He pointed to the fact that the present law had grown out of the past and could only be explained by looking at how it had developed. At the same time, he saw law as an emerging element that accompanied the progressive life of humanity.[7] For him, enemies had not ceased to be human beings because even in war they enjoyed the protection of present-day international law.[8] Bluntschli's French colleague, Achille Morin, and American lawyer, Richard Henry Dana, who was the editor of the classic work of Henry Wheaton, followed similar tracks and stressed the fact "that no use of force against an enemy is lawful, unless it is necessary to accomplish the purposes of war."[9] As to violations of the laws of war, it was clear for Bluntschli and his colleagues that courts martial or military courts would be the institutions dealing with such issues.[10] High ranking military officers, such as Carl von Clausewitz or Dmitry Alekseyevich Milyutin, also accepted limits to violence in war, but they preferred practical solutions and never referred to legal scholars in their writings. They stated that it was the duty of military commanders to consider whether the introduction of a new weapon could be seen as a means justified by the necessities of war and that "the belligerent parties should only tolerate those cruelties which are imperiously necessitated by war."[11] They did not, however, address the issue of dealing with violations explicitly.

The 1860s were a time which saw quite some changes in regard to war and international regulations in regard to war victims and aspects of conduct in war. While war and armed (international) intervention had continued outside Europe

6 Johann Caspar Bluntschli, *Das moderne Kriegsrecht der der civilisirten Staten als Rechtsbuch dargestellt* (Nördlingen: Druck und Verlag der C. H. Beck'schen Buchhandlung, 1866); Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (Nördlingen: Druck und Verlag der C. H. Beck'schen Buchhandlung, 1868).

7 Bluntschli, *Völkerrecht*, vi.

8 Bluntschli, *Völkerrecht*, 30–36. Without explicitly stating it, at this stage he referred to Jean-Jacques Rousseau, *Du Contract Social ou Principes du Droit Politique* (Amsterdam: Chez Marc Michel Rey, 1762), 18–19, who stated that wars were a relation between states, but not between humans and that the latter in war were only accidentally involved.

9 Quote from Henry Wheaton, *Elements of International Law* 8th ed. Richard Henry Dana (Boston: Little, Brown and Company, 1866), 431. See also Achille Morin, *Les Lois relatives à la Guerre* 2 Vols. (Paris: Cosse Marchal et Billard, 1872) Vol. 1, 38–39.

10 Bluntschli, *Kriegsrecht*, 59–66; Morin, *Lois*, Vol. 1. 500–568.

11 Explosive Projectiles in War, *The Times* No. 26152, 16 June 1868, 5. See also Carl von Clausewitz, *On War* (1832, ed. and transl. Michael Howard and Peter Paret, London: Everyman's Library, 1993), 707–708, 718 and 731–733.

for most of the years between the end of the Napoleonic Wars (1799–1815) and the revolutions of 1848, armed intervention in Europe and international wars between large European powers only became more common again from that point in time onwards.[12] Examples include wars and military operations in the context of the revolutions of 1848–49, the Crimean War, the Italian Wars of Independence, or the German wars of unification. While the Crimean War was of vital importance for the development of the laws of war at sea, together with the American Civil War of 1861–1865 as the only non-European campaign, the latter two wars played an essential role for regulations in regard to war victims and other aspects of the conduct of war on land.[13] With the exception of the intervention in Syria, colonial campaigns, such as the Second Opium War (1856–1860), the Ambela campaign on the border between British India and Afghanistan (1863–1864), the Anglo-Bhutan War (1864–1865) or the British expedition against Abyssinia (1867–1868), had almost no impact at all on the international debate on the implementation of the laws of war dominated at the time by European scholars.[14] The founding of the Geneva Committee, which was later to become the International Committee of the Red Cross (ICRC), was largely the product of the wars in Italy and, more specifically, the Battle of Solferino. The same is true of the Geneva Convention of 1864 and the additional articles to it in 1868. The latter was of course also influenced by the campaigns in Denmark, Austria and Italy that were part of the German wars of unification. The Declaration of St. Petersburg regarding explosive projectiles, on the other hand, was not a direct consequence of a specific war, but rather resulted from the development of new weaponry in this

12 See Davide Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire 1815–1914* (Princeton: Princeton University Press, 2012), 18–90 and Fabian Klose, *"In the Cause of Humanity": Eine Geschichte der humanitären Intervention im langen 19. Jahrhundert* (Göttingen: Vandenhoeck&Ruprecht, 2019), 37–418.

13 See Gabriela Frei, *Great Britain, International Law & the Evolution of Maritime Strategic Thought, 1856–1914* (Oxford: Oxford University Press, 2020) and Jan Martin Lemnitzer, *Power, Law and the End of Privateering* (Basingstoke, Palgrave Macmillan, 2014).

14 On Syria, see Benjamin F. Brockman-Hawe, "Constructing Humanity's Justice: Accountability for 'Crimes Against Humanity in the Wake of the Syria Crisis of 1860," in: *Historical Origins of International Criminal Law,* Vol. 3, ed. Morten Bergsmo, Wui Ling Cheah, Tianying Song and Ping Yi (Brussels: Torkel Opsahl Academic EPublisher, 2015), 181–248. Ziv Bohrer and Benedikt Pirker, "World War I: A Phoenix Moment in the History of International Criminal Tribunals," *European Journal of International Law* 33.1 (2022): 866–870, are correct to claim that ideas for international tribunals surfaced in the nineteenth century and were not something conceived of as late as the First World War. The impact of such ideas on the scholarly debate was, however, rather small.

context and was therefore an indirect consequence of the renewed warfare in Europe.[15]

Although many issues remained unresolved in detail, the lawyers involved were rather optimistic that the rules which governments had agreed to would be observed and that they would have a positive impact on the way wars were fought. In a volume published just before the beginning of the Franco-Prussian War (1870–1871), the president of the Geneva Committee, Swiss jurist Gustave Moynier, made public his conviction that military leaders would do all they could to make sure that the regulations of the Geneva Convention and the laws of war in general would be observed in a future conflict. In this context, Moynier was aware of the fact that he did not live in an ideal world and that, as Mark Lewis has pointed out in a different context, scholars, but also military leaders, supported restrictions in war for different motives.[16] He was optimistic nonetheless about the future of humanity's social fabric and convinced that war was "inevitably an evil, which should not exceed the limits of strict necessity".[17] For him, it was clear that it was the duty of the signatories of the Geneva Convention to make sure that violations – should they nevertheless occur – would quickly be punished by military courts of the nations concerned.[18] As indicated above, this conviction was in line with the practice of the time which, with the exception of the colonial context, left the punishment of violations of the laws of war completely to the states concerned – whether the party of the perpetrator or that of the victim.

Already early on during the Franco-Prussian War, it became clear to Moynier and the Geneva Committee that the norms of international law and especially the Geneva Convention had not been enough to prevent the use of military violence beyond "strict necessity".[19] Not least as a reaction to a proposal made by his Bel-

15 Declaration renouncing the use in time of war of explosive projectiles under 400 grammes weight, signed at St. Petersburg, 29 November / 11 December 1868, printed in Dietrich Schindler and Jirí Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Geneva: Henry Dunant Institute, 1981), 95–97. See Peter Holquist, *By Right of War: Imperial Russia and the Making of the 'Laws of War' (1868–1917)* (forthcoming).

16 Mark Lewis, *The Birth of New Justice: The Internationalization of Crime and Punishment, 1919–1950* (Oxford: Oxford University Press, 2014), 3–6.

17 Gustave Moynier, *Étude sur la Convention de Genève pour l'Amélioration du Sort des Militaires Blessés dans les Armées en Campagne (1864 et 1868*) (Paris: Librairie de Joël Cherbuliez, 1870), 14–15 [Translation by the author].

18 Moynier, *Étude*, 299–306.

19 Corresponding reports arrived in Geneva in early 1871. Minutes of the Geneva Committee 4 February and 10 May 1871: Jean-François Pitteloud (ed.), *Procès-Verbaux des séances du comité international de la Croix-Rouge 1863–1914* (Geneva: Société Henry Dunant, 1999), 206, 236.

gian colleague, Gustave Rolin-Jaequemyns, who had wondered whether it might be expedient to create an international tribunal or an international fact-finding committee in order to prevent national military courts from judging their own soldiers too leniently, Moynier launched his proposal for the creation of an international judicial body to try violations of the Geneva Convention in January 1872.[20] He was aware that his proposal affected national sovereignty, but he was frustrated that the authorities involved had not shown a large zeal to punish perpetrators within their own armed forces.[21] Moynier's proposal received a mixed reaction. While some, like Francis Lieber and John Westlake, were highly sceptical about the practicability and usefulness of such a court and preferred to leave the punishment of violations of the laws of war to national courts,[22] others were more positive and the Geneva Committee also received messages encouraging it to continue its work for the creation of an international judicial body.[23] Nevertheless, Moynier and the committee did not follow up on the issue, mainly because at the time there were greater challenges to the Geneva Convention.[24]

In the years following Moynier's proposal, the issue of the punishment of violations of the laws of war did not really figure prominently in scholarly debates on the laws of war as it seemed more important to more clearly fix the content of these laws. In 1874, a conference in the Belgian capital agreed on the so-called Brussels Declaration, which set up distinct rules, but was ultimately not ratified.[25]

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20 Gustave Rolin-Jaequemyns, "Essai Complémentaire sur la Guerre Franco-Allemande dans ses Rapports avec le Droit International," *Revue de Droit International et de Législation Comparée* 3 (1871): 327–331.

21 Moynier Gustave, "Note sur la Création d'une Institution Judicaire Internationale propre à prévenir et à réprimer les Infractions à la Convention de Genève," *Bulletin International des Sociétés de Secours aux Militaires Blessés* 11 (1872): 122–127 modelled his court on the recent and on-going arbitration trial in regard to the ALABAMA case and left the execution of forthcoming sentences of that court to the governments concerned.

22 Gustave Rolin-Jaequemyns, "Convention de Genève: Note sur le Projet de M. Moynier, relatif à l'Établissement d'une Institution Judiciaire Internationale, Protectrice de la Convention," *Revue de Droit International et de Législation Comparée* 4 (1872): 330–332, 334–335.

23 Rolin-Jaequemyns, "Convention de Genève: 332–334 and 339–341; Minutes of the Geneva Committee 15 May and 5 June 1872," in: *Pitteloud, Procès-Verbaux,* 266–269.

24 See Daniel Marc Segesser, "Forgotten, but nevertheless relevant! Gustave Moynier's attempts to punish violations of the laws of war 1870–1916," in: *International Humanitarian Law and Justice: Historical and Sociological Perspectives*, ed. Mats Deland, Mark Klamberg and Pal Wrange, (London: Routledge, 2019), 202.

25 Daniel Marc Segesser, *Recht statt Rache oder Rache durch Recht: Die Ahndung von Kriegsverbrechen in der internationalen wissenschaftlichen Debatte 1872–1945* (Paderborn: Ferdinand Schöningh, 2010), 97–102.

In regard to violations of the laws of war, the minutes of the conference only recorded the desire of French general Eugène Arnaudeau for a comprehensive standardisation of the penal laws of the countries concerned.[26] The issue, however, resurfaced shortly after the end of the Brussels Conference, as the uprisings in the Balkans finally led to a further Russo-Turkish War in 1877–1878. In the context of debates within the Institut de Droit International, founded in 1873 in Ghent, it was Moynier's fellow Geneva citizen, Joseph Hornung, who focused on the issue. In August 1879, he finally submitted a report to the annual meeting of the institute.[27] In contrast to Moynier and taking up on the proposal of Arnaudeau, Hornung did not look as much for an international solution, but stressed rather the advantage of national laws over international agreements claiming that "it was 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."[28] He also pointed to the fact that many governments had enacted norms in this regard, concluding that "there was a marked tendency to punish violations of norms of international law."[29] Nevertheless, the situation was far from perfect and governments could do more to improve it by adapting their national legislation and thereby to "put into practise by law-making, what others had tried to do by means of diplomacy."[30] Eventually, a committee presided over by Moynier received a mandate to submit a full report to the Institut de Droit International, in which it was stated that governments should be provided with a set of norms that both acknowledged the progress of law and respected the needs of civilised armed forces.[31] In regard to the punishment of violations of the laws of war, the so-called Oxford Manual of 1880 in the end followed the proposals made by Hornung with Article 84 stating that "offenders [. . .] are liable to the punishment specified in penal law" and a further comment that punishment should take

26 Actes de la Conférence de Bruxelles (1874) (Brussels: F. Hayez, 1874), 43; Segesser, *Recht statt Rache*, 99.

27 Joseph Hornung, "Note sur la Répression des Délits contre le Droit des Gens et plus spécialement sur celle des Délits contre les Lois de la Guerre," *Annuaire de l'Institut de Droit International* 3.4 (1879–1880): 320–325. For a wider academic public, the report was also published as Joseph Hornung, "Note sur la Répression des Délits contre le Droit des Gens et plus spécialement sur celle des Délits contre les Lois de la Guerre" *Revue de Droit International et de Législation Comparée* 12 (1880): 104–108.

28 Hornung, "Note," 321, 325 (translation by the author).

29 Hornung, "Note," 321 (translation by the author).

30 Hornung, "Note," 325 (translation by the author).

31 Gustave Moynier, "Rapport sur la Réglementations des Lois et Coutumes de la Guerre," *Annuaire de l'Institut de Droit International* 5 (1882): 158.

place "after a judicial hearing, by the belligerent in whose hands [the offenders] are."[32]

Neither Hornung's appeal for more unified national legislation nor Moynier's renewed efforts to find an international solution to the punishment of violations of the laws of war reached their aims.[33] This became most manifest in the Hague Rules of Land Warfare that focused on the protection of combatants as well as civilians, on the duties of powers in regard to their occupation policy, the treatment of enemies in their custody and their dealing with the civilian population of occupied territories. The rules were largely based on the norms of the Declaration of Brussels, but neither did they take up Arnaudeau's desire nor was the wording of the Oxford Manual considered in regard to ways to punish violations of the norms that the states had just agreed to.[34] It is unclear as to how far Moynier had foreseen this, but already in his last major publication in 1898 he had admitted that the issue of the punishment of violations of the laws of war remained primarily a national matter. Diplomacy had the right to urge the states to do something about it, but not more than that.[35] Such was finally the line taken by Louis Gillot and his doctoral supervisor Louis Renault in their proposals for a revision of the Geneva Convention, which finally materialised in 1906.[36] Article 28 of the new convention was slightly longer than Article 84 of the Oxford Manual, but the content was almost the same. The version of 1906 stated more explicitly, however, that "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.[37] With this, a first circle in the debate on national versus international means of justice in the case of violations of the laws of war had come to

32 Oxford Manual 1880, Art. 84 printed in: Schindler/Toman, *Laws of Armed Conflict*, 47 and French original in: Moynier, "Rapport," 174.

33 Segesser, *Recht statt Rache*, 114–119. Hornung died in 1884, and Moynier unsuccessfully attempted to launch a new debate on an international solution within the Institut de Droit International in the 1890s.

34 On the Hague peace conferences and the issue of the laws of war, as well as the punishment of violations, see Jost Dülffer, *Regeln gegen den Krieg? Die Haager Friedenskonferenzen von 1899 und 1907 in der internationalen Politik* (Frankfurt a. M.: Ullstein, 1978) and Segesser, *Recht statt Rache*, 123–140. For the articles of the Hague Rules of Land Warfare, see Schindler/Toman, *Laws of Armed Conflict*, 57–92.

35 Gustave Moynier, *La Révision de la Convention de Genève: Étude Historique et Critique suivi d'un Projet de Convention revisée* (Geneva: Comité International de la Croix-Rouge, 1898), 35.

36 Louis Gillot, *La Révision de la Convention de Genève* (Paris: Librairie Arthur Rousseau, 1901); Segesser, *Recht statt Rache*, 120–122.

37 Art. 28 of the Geneva Convention of 1906, in: Schindler/Toman, *Laws of Armed Conflict*, 239.

an end. The idea of an international solution had been discussed for the first time, but a solution at the national level still prevailed.

2 From Tripoli to Paris: A Second Circle in the Debate on the Punishment of Violations of the Laws of War, 1911–1919

When war began again in regard to the future of the Ottoman possessions in North Africa and in the Balkans in 1911 and 1912/13 respectively, most legal scholars – in a way similar to Moynier before the Franco-Prussian War – continued to trust the fact that the political and military authorities would do what they should to check violations of the laws of war.[38] Few and anonymous were the authors that stated, such as in the Law Journal of 1911, that "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."[39] Violations of the laws of war, mainly in regard to the treatment of civilians and the wounded, became an issue both in regard to the war in Libya and those in the Balkans.[40] In the latter case, the Carnegie Endowment of International Peace even dispatched an international commission presided over by peace activist Henri d'Estournelles de Constant, which submitted a report in mid-1914 claiming that "that there is no clause in international law applicable to land war and to the treatment of the wounded, which was not violated, to a greater or less[er] extent, by all the belligerents."[41] Not least as the major European and North American powers were confident that their troops would behave differently from those in North Africa or those of the Balkan countries, the punishment of violations of the laws of war was no real issue in the context of this debate.[42]

The appraisal of this situation changed quickly after German troops began to invade Belgium and Austro-Hungarian ones Serbia in early August 1914. All sides

38 Segesser, *Recht statt Rache*, 142.

39 Anonymous, "Italy and International Law," *Law Journal* 46 (1911): 677.

40 Anonymous, "Italy," 676; Anonymous, "La Guerre en Tripolitaine," *Bulletin International des Sociétés de la Croix Rouge* 43 (1912): 75–83, 174–180.

41 Carnegie Endowment of International Peace, *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars*, (Washington: Carnegie Endowment of International Peace, 1914), 208.

42 Segesser, *Recht statt Rache*, 148–150.

blamed the enemy for having violated international law, be it by shooting civilians, by maltreating prisoners of war or by using illegal methods of warfare. The so-called "Belgian atrocities" were only the tip of the iceberg.[43] Propaganda all over the globe was central in turning the enemy into some sort of absolute evil that had to be fought by all means. Alleged crimes played an important role in this context.[44] For jurists, this meant almost without exception that they had to decide on which side they wanted to stand. To hold a middle ground, as some like Heinrich Lammasch, Romain Rolland, Walter Schücking or Hans Wehberg tried to do, was almost impossible.[45] In any case, 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.[46] Amongst the first jurists to come forward was Louis Renault. As he had been the main legal figure in the revision of the 1906 Geneva Convention, which committed the states to punish violations of its rules, he was of course one of the key men in the debate. Many had waited to hear what he had to say when he addressed the Institut de France in Paris on 26 October 1914 and stated that there had always been rules in war that belligerents had to observe. With these words, but without saying it explicitly, Renault clearly disagreed with the justification that German chancellor Theobald Bethmann Hollweg had given at the beginning of the war when he had claimed that "necessity knew no law".[47] Renault closed his address by pointing to his immense

43 See John Horne / Alan Kramer, *German Atrocities, 1914: A History of Denial* (New Haven / London: Yale University Press, 2001).

44 Michael Jeismann, "Propaganda," in: *Enzyklopädie Erster Weltkrieg*, ed. Gerhard Hirschfeld, Gerd Krumeich und Irina Renz (Paderborn: Ferdinand Schöningh, 2003), 198–209; Segesser, *Recht statt Rache*, 170–171.

45 Heinrich Lammasch, "Beweiserhebung über Verletzungen des Völkerrechts," *Das Recht: Rundschau für den deutschen Juristenstand* 18 (1914): 629–632; Heinrich Lammasch, *Das Völkerrecht nach dem Kriege* (Publications de l'Institut Nobel Novégien, Vol. 3) (Kristiania: H. Aschehoug & Co, 1917), 8–9; Romain Rolland, *Au-dessus de la Mêlée* (Paris: Librairie Paul Ollendorff, 1915); Walther Schücking: *Die deutschen Professoren und der Weltkrieg* (Flugschriften des Bundes Neues Vaterland, No. 5) (Berlin: Verlag "Neues Vaterland", 1915); Hans Wehberg: *Als Pazifist im Weltkrieg* (Leipzig: Der Neue Geist-Verlag, 1920), 45–77; James Brown Scott, "The Attitude of Journals of International Law in Time of War," *American Journal of International Law* 9 (1915): 924–927.

46 Segesser, *Recht statt Rache*, 173–176.

47 Louis Renault, "La Guerre et le Droit des Gens au Vingtième Siècle," *Revue Générale de Droit International Public* 21 (1914): 468–481. The address was later also published in English in the United States as Louis Renault, "War and the Law of Nations in the Twentieth Century," *American Journal of International Law* 9 (1915): 1–16. For Bethmann Hollweg's justification, see Larry Zuckerman, *The Rape of Belgium: The Untold Story of World War I* (New York, New York University Press, 2004), 20.

disappointment that in the current war there had not only been "individual violations" of the laws of war that he and his colleagues had expected, but that "a general and systematic disregard of all the rules solemnly adopted" had taken place.[48]

In 1914, Renault just pointed to the fact that conclusions might have to be drawn from this. Not least because of discussions in the French and British public, and as a response to an initiative of deputy Fernand Engerand, he presented his conclusions in a further address to the Société Générale des Prisons in May 1915. The question he put in his address was to what extent penal law could apply in the context of violations of the laws of war.[49] Again Renault stressed the fact that laws applied to war and that there were restrictions in warfare. The principle that applied in his eyes was that all actions that were not lawful acts of war were crimes that could be punished.[50] Article 28 of the Geneva Convention of 1906 was therefore nothing more than a specific application of this general principle. The advantage that could be drawn from this was that almost all countries had introduced legal norms giving their courts explicit rights to punish violations of the Geneva Convention and – such was Renault's conviction – also all other violations of the laws of war. In this context, Renault also pointed to the efforts of the already mentioned Arnaudeau and to the fact that even the German regulation *Kriegsgebrauch im Landkrieg* at least in part agreed with his interpretation.[51] What was clear to Renault, however, was that it was not possible to sue anyone for going to war and for violating the neutralities of Belgium and Luxemburg.[52] In the discussion that followed Renault's address, most speakers – amongst them most of his French colleagues, but also representatives from Belgium or Serbia – supported his arguments. Henri Joly and André Weiss proposed to set up an international criminal court, but they found almost no support for such an idea, the great majority considering military courts to be those to deal with such violations.[53] For most of the remainder of the war, Renault's arguments went unchallenged and, in early 1918, the renowned Revue Générale de Droit International Public republished Renault's statements in extenso.[54]

48 Renault, "War and the Law of Nations," 16.

49 Louis Renault, "Dans quelle mesure le droit pénal peut-il s'appliquer à des faits de guerre contraires au droit des gens?" *Revue Pénitentiaire et de Droit Pénal* 39 (1915): 406–493.

50 Renault, "Dans quelle mesure," 413–414.

51 Renault, "Dans quelle mesure," 414–417.

52 Renault, "Dans quelle mesure," 423.

53 Renault, "Dans quelle mesure," 430–468, for Weiss 461–62 and for Joly 464.

54 See, for example, Alexandre Mérignhac, "De la Sanction des Infractions au Droit des Gens commises, au Cours de la Guerre Européenne par les Empires du Centre," in: *Revue Générale de Droit International Public* 24 (1917), 5–56; Segesser, *Recht statt Rache*, 196–198; Louis Renault, "De

In Britain it was Hugh Bellot who played a role similar to that of Louis Renault in France. While practical considerations dominated the public discussion on violations of the laws of war, Bellot concentrated on aspects that would help to bring "the actual perpetrators of the more heinous offences against the usages of war [. . .] to trial." He was convinced that "the Entente Powers [were] entitled to try and punish all offenders against the established laws and usages of war by court-martial." He, however, would have preferred a court "composed of eminent civilian judges versed in criminal law and practice," which would make sure that there would be "as impartial a tribunal as any likely to be obtained."[55] Although discussions on the punishment of violations of the laws of war lingered on in late 1916 and 1917, it was only in 1918 that there was a renewed upsurge in the debate. The issue now at hand, though, was, the trial of the German Kaiser Wilhelm II. He should be tried for his responsibility for the invasion of Belgium in contravention to international law, for all criminal acts that took place as a consequence of this decision, for his responsibility for the crimes committed in the context of unrestricted submarine warfare and for other offences, such as the illegal execution of Captain Charles Fryatt.[56] Bellot and Renault had described such an amplification of law enforcement as "futile", "bold", or as having "no equivalent in positive law",[57] but in 1918–19 the political situation was such that the Treaty of Versailles finally called for the trial of Wilhelm II before a special international tribunal "for a supreme offence against international morality and the sanctity of treaties."[58] "Persons accused of having committed acts in violation of the laws and customs of war", it was stated, had to be brought to justice "before military tribunals" of the respective powers.[59] Almost none of these trials ever took place. There were some in German and Turkish courts in Leipzig and Istanbul, but none

l'Application du Droit Pénal aux Faits de Guerre," *Revue Générale de Droit International Public* 25 (1918): 5–29.

55 Segesser, *Recht statt Rache*, 162–164, 177–178, 182–185, 199–201; Hugh H. L. Bellot, "War Crimes, their Prevention and Punishment," in: *Nineteenth Century and After* 80 (1916): 659.

56 Matthew Garrod, "The British Influence on the Development of the Laws of War and the Punishment of War Criminals: From the Grotius Society to the United Nations War Crimes Commission," in: *British Influences on International Law, 1915–2015*, ed. Robert McCorquodale and Jean-Pierre Gauci (Leiden: Brill Nijhoff, 2016), 325–326; Segesser, *Recht statt Rache*, 213–215; James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, CT: Greenwood Press, 1982), 54–55.

57 Bellot, "War Crimes," 650; Renault, "Dans quelle mesure," 423.

58 Art. 227 of the Treaty of Versailles, printed in Willis, *Prologue to Nuremberg*, 177.

59 Art. 228 of the Treaty of Versailles, Art. 174 of the Treaty of St. Germain, Art. 119 of the Treaty of Neuilly, Art. 158 of the Treaty of Trianon and Art. 227 of Treaty of Sèvres, printed in Willis, *Prologue to Nuremberg*, 177–181.

of the major suspects were brought to trial at the end of the First World War.[60] In this second circle in the debate on national versus international means of justice, the idea of an international criminal court was more manifest than it had been in the first circle, when it had only been an academic idea. Nevertheless, all trials that finally took place happened on a national level, which prevailed again. Almost all involved in the debate, however, now agreed that violations of the laws of war had to be considered criminally liable and could therefore be termed war crimes.

3 From Buenos Aires to Nuremberg: A Third Circle in the Debate on the Punishment of Violations of the Laws of War, 1922–1945

Sometime after the end of the First World War, it became clear that the trials in national military courts would not materialise and that those at Leipzig and Istanbul had not delivered the expected outcome. Furthermore, the newly created League of Nations had decided at first not to take up the idea of finding a new means to punish violations of the laws of war but rather left it to academic institutions to discuss the matter.[61] It was up to Walter George Phillimore and Hugh Bellot to take up the issue again within the International Law Association in Buenos Aires in 1922. The former stressed the fact that he had always been critical of the attempts to punish the former German Kaiser Wilhelm II. Nonetheless, he believed that an international court of criminal justice was best suited for trials of violations of the laws of war because "[o]n the whole as it will nearly always happen that the complaining State, if it has to proceed before the tribunals of the other State, will not think that it gets its full measure of justice, while if it proceeds before its own tribunals it will be suspected of injustice or hardship."[62] Bel-

60 Segesser, *Recht statt Rache*, 225–231. On the trials in Leipzig and Istanbul, see Taner Akçam, *Armenien und der Völkermord: Die Istanbuler Prozesse und die türkische Nationalbewegung* (Hamburg: Hamburger Edition, 1996), Gerd Hankel, *Die Leipziger Prozesse: Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (Hamburg: Hamburger Edition, 2003) and Harald Wiggenhorn, *Verliererjustiz: Die Leipziger Kriegsverbrecherprozesse nach dem Ersten Weltkrieg* (Studien zur Geschichte des Völkerrechts, Bd. 10) (Baden-Baden: Nomos Verlagsgesellschaft, 2005).

61 Segesser, *Recht statt Rache*, 233–236

62 Walter George Phillimore, "An International Criminal Court," *British Yearbook of International Law* 3 (1922–23): 83; Walter George Phillimore, "Las Propositiones del Comite de Juriscon-

lot highlighted the efforts that he and the British delegation at the Paris Peace Conference had made to bring to justice those responsible for violating the laws of war. In this context, he never referred to any earlier attempts from the first circle of the debate on an international solution, but only quoted British and American authors to prove his point that for "centuries, indeed, offences against the laws and customs of war have been punished, and without protest, in accordance with the common law of war, by belligerents of all nationalities, [. . .]."[63] He argued that trials in national courts had always proved to be unsatisfactory and that, depending on who was in charge, victor or vanquished would always believe that such a trial was unfair. National trials might also result in conflicting decisions and varying penalties; only trials in an international court could therefore be fair and satisfactorily enforce international law.[64] Bellot pointed to the fact that such a court was also essential in view of the fact that several military officers already presented ideas for an intensified future war. In his eyes, these men "will be less anxious to put their doctrine to the test when they realise that they will be regarded as criminals, and punished as such by an International High Court of Justice."[65] Nevertheless, his proposal faced some stiff opposition and, among other reasons, he finally united his efforts with those of others, such as Henri Donnedieu de Vabres and Vespasian Pella, who pursued similar goals within the Association Internationale de Droit Pénal.[66]

In 1924, the same year that Bellot submitted his proposed draft statute for an international criminal court to the International Law Association,[67] Donnedieu de Vabres challenged the view that Louis Renault had held in regard to the possibility of dealing with all violations of the laws of war in national (military) courts. He contended that race massacres, crimes on the high seas and those committed by different people from different countries could not be punished in a court

sultos," in *Report of the Thirty-First Conference (Buenos Aires, 24th August – 30th August 1922),* ed. International Law Association (London: Sweet & Maxwell, 1923), 57.

63 Hugh H. L. Bellot, "A Permanent International Criminal Court," in *Report of the Thirty-First Conference (Buenos Aires 24th August – 30th August 1922)* ed. International Law Association (London: Sweet & Maxwell, 1923), 68 for the quote and 68–73 for precedents.

64 Bellot, "Permanent International Criminal Court," 74.

65 Bellot, "Permanent International Criminal Court," 80.

66 See Segesser, "Hugh H. L. Bellot: A Life in the Service of the Prevention and Punishment of War Crimes and Crimes Against Humanity," in *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents*, ed. Frédéric Mégret and Immi Tallgren (Cambridge: Cambridge University Press, 2020), 40–47.

67 Hugh H. L. Bellot, "Draft Statute for the Permanent International Criminal Court," in *Report of the Thirty-Third Conference (Stockholm, September 8th to 13th, 1924)*, ed. International Law Association (London: Sweet & Maxwell, 1925), 75–91.

based on territorial jurisdiction. Moreover, the issue of criminalising war itself that had been taken up at the Paris Peace Conference could definitely not be dealt with in the context of national jurisdictions.[68] In 1928, a committee of the Association Internationale de Droit Pénal submitted a report which largely stemmed from Vespasian Pella, and which preferred a penal chamber of the International Court of Justice to an independent international criminal court. This chamber would not only deal with the crimes already mentioned by Donnedieu de Vabres but would also have jurisdiction in cases of wars of aggression.[69] In January 1928, the Association adopted the proposal and, in September of the same year, submitted it to the League of Nations where it lingered until 1934 when the issue became topical again in the context of the murder of Yugoslav King Alexander. Finally, the states signed a convention establishing an international criminal court for fighting terrorism in 1937. Its impact, however, was minimal, as no government ratified it.[70] While Pella and the Association Internationale de Droit Pénal favoured an international approach, at the same time they continued to work for a unification of national penal laws in regard to the punishment of international crimes.[71]

When the Second World War began, the protection of prisoners of war (but not civilians) had been improved, but no clear solution existed as to how violations of the laws of war should be punished.[72] Yet, scholars by now agreed that such violations could and should be punished in court. As no international solution existed and, following Article 29 of the revised 1929 Geneva Convention, most continued to rely on national courts and legislation.[73] This is especially true for Germany where there was a significant debate about the punishment of violations of the laws of war in the first two years of the war. In France and Britain, there was less of a discussion, as many there feared that talking about such viola-

68 Henri Donnedieu de Vabres, "La Cour Permanente de Justice Internationale et sa Vocation en Matière Criminelle," *Revue Internationale de Droit Pénal* 1 (1924): 175–201.

69 Vespasian Pella, "Rapport sur un Projet de Statut d'une Cour Criminelle Internationale," *Revue International de Droit Pénal* 5 (1928): 265–292; Association Internationale de Droit Pénal, "Projet de Statut pour la Création d'une Chambre Criminelle au Sein de la Cour Permanente de Justice Internationale," *Revue International de Droit Pénal* 5 (1928): 293–307; Henri Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International*, (Paris: Librairie du Recueil Sirey, 1928), 403–431 opposed such an amplification of his original proposal.

70 Segesser, *Recht statt Rache*, 257–258, 295–300.

71 Segesser, *Recht statt Rache*, 259–261, 296.

72 1929 Geneva Convention relative to the Treatment of Prisoners of War, printed in Schindler/Toman, *Laws of Armed Conflict*, 271–298.

73 Art. 29 of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, printed in Schindler/Toman, *Laws of Armed Conflict*, 264.

tions would renew the debate on the use of such allegations as measures of propaganda.[74] Within the British government, scepticism in regard to the potential of public announcements and debates on the issue of violations of the laws of war was particularly high. Therefore governments, as well as scholars in exile, began to push for a more active policy.[75] On 13 January 1942, these governments agreed on the Declaration of St. James in which they demanded that "those guilty of or responsible for" crimes committed during this war be punished "through the channels of organised justice, [. . .] whether they have ordered them, perpetrated them or participated in them."[76] As the governments of the leading allied countries did not offer formal support to the declaration, scholars who came forward became actors themselves.[77] Amongst them were Jaroslav Stransky, Bohuslav Ecer and Vaclav Benes from Czechoslovakia, Georg Schwarzenberger from Germany, Georg Lelewer from Austria and Marcel de Baer from Belgium. Their main aim was to strengthen the hands of those who demanded punishment through "channels of organised justice" and thereby to avoid pure vengeance. The majority, amongst them Schwarzenberger, showed a preference for an international criminal court, while others, such as Lelewer, preferred to rely primarily on national courts and laws.[78] Some, like de Baer, took a middle ground and accepted

74 Segesser, *Recht statt Rache*, 303–313.

75 Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill, NC: University of North Carolina Press, 1998), 9–15; Segesser, *Recht statt Rache*, 313–315.

76 United Nations War Crimes Commission (UNWCC), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO, 1948), 90. See also Segesser, *Recht statt Rache*, 315, Kerstin von Lingen, "*Crimes against Humanity": Eine Ideengeschichte der Zivilisierung von Kriegsgewalt 1864–1945* (Paderborn Ferdinand Schöningh, 2018), 211–221; Julia Eichenberg, "Crossroads in London on the Road to Nurembrg: The London International Assembly, Exile Goverenments and War Crimes," *Journal of the History of International Law* 24 (2022): 339–342.

77 Von Lingen, "*Crimes against Humanity*", 221–236; Kerstin von Lingen, "Epistemic Communities of Exile Lawyers at the UNWCC", *Journal of the History of International Law* 24 (2022): 315–333; Eichenberg, "Crossroads," 342–348 and Julia Eichenberg, "Recht als Ressource: europäische Exilregierungen und die *London International Assembly* während des Zweiten Weltkriegs," in *Wie schreibt man Internationale Geschichte? Empirische Vermessungen zum 19. und 20. Jahrhundert*, ed. Arvid Schors and Fabian Klose (Frankfurt am Main: Campus, 2023), 243–263.

78 Georg Schwarzenberger, "War Crimes and the Problem of an International Criminal Court," *Czechoslovak Yearbook of International Law* 1 (1942), 81–88; Georg Schwarzenberger, *International Law and Totalitarian Lawlessness* (London: Jonathan Cape, 1943), 75–81; Georg Lelewer, "Punishment of War Criminals," *Central European Observer* 20(18) (1943): 283; UNWCC, *History*, 95.

an international criminal court for those cases that could not be dealt with by national courts.[79]

In manner similar to Britain, the authorities in the United States were also sceptical in regard to the issue of the punishment of war crimes.[80] The debate amongst scholars there was, however, livelier. While George T. Shilling and Manley O. Hudson claimed that no new international criminal court was necessary to deal with any legal aspects of the current war,[81] Sheldon Glueck, professor of penal law at Harvard, gave four reasons as to why such a court would make sense. In contrast to national courts, he argued, it would be able to deal first with crimes against civilians and soldiers of different Allied nations, second with crimes of commanders active on several fronts, third with crimes ordered by civilian or military authorities and fourth with crimes that national courts preferred not to deal with.[82] Glueck's arguments found the support of several of his colleagues, among them Clyde Eagleton from New York University, Quincy Wright from Chicago, his doctoral student, Albert G. D. Levy, and Hans Kelsen, an exiled Austrian professor of international law.[83] Charles Cheney Hyde agreed that there were arguments in favour of an international criminal court but that on the other hand, trials in national courts were much easier. He therefore refrained from making a choice.[84] By contrast, George Manner saw no other solution than trials in national courts, as no international code of penal law existed. He also pointed to the fact that the Geneva Conventions of 1906 and 1929, as well as the Treaty of Versailles, stipulated that national courts were competent in such cases.

79 Marcel De Baer, "The Treatment of War Criminals: Suggestions for the Future," *Message* 14 (1942), 12. See Segesser, *Recht statt Rache*, 323–326.

80 Peter Novick, *The Holocaust and Collective Memory* (London: Bloomsbury, 2000), 22; Segesser, *Recht statt Rache*, 330.

81 George T. Shilling, "Constitutional Law: Saboteurs and Jurisdiction of Military Commissions," *Michigan Law Review* 41 (1942): 481–495; Manley O. Hudson, "International Courts in the Postwar World," *Annals of the American Academy of Political and Social Science* 222 (1942): 122.

82 Sheldon Glueck, "Trial and Punishment of the Axis War Criminals," *Free World* 4 (1942): 139.

83 Clyde Eagleton, "Punishment of War Criminals by the United Nations," *American Journal of International Law* 37 (1943): 495; Hans Kelsen, "Collective and Individual Responsibility in International Law, with particular regard to the Punishment of War Criminals," *California Law Review* 31 (1943): 530–571; Albert G. D. Levy, "The Law and Procedure of War Crime Trials," *American Political Science Review* 37 (1943): 1054–1081; Wright in debate of Charles Cheney Hyde, "Punishment of War Criminals," *Proceedings of the American Society of International Law* 37 (1943): 55–56.

84 Hyde, "Punishment," 39–46.

Should several states claim jurisdiction, Manner proposed to have mixed military tribunals.[85]

While the debate continued, on 1 November 1943, the Allied governments agreed on the Moscow Declaration. It provided for the punishment of all those German officers, men, and members of the Nazi Party, who were responsible for or had taken a consenting part in atrocities, massacres, and mass executions. As to the courts responsible for such punishment, those whose crimes were clearly located in one place should be sent back to the countries where they had committed their crimes. For offences with no particular geographical location, punishment should be meted out by a joint decision of the Allies.[86] Although there was no reference to the academic discussions, it is clear from the positions taken that decision makers had referred to points made in the debate.

While the Western Allies still refrained from holding trials during the war, the Soviet authorities did not. Already in July and August 1943, they held the first trials in military courts at Krasnodar and Krasnodon against persons suspected of collaboration with the occupying power.[87] Shortly after the declaration of Moscow, a trial was also held in Charkiv against members of the German Wehrmacht and the SS. Soviet authorities tried hard to alert Western academics and the public to this trial, but while there was a large, if short-lived awareness in the press, only two Czech lawyers in exile took notice of it.[88] Meanwhile, the debate among academics, diplomats and politicians continued. To a large extent, it took place within the United Nations War Crimes Commission created in 1943. At this time, the question of which courts should be responsible for what crimes was not the main issue. A statement from the Dutch government-in-exile and the response of British Lord Chancellor John Simon at the first meeting show, however, that national courts were still to play a central role and that the fate of so-called "arch-

85 George Manner, "The Legal Nature and Punishment of Criminal Acts of Violence contrary to the Laws of War," *American Journal of International Law* 37 (1943): 407–435.

86 Arieh J. Kochavi, "The Moscow Declaration, the Kharkov Trial and the Question of a Policy on Major War Criminals in the Second World War," *History* 76 (1991): 401–417; Daniel Marc Segesser, "Moscow Declaration (1943)" in: *Atrocities, Massacres, and War Crimes: Encyclopedia* ed. Alexander Mikaberidze, 2 Vols, (St. Barbara: ABC-Clio, 2013), Vol. 2, 458–459; von Lingen, *"Crimes against Humanity,"* 266–268.

87 George Ginsburgs, *Moscow's Road to Nuremberg: The Soviet Background to the Trial*, (Law in Eastern Europe 47) (Den Haag: Martinus Nijhoff Publishers, 1996), 46–48, Segesser, *Recht statt Rache*, 346–347.

88 Vaclav Benes, "The Punishment of War Criminals," *Spirit of Czechoslovakia* 5 (1944): 22; Bohuslav Ecer, "Crimes and War," *Message* 31 (1944): 11; Bohuslav Ecer, *The Lessons of the Kharkow Trial* (London: Russia Today Society, 1944). See Segesser, *Recht statt Rache*, 347–348 and von Lingen, "*Crimes against Humanity*," 268–270.

criminals" would still have to be decided on a political level.[89] The debates within the United Nations War Crimes Commission revolved mainly around the crimes for which those responsible should be prosecuted. In this context, lawyers, especially from governments-in-exile, played an important role and used the network they had created previously.[90]

During the last year and immediate aftermath of the war, it was US Secretary of War Henry Stimson who finally won out on the issue of trials for the punishment of war criminals of the Axis powers. He was adamantly opposed to any political solutions and called for a legal process to deal with the enormous crimes that had been committed during the Second World War on all fronts. In this endeavour, the great majority of scholars on both sides of the Atlantic supported Stimson, but the challenge that existed was to keep up legal principles, while at the same time delivering swift justice.[91] The solution they finally found was a combination of a mixed military court with its larger room for manoeuvre, an international court consisting of judges from the four major victorious powers and a wider notion of what a war crime represented. Furthermore, trials could be conducted in occupied Germany for crimes committed in that country and offenders could also be tried in countries in which they had committed their crimes.[92] Only the major criminals would be tried in what became the International Military Tribunal in Nuremberg or the International Military Tribunal for the Far East in Tokyo. The lesser war criminals were tried in the military courts of the countries in which they had committed their crimes, in courts of the occupying powers, such as the NMT- trials, or in other military courts according to Joint Chiefs of Staff Directive 1023/10.[93]

In this third circle in the debate on national versus international means of justice, the concept of an international criminal court was clearly dominant. The idea was prevalent within academic institutions, such as the International Law

89 UNWCC, *History*, 113–114; von Lingen, "*Crimes against Humanity*," 273–274.

90 UNWCC, *History*, 118–154, Eichenberg, "Crossroads," 348–350; Kochavi, *Prelude*, 92–104; Segesser, *Recht statt Rache*, 352–354; von Lingen, *"Crimes against Humanity*," 274–282 and von Lingen, "Epistemic Communities," 322–328.

91 Segesser, *Recht statt Rache*, 372–381; von Lingen, *"Crimes against Humanity*," 282–287.

92 UNWCC, *History*, 450–475; Quincy Wright, "War Criminals," *American Journal of International Law* 39 (1945): 260–261.

93 Kim Christian Priemel and Alexa Stiller, *Die Nürnberger Prozesse, 1945–1949: Zwischen Geschichte, Gerechtigkeit und Rechtsschöpfung* (Hamburg: Hamburger Edition, 2013) and Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011); Ludwig Eiber and Robert Sigel (ed.), *Dachauer Prozesse – NS-Verbrechen vor amerikanischen Militärgerichten in Dachau 1945–1948* (Göttingen: Wallstein Verlag, 2007).

Association or the Association Internationale de Droit Pénal. In 1937, a first convention for the creation of an international criminal court was adopted, although its jurisdiction was limited to acts of international terrorism. The Second World War prevented its adoption, and national courts remained the main instrument to punish violations of the laws of war. This remained true for the duration of the war, although the dimension of Nazi and Japanese war crimes drove jurists in exile to look for other solutions, particularly in regard to bringing "arch-criminals" to justice. The idea of an international criminal court quickly rose to prominence in this context and finally materialised in the form of mixed international military courts in Nuremberg and Tokyo in 1945–46. National, often military, courts remained important, however, especially in judging crimes within a particular geographical location.

4 From Nuremberg Back to Geneva: A Fourth Circle in the Debate on the Punishment of Violations of the Laws of War, 1945–1949

Looking back at his efforts in the interwar period, Vespasian Pella was a bit disenchanted and regretted that his proposals had not been accepted. In his opinion, this would have made things easier at the end of the war. Furthermore, he criticised the victorious powers for the fact that they just looked at past crimes and that the charter of the International Military Tribunal did not guarantee that international trials would also be happening in the future.[94] Pella would certainly have been even less happy had he known at that moment that the trials in Nuremberg and Tokyo would be the only trials in an international criminal court for a very long time. Until his death in 1952, he continued to fight for a permanent international criminal court.[95] On the one hand, the debate on the issue of punishing violations of the laws of war continued in the International Law Commission of the United Nations, but although the commission acknowledged the desirability of such a court, a lack of will stalled all specific proposals.[96] On the other hand, the discussions returned to Geneva in the context of the issue of revising

94 Vespasian Pella, "La Justice Pénale Internationale: Ce qu'elle est et ce qu'elle devrait être," *Revue de Droit International de Sciences Diplomatiques et Politiques* 23 (1945): 85–139.

95 His major article in this context was Vespasian Pella, "Towards an International Criminal Court," *American Journal of International Law* 44 (1950): 37–68.

96 McCormack, *From Sun Tzu*, 59–62.

the 1929 Geneva Conventions. In that year, a new convention for the protection of prisoners of war had provided some supplementary articles to guard against potential arbitrariness in judicial proceedings in the military courts of the captor country, while Article 28 of the Geneva Convention of 1906 had almost remained unchanged as Article 29 of 1929.[97] Article 30 provided for an international fact finding commission on violations – an idea Rolin-Jaequemyns and Moynier had already proposed from the 1870s onwards – but neither scholars nor states were able to agree on how to put the article into effect.[98] In this context, in 1936, ICRC President Max Huber anticipated that his organisation would be criticised, whatever position it would take in a future war.[99] Therefore during the Second World War, the ICRC was very reluctant to voice criticism of any belligerent and remained silent, especially in regard to the persecution of Jews in Nazi Germany.[100] In a number of cases, its supervisors could do meaningful work in protecting prisoners of war and thereby probably saved countless prisoners. On the other hand, more than 70% of the world's prisoners of war never received a visit from any external supervisor and the trend became worse the more that belligerents escalated their war efforts.[101] By the end of the war, the ICRC had therefore lost its reputation and was under severe pressure. Based on the aforementioned articles in the Geneva Convention of 1929, and following its bourgeois liberal, legalistic, and partially anti-Jewish tradition, the organisation continued to voice criticism of war crimes trials and was reluctant to support proposals for an extension of rules on the punishment of violations of the laws of war into revised versions of the Geneva Conventions. It even helped former Nazis, who tried to flee from prosecution, to travel to South America.[102]

Between 1946 and 1948, two Red Cross Conferences (in Oxford and Stockholm respectively), as well as an important and often underestimated meeting of government experts in 1947 at Geneva, saw ideas on how to merge rules of the existing Geneva Conventions with concepts of law enforcement and fact finding begin

97 Art. 60–67 of the Geneva Convention relative to the Treatment of Prisoners of War and Art. 29 of the Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armies in the Field, in: Schindler/Toman, *Laws of Armed Conflict*, 264–265, 286–287.

98 Segesser, *Recht statt Rache*, 292–295.

99 Max Huber, "Croix-Rouge et Neutralité, "*Revue Internationale de la Croix-Rouge* 18 (1936): 363.

100 Jean-Claude Favez, *Das Internationale Rote Kreuz und das Dritte Reich: War der Holocaust aufzuhalten?* (Zurich: Verlag Neue Zürcher Zeitung, 1989).

101 Boyd van Dijk, *Preparing for War: The Making of the Geneva Conventions* (Oxford: Oxford University Press, 2022), 263.

102 van Dijk, *Preparing for War*, 265–266; Schindler/Toman, *Laws of Armed Conflict*, 286–287, Lewis, *Birth*, 237–240; Gerald Steinacher, *Nazis on the Run: How Hitler's Henchmen Fled Justice* (Oxford University Press, 2011), 55–100.

to develop.[103] Within the ICRC, but also amongst government experts, the method of choice was controversial. The different experiences during the recent Second World War, but also the growing political and ideological dissent as a consequence of the mounting Cold War, had at least as much influence as the various legal opinions. On the one hand, there were those who supported an international solution, often linked more to the United Nations than to the Red Cross, while there were others who were anxious to preserve as much state sovereignty as possible. Within the ICRC, a younger generation of experts believed that including the concept of war crimes into the Geneva Conventions was an interesting proposal, while the older generation continued to fear that such an inclusion would compromise the ICRC's neutral position. While the tendency within the ICRC to be more open to ideas about including rules on the punishment of violations of the laws of war into a revised version of the Geneva Conventions, government representatives, especially from large powers such as the United States, Britain or the Soviet Union became rather more cynical. With the exception of the Red Cross Conferences, as well as some reports and public statements, most of this debate did not take place in public, but rather behind closed doors.[104] In 1947, however, the ICRC made use of one of its few female members to publicly present its position at a meeting of government experts. Marguerite Frick-Cramer had already been active within the organisation during the First World War, but she had never been able fully to win the necessary support for her humanitarian ideas within the organisation. Since, during the Second World War, she had been one of the few within the ICRC to support a public appeal condemning Nazi atrocities – a fact that gave her a great credibility – the organisation fell back on her to present its ideas for a compromise in regard to a revision of the Geneva Conventions.[105] Although mainly stressing the traditional position of the ICRC, which relied on private diplomacy and agreements and included an important role for the organisation itself, Frick-Carmer also admitted that an international organisation could play a role in this context. Persons responsible for violations of the laws of war – Frick-Cramer mainly focused on violations of the rights of military and ci-

103 Van Dijk, *Preparing for War*, 36–39.

104 Lewis, *Birth*, 242–257; van Dijk, *Preparing for War*, 266–277.

105 Marguerite Frick-Cramer, "Contribution à l'élaboration d'une Convention sur les prisonniers, militaires ou civils, tombés au pouvoir de l'ennemi ou d'une autorité non reconnue par eux," *Revue Internationale de la Croix-Rouge* 29, 339 (1947): 228–247. On Frick-Cramer's stand within the ICRC, see Irène Hermann, "Die brilliante Unbekannte: Die Genferin Marguerite Frick-Cramer hat ihr Leben den humanitären Organisationen gewidmet," *NZZ Geschichte* 6 (2016): 56–59 or Daniel Palmieri, Marguerite Frick-Cramer, "Genève, 1887–1963," in *Les femmes dans la mémoire de Genève: du XVe au XXe siècle*, ed. Erica Deuber and Natalia Tikhonov (Geneva: S. Hurter, 2005), 182–183.

vilian internees in her article but certainly included other such violations – should be held personally accountable either in national or international courts. Falling back on regulations of the Geneva Conventions of 1906 and 1929 she concluded that signatories should be called upon to pass the necessary legislation for such trials.[106] In 1949, the High Contracting Parties finally agreed on revised and amplified versions of the Geneva Conventions. Although, the terms of the 1906 and 1929 conventions were only slightly altered, now stressing the obligation to search for persons who had committed "grave breaches" of the Convention:[107]

> Each High Contracting Party shall be under the obligation to search for persons 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 an-other High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.[108]

Articles 82 to 88 of the Convention relative to the Treatment of Prisoners of War tried to make the 1929 provisions protecting prisoners of war from possible arbitrariness in judicial proceedings in military courts of the captor country more precise, while Articles 64 to 75, as well as 117 and 118, of the Convention relative to the Protection of Civilian Persons in Time of War did the same in regard to both civilians in occupied territory and those interned.[109]

At the end of the Second World War, it seemed that the idea for an international criminal court had finally been established. Although national courts still played a role in the punishment of crimes committed in a specific geographical location, the Nuremberg moment seemed to sway the debate. The ICRC was critical at first, but the younger generation of scholars became convinced that it might be a good idea to include the punishment of violations of the laws of war into revised conventions. The longer the debate continued, however, the more the notion of an international solution faltered. After the end of the Tokyo trial in 1948, no further international trials took place and solutions that preferred national courts to deal with the issue of violations of the laws of war – or war crimes in a wider sense as they were now called – began to dominate, notwith-

106 Frick-Cramer, *Contribution*, 244; Lewis, *Birth*, 241–242.

107 On the debate on the terminology of "grave breaches" which echoes Bellot's "most heinous offences," see van Dijk, *Preparing for War*, 252–300 and Bellot, "War Crimes," 659.

108 Art. 49 of the First Geneva Convention of 1949, printed in: Schindler/Toman, *Laws of Armed Conflict*, 323.

109 Art. 82–88 of the Third Geneva Convention of 1949 and Art. 117 and 118 of the Fourth Geneva Convention of 1949, printed in: Schindler/Toman, *Laws of Armed Conflict*, 391–392, 469–470.

standing of course that scholars, such as Vespasian Pella, continued to fight for the creation of a permanent international criminal court.[110]

Conclusion

In the period between the Franco-Prussian War and the beginning of the Cold War, national and international means of (military) justice were always part of the legal debate on the laws of war. Although not always at the centre of the current debate of the time, it always remained a challenge, not least for legal scholars, who dealt with the problem. Proposals for dealing with the issue by creating an international criminal court in whatever fashion emerged soon after the end of the Franco-Prussian War and arose from Gustave Moynier's frustration that the belligerents had shown themselves unable to punish violations of the Geneva Convention of 1864. As Moynier's example demonstrates, the power of national sovereignty made it difficult for such an idea to gain the necessary support to go beyond the stage of pure academic debate. Trials in national (military) courts remained the preferred option, although most participating in the debate were aware that such courts might be too lenient on soldiers of its own side and too harsh on soldiers of the enemy. The Geneva Convention of 1906 was the first international regulation which specifically addressed the issue of the punishment of violations of the laws of war on an international scale. It was, however, a compromise that left state actors and courts in the driving seat. Attempts to change this at the end of both world wars resulted in the creation of the International Military Tribunal in Nuremberg or the International Military Tribunal for the Far East in Tokyo, but nevertheless the International Law Commission was not able to reach agreement in regard to the creation of a permanent international criminal court. Finally, the circles in the debate on the punishment of violations of the laws of war ended in Geneva again in 1949. Although more precise than the Convention of 1906 and also going further than the protection of the rights of defendant prisoners of war granted in that of 1929, the Geneva Conventions of 1949 still left punishment almost exclusively in the hands of national (military) courts. It would take almost half a decade more before ideas proposed by Sheldon Glueck in 1942 (i.e. to assign crimes committed in different places, ordered by civilian or military authorities, as well as those which national courts preferred not to deal

110 Seel Wright, "War Criminals," 260–261.

with), would become the task of the International Criminal Court in the Hague.[111] As, however, the court only holds jurisdiction if the respective governments have signed and ratified the convention, it is still up to national institutions to decide to what extent international macro-criminality can be punished on an international level.[112] It seems as if these circles of the legal debate on the punishment of violations of the laws of war that shaped the period between the Franco-Prussian War and the beginning of the Cold War are not yet completely resolved.

111 Glueck, "Trial and Punishment," 139; on the ICC, see Heiko Ahlbrecht, *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 335–390; William A. Schabas, *An Introduction to the International Criminal Court,* Third Edition (Cambridge: Cambridge University Press, 2007), 15–21, 194–341.
112 Schabas, *Introduction*, 58–170.