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The History of the International Association of Penal Law, 1924–1950: Liberal, Conservative, or Neither?

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Previous histories dealing with the building blocks of international criminal law have largely comprised histories of international tribunals: their founding, politics, proceedings and cultural meanings.[1] As an alternative to examining political leaders and diplomats as the central actors in these affairs, some political scientists and historians have drawn attention to the role of non-governmental organisations as potent lobbies, arguing that their vision of a permanent international criminal court was shaped by their intellectual worldview or their political and social interests.[2] Lurking

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1 Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial*, Princeton University Press, Princeton, NJ, 1971; Ann Tusa and John Tusa, *The Nuremberg Trial*, Atheneum, New York, 1986; Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford University Press, Oxford, 2001; Francine Hirsch, "The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order", in *American Historical Review*, 2008, vol. 113, no. 3, pp. 701–30; Yuma Totani, *The Tokyo War Crimes Trial*, Harvard University Asia Center, Cambridge, MA, 2008; Thierry Cruvellier, *Court of Remorse: Inside the International Tribunal for Rwanda*, trans. Chari Voss, University of Wisconsin Press, Madison, 2010.

2 Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement*, Routledge, London, 2006; Daniel Marc Segesser, *Recht statt Rache oder Rache durch Recht? Die Ahndung von Kriegsverbrechen in der internationalen wissenschaftlichen*

beneath the surface of these investigations is the question of which ideologies shaped the views of these organisations and ultimately the types of tribunals they proposed. The notion that they were all shaped by pacific internationalism, liberal legalism or a universal concept of rights cannot be sustained.

The concept of ideology is tricky, as various political thinkers have defined it positively and negatively since the term was first used in the late eighteenth century.[3] One contemporary definition holds that it requires three elements: a political or social vision of a reality that does not yet exist, an agent that will create that reality and a defined obstacle that stands in the way. To this I would add that ideologies emerge from specific historical contexts, often in response to economic, social or cultural crises. The groups that support them have specific bases of social support, develop their own discourses and cultural reference points, and prioritise certain forms of action over others.[4]

An assessment of non-governmental organisations that supported the construction of international law in the nineteenth and twentieth centuries shows that their demands did not exist in an ideological vacuum but were shaped by social group interest, national interest, concepts of the international state system, schools of criminology, visions of history or some combination of these. For example, the International Law Association, whose predecessor organisation was founded around 1873, was formed by liberal international lawyers and peace activists, but the merchants and shippers who later joined the organisation wanted to codify international law to ensure smoothly functioning commerce.[5] The Red

Debatte 1872–1945 [Law Instead of Vengeance or Vengeance Through Law? The Punishment of War Crimes in the International Scholarly Debate, 1872–1945], Ferdinand Schöningh, Paderborn, 2010; Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950*, Oxford University Press, Oxford, 2014.

3 Terrell Carver, "Ideology: The Career of a Concept", in Terence Ball and Richard Dagger (eds.), *Ideals and Ideologies: A Reader*, Longman, Boston, 2011, pp. 4–10.

4 Miroslav Hroch, *Social Preconditions of National Revival in Europe: A Comparative Analysis of the Social Composition of Patriotic Groups among the Smaller European Nations*, trans. Ben Fowkes, Columbia University Press, New York, 2000; Charles Tilly, *Popular Contention in Great Britain, 1758–1834*, Harvard University Press, Cambridge, MA, 1995.

5 Irwin Abrams, "The Emergence of International Law Societies", in *Review of Politics*, 1957, vol. 19, no. 3, pp. 361–80.

Cross movement, founded in the 1860s initially to establish volunteer medical corps for wartime, expressed the Christian humanitarianism of the Swiss Protestant bourgeoisie.[6] The International Association of Penal Law (Association Internationale de Droit Pénal, 'AIDP'), founded by European criminal law specialists from Allied and neutral countries in 1924, comprised political liberals and conservatives. Many wanted to reform penal systems using the ideas of "social defence" but also believed that an international criminal jurisdiction was needed to protect states against aggression. In the 1930s the World Jewish Congress, representing an assembly of democratic Jewish organisations from the Diaspora, represented the interests of a religious/cultural minority during a time when the League of Nations' system of protecting minority rights was breaking down.[7] In the 1970s Amnesty International represented a "non-partisan morality" of middle- and upper-class American activists who protested against torture and the death penalty without calling for social or political revolution abroad. Soviet human rights activists in the same period rejected reform communism and instead criticised government abuses based on the fact that they violated socialist law. Both groups adopted moral and legal intervention because revolution or political reform seemed like ideological dead ends.[8] Finally, in the 1990s, during the negotiations for the Rome Statute establishing the permanent International Criminal Court, civil society organisations did not represent a uniform ideology for women's issues. The Women's Caucus for Gender Justice, representing different types of feminists, wanted to criminalise rape and sexual slavery under international law and ensure that prosecutors and judges had expertise with gender issues. "Pro-family" organisations, such as REAL Women of Canada and the International Right to Life Federation, opposed any mention of gender in the Court's Statute and argued that including "forced

6 John F. Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, Westview Press, Boulder, CO, 1996; David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross*, Cambridge University Press, New York, 2005, pp. 202–10.

7 Carole Fink, *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection, 1878–1938*, Cambridge University Press, New York, 2004, pp. 49–57, 148–51, 316–22; Mark A. Lewis, "The World Jewish Congress and the Institute of Jewish Affairs at Nuremberg: Ideas, Strategies, and Political Goals, 1942–1946", in *Yad Vashem Studies*, 2008, vol. 36, no. 1, pp. 181–210.

8 Samuel Moyn, *The Last Utopia: Human Rights in History*, Belknap Press, Cambridge, MA, 2010, pp. 130–36.

pregnancy" as a crime in the Court's Statute would conflict with states whose domestic legislation prohibited abortion.[9]

Yet the view that all concepts in international law are shaped by different group interests and ideological currents does not address how non-governmental organisations have been forced to change their practices as a result of wars or failures, as one of the longest-standing organisations, the International Committee of the Red Cross, had to do.[10] The goal of this chapter is to explain how a different organisation, the AIDP, changed its ideology between its founding in 1924 and the early Cold War. At that point, it had been unable to achieve two of its major projects from the late 1920s: the formation of a permanent international criminal court and a global penal code against aggression.

The ideological transformation of the AIDP is an important topic because the organisation was and remains a prominent formulator of ideas, statutes and draft conventions that have been adopted by the League of Nations and the United Nations. The AIDP was explicitly founded to develop international criminal law as a new discipline. Several of its members invented the term in the early 1920s, something that cannot be claimed about other groups of lawyers in the nineteenth century who codified the laws of war or worked on military tribunals. Two of its members in the 1925–1950 period, Vespasien V. Pella and Henri Donnedieu de Vabres, were major architects of international criminal law: both developed concepts of state criminality, and both worked on a draft statute for an international criminal court in the 1920s. Pella played a role in drafting a world penal code in the late 1920s and early 1930s, and Donnedieu de Vabres was France's chief judge at Nuremberg. A third jurist, Raphael Lemkin, was a member of another organisation closely related to the AIDP – the International Bureau for the Unification of Penal Law – where Lemkin developed his early formulation of the genocide concept in the midst of debates about which crimes warranted universal jurisdiction. All three figures wrote the first draft of the United Nations Convention for the Prevention and Punishment of Genocide.

This chapter will argue that from 1924 to roughly 1950 the AIDP experienced a series of ideological transformations and was neither whol-

[9] Glasius, 2006, pp. 77–93, see *supra* note 2.

[10] Jean-Claude Favez, *The Red Cross and the Holocaust*, trans. John and Beryl Fletcher, Cambridge University Press, Cambridge, 1999; Forsythe, 2005, see *supra* note 6.

ly liberal nor conservative. Liberal was a term used by AIDP jurists in the 1920s to 1940s to describe their support for fair trials based on pre-established laws and more humane treatment of prisoners. Yet their liberalism was not the liberalism of the nineteenth century, which stressed individual liberty, republicanism and the nation-state. It was a social liberalism that was anti-communist, anti-revolutionary and pro-"social defence", a school of criminology that believed crime stemmed from social conditions, so the type of punishments and corrective measures applied must address specific social categories, such as juveniles, alcoholics and the insane. Conservatism in the 1920s was a philosophy supporting nationalism, state sovereignty and authoritarianism rather than democratic government. It was distinct from the new radical right-wing movements of fascism and Nazism, which also stressed state sovereignty and were anti-democratic, but sought to overthrow the existing social order and political system with a corporatist economic system and the domination of a single nation or race. In the 1920s the AIDP developed a "criminological" liberal internationalism based on criminal prosecution of states and individuals who started illegal wars or created international disorder. During the turbulent 1930s, when economic depression, fascism and militarism destroyed the international system erected by the League of Nations, it grew slightly more conservative, moving toward state security and even opening up lines of communication with Nazi jurists. During the Second World War it was inactive and silent; it did not play a major role in advocating or preparing for post-war trials, either national or international. After the war, it attempted to resuscitate its criminological internationalism from the 1920s, but it was caught in the Cold War and had to figure out how to position its own criminological programme in that ideological debate. The AIDP's ideological changes represent a larger transformation in the ideas of the European intellectual bourgeoisie and enlightened upper classes from the 1920s to the 1950s. They sought stability and social order in the interwar period, did not support fascism during the Second World War but did not actively resist it, and then adopted anti-communist views and human rights doctrines in the Cold War, as these two were closely connected.

15.1. Was the AIDP Liberal or Conservative? Previous Views

In 1924 a group of French jurists and penal reformers founded the AIDP, attempting to rejuvenate the work of the more German-oriented Interna-

tional Union of Criminal Law (Internationale Kriminalistische Vereinigung, 'IKV') whose German faction had split off due to the German–French animosity of the First World War.[11] Previous legal and political science scholarship on the AIDP and the IKV have addressed their ideological roots and the AIDP's contributions to international criminal law, taking different viewpoints on whether the two organisations were liberal or conservative. The criminal law scholar and former AIDP President Hans-Heinrich Jescheck views both organisations as a unity, believing they propelled liberal-progressive ideas, such as suspended sentences and fines as alternatives to prison sentences. He briefly summarises a few AIDP projects in international criminal law (support for an international criminal jurisdiction in 1926, Pella's international penal code and law against aggression in 1935, and the AIDP's influence on a League of Nations terrorism convention in 1937), but he does not delve into the political circumstances or the ideological motives behind them.[12] The criminal law scholar and former AIDP Vice President Sir Leon Radzinowicz concentrates on the ideology of the IKV in relation to domestic penal law, but does not discuss the AIDP's international projects. He takes a more nuanced view of the IKV's ideological profile, arguing that its criminal law concepts reflected social Darwinism (especially the view that the poor were dangerous and social radicals should be repressed) but also social liberalism (criminal codes should be reformed to define different types of penalties for attempted crimes, completed crimes and repeated crimes.) He briefly notes that the Soviet Union and Nazi Germany ruthlessly amplified criminal law doctrines developed by the Italian positivists and the IKV's social defence theorists, though he does not discuss whether the latter concepts influenced the AIDP's *international* criminal law concepts.[13]

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[11] Elisabeth Bellmann, *Die Internationale Kriminalistische Vereinigung (1889–1933)* [The International Union of Penal Law (1889–1933)], Peter Lang, Frankfurt am Main, 1994.

[12] Hans-Heinrich Jescheck, "Der Einfluß der IKV und der AIDP auf die internationale Entwicklung der modernen Kriminalpolitik" [The Influence of the IKV and AIDP on the International Development of Modern Criminal Policy], in *Zeitschrift für die gesamte Strafrechtswissenschaft* [Journal for the Entire Science of Penal Law], 1980, vol. 92, no. 4, pp. 997–1020.

[13] Leon Radzinowicz, *The Roots of the International Association of Criminal Law and Their Significance: A Tribute and a Re-assessment on the Centenary of the IKV*, Max-Planck-Institut für Ausländisches und internationales Strafrecht, Freiburg, 1991, pp. 26–41, 47–48, 91.

The international criminal law scholar and former AIDP President M. Cherif Bassiouni contends that the AIDP's approach to penal science represents "humanistic and universalist philosophies […] embodied in the modern approach to human rights".[14] However, in the area of international criminal law, he shows the influence of human rights more clearly for the late 1960s to 1990s, when AIDP jurists worked on conventions against torture, illegal human experimentation and apartheid[15] than he does for the 1920s to 1930s, when AIDP jurists were more concerned with using an international criminal court to defuse frictions that could lead to war than they were in protecting civilians and minorities from government abuses.

The political scientist Martin David Dubin, in a 1991 book about the 1937 terrorism convention and a corresponding convention to establish an international criminal court for terrorism cases, explains two of the AIDP's main projects in the interwar period: creating interstate law (Pella's term for an international criminal jurisdiction that would hold states as well as individuals responsible for various crimes that threatened international relations) and unifying domestic penal codes. Ultimately, he concludes that Pella and other AIDP jurists were utopian reformers who confused their hopes with reality. Few states were serious about repressing terrorism: France propelled the convention to support its ties with its Eastern European allies, while Italy, Germany and the Soviet Union supported foreign terrorist groups or used police terror domestically.[16]

15.2. The Division of the IKV during the First World War and the Founding of the AIDP in 1924

The IKV, founded in 1888 by the Austrian Franz von Liszt, the Dutchman Gerardus van Hamel and the Belgian Adolphe Prins, collapsed due to First World War tensions. According to Radzinowicz, the organisation was under strong German leadership. Its main journal, *Zeitschrift für die gesamte Strafrechtswissenschaft* [Journal for the Entire Science of Penal

[14] M. Cherif Bassiouni, "AIDP: International Association of Penal Law: Over a Century of Dedication to Criminal Justice and Human Rights", in *Nouvelles Études Pénales. Recueil de l'Association internationale de droit pénal* [New Penal Studies. Anthology of the International Association of Penal Law], 1999, no. 18, p. 40.

[15] *Ibid*., pp. 56, 58, 60.

[16] Martin David Dubin, *International Terrorism: Two League of Nations Conventions, 1934–1937*, Kraus International Publications, Millwood, NY, 1991, pp. 21–31, 65–69, 75–76.

Law], was a German-language publication. However, the IKV had many active national subgroups, including a large number of Russian liberals who joined after the 1905 Russian Revolution. The Great War of 1914 ignited German–French tensions, played out during the war as a cultural debate about German *Kultur* versus French *civilisation*, the rivalry between the German claim to philosophical depth and commitment to the collective nation versus the French claim to individual liberty and universalism. In 1915 two German members resigned from the IKV for "national reasons", as von Liszt wrote, but other German members remained in the group, believing that the split would be resolved after the war was over, and Europeans could again return to scientific work free of politics.[17] That conception of legal theory free of all other considerations represented a nineteenth-century positivist view that could not be recovered after nearly five years of horrendous warfare. Van Hamel died in 1917, and the deaths of von Liszt and Prins followed in 1919. The Swiss group in the IKV wanted to resurrect the old organisation and invite the membership to a conference in Zurich, but the response was cool, so no meeting occurred.[18]

The German *Landesgruppe* (national branch) of the IKV continued an independent existence and kept publishing its *Zeitschrift*, but some of its scholars in 1917 were already discussing closer bonds among Central European states' penal systems, not a pan-European system or even an international system. The Swiss German jurist, Ernst Delaquis, for example, described how certain German, Austrian and Hungarian jurists wanted to unify their criminal codes after the war, believing this would build on the (supposedly) closer ties these countries had developed before the war. (He wrote this before the German Empire and Austria-Hungary had collapsed.) He thought that countries with similar cultures were most likely to find common ground in their approaches to crime, but he also noted that it was unlikely that Austrian legislators would accept the IKV idea of allowing judges to issue flexible sentences, since those legislators feared that Czech judges would intentionally rule with harshness against Austro-Germans.[19] Such concerns about Austria's nationality conflicts proved to

[17] Franz von Liszt, "G.A. van Hamel. Die Zukunft der IKV", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1917, vol. 38, pp. 508–9.

[18] Bellmann, 1994, pp. 139–45, see *supra* note 11.

[19] Ernst Delaquis, "Strafrechtliche Kriegsziele. Vortrag gehalten in der Juristischen Gesellschaft zu Frankfurt a.M. am 26. November 1917" [War Goals for Criminal Law.

be accurate in another sense: at the end of First World War, Austria-Hungary dissolved due to internal nationality problems and economic collapse. Furthermore, after the war, the Paris Peace Treaties forbade German-Austrian unification, and the conservative German bureaucracy, including some judges and university professors, resented the Versailles Treaty. In the early 1920s, when Germany was in the midst of a hyperinflation and France occupied the Ruhr industrial region, German–French reconciliation and a rebirth of the IKV seemed highly unlikely.

The idea to refound the IKV came from the Spanish jurist Quintiliano Saldaña, who discussed it with French criminal law professor Henri Donnedieu de Vabres. Donnedieu de Vabres then obtained support from Henri Berthélemy, Dean of the Law Faculty in Paris, and financial backing from the Société générale des prisons, a prison reform organisation. The first Congress, held by the AIDP in Paris in 1924, elected Henri Carton de Wiart, a former Belgian Prime Minister, as its first president, who served until 1946.[20] Fifty-two members of the AIDP voted for a board of directors, electing 11 men (no women), all of whom were jurists or law professors from states that had fought on the side of the Allies, had been neutrals during the war or were from newly created states, such as Czechoslovakia and Poland.[21]

The AIDP's founders denied that they had any political goal[22] and welcomed all branches of criminal law and penology. According to their statute, their purpose was to hold congresses and publish journals to study

Lecture held by the Legal Society in Frankfurt am Main on 26 November 1917], in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1918, vol. 39, pp. 282–83.

20 Carton de Wiart had worked for many years with Adolphe Prins, who had been Belgium's Inspector General of its prisons.

21 The directors were Mariano D'Amelio (Italy), Megalos Caloyanni (Greece), Henri Carton de Wiart (Belgium), André Mercier (Switzerland), August Mifička (Czechoslovakia), Albert Rivière (France), Jean-André Roux (France), Quintiliano Saldaña (Spain), Julian Teodorescu (Romania) and John Wigmore (United States). See Association Internationale de Droit Pénal, "Assemblée générale constitutive. Tenue le vendredi 28 Mars 1924 à la Faculté de Droit de Paris" [Constitutive General Assembly. Held on Friday 28 March 1924 at the Law Department of Paris], in *Revue internationale de droit pénal* [International Review of Penal Law], 1924, no. 1, pp. 4–6.

22 Henri Berthélemy *et al*., "Projet d'une Association Internationale de Droit Pénal" [Draft for an International Association of Penal Law], in *Revue internationale de droit pénal*, 1924, no. 1, p. 2.

the causes of criminality and means to repress it.[23] This was similar to the IKV's pre-war mission. Both organisations were types of "professional internationalism", a historical term that describes a phase of internationalism in the nineteenth century in which self-selected experts from different nation-states joined together to address common problems, and, ideally, build international bases of support for changes they sought at home.[24] Like the IKV, the AIDP carried the torch of reforming criminal codes according to the ideas of "social defence", supporting alternatives to prison confinement and promoting the view that different types of offenders required particular forms of "security measures" and rehabilitation according to whether they were juveniles or recidivists.

15.3. The AIDP's Ideological Features

The AIDP was not a reincarnation of the IKV, since it contained several new ideological features. First, the founders stated that the impetus for forming the group was the dislocation caused by the Great War, the material and moral disequilibrium it left behind.[25] Authors across Europe – in Austria, Britain, Switzerland and France – all feared that the war had caused an increase in crime due to demobilised soldiers and unsupervised youth.[26] The French founders of the AIDP gave this an international meaning, explicitly stating in their founding document that *international crime* was multiplying due to "the interpenetration of people, the presence in a good many territories of foreign elements".[27] This was a refrain among conservatives in Europe after the war: not only had the war de-

[23] See articles one and two, Association Internationale de Droit Pénal, "Statuts de l'Association Internationale de Droit Pénal" [Statutes of the International Association of Penal Law], in *Revue internationale de droit pénal*, 1924, no. 1, p. 17.

[24] Martin H. Geyer and Johannes Paulmann (eds.), *The Mechanics of Internationalism: Culture, Society, and Politics from the 1840s to the First World War*, Oxford University Press, Oxford, 2001, p. 22.

[25] Berthélemy *et al*., 1924, p. 1, see *supra* note 22.

[26] For example, see Sicherheitsbericht für das Jahr 1915 [Security Report for 1915], 31 July 1916, in the Austrian State Archives, Allgemeines Verwaltungsarchiv, Ministerium des Innern, Allgem., K. 2089, 20. Polizei-, Gewölbe-, Grenz- und Sicherheitswache, in genere 1915–1918, Protokoll Nr. 22276/18; Edith Abbott, "Crime and the War", in *American Institute of Criminal Law and Criminology*, 1918, vol. 9, no. 1, pp. 32–43; Delaquis, 1918, see *supra* note 19, pp. 284–85; Maureen Healy, *Vienna and the Fall of the Habsburg Empire: Total War and Everyday Life in World War I*, Cambridge University Press, New York, 2004, pp. 253–54.

[27] Berthélemy *et al*., 1924, p. 1, see *supra* note 22.

stroyed the traditional family, but it brought refugees with foreign customs into their countries, and increases in crime were sometimes blamed on outsiders. Borders were porous, and states' penal systems were not domestically unified, particularly in Central and Eastern Europe, where new states were created out of territories from defeated states and empires. The police's viewpoint was that it could expel a criminal from one province or country, but he or she might well set up shop in the neighboring one. Thus, the AIDP started with the basic view that society was in turmoil, crime was increasing and outsiders were at fault. Donnedieu de Vabres in 1922 argued that France should exercise jurisdiction over everyone in its territory, whether a citizen or a foreigner, in the interest of public security. Indeed, he defended the right of the state to expel foreigners at the border, arguing that four times as many foreigners as French were prosecuted by French criminal courts in 1910 because "the average morality of those who have left their countries of origin […] is inferior to the morality of sedentary people".[28] But were foreigners who were brought before the courts subjected to unfair prejudice? Donnedieu de Vabres did not say.

Members of the AIDP were not social liberals in the sense of the British writer L.T. Hobhouse, who advocated the rights of the working class and argued that "the function of State [is] to secure the conditions upon which mind and character may develop themselves".[29] For criminal law jurists, the role of the state was to protect society against criminals, not re-educate and rehabilitate them for their own sake. Pella argued that highly dangerous criminals (such as murderers who attack their guards) should be shipped to the penal colonies, far from continental Europe, where they should be kept in perpetuity. He supported this policy because he thought it sprang from the same humanitarian motives as eliminating the death penalty.[30] At the AIDP's first congress in Brussels in 1926, the

[28] Henri Donnedieu de Vabres, *Introduction á l'étude du droit pénal international: essai d'histoire et de critique sur la compétence criminelle dans les rapports avec l'étranger* [Introduction to the Study of International Criminal Law: An Essay on History and Critique of Criminal Competence in Relations with Foreign Countries], Recueil Sirey, Paris, 1922, p. 441.

[29] L.T. Hobhouse, *Liberalism*, Batoche, Kitchener, ON, 1999 [1911], p. 68.

[30] Vespasien Pella, "Proposition adressée à la Société des Nations en vue de l'organisation d'un système général internationale d'élimination des criminels dangereux et des délinquents d'habitude" [Proposal Addressed to the League of Nations Regarding a

group voted in favour of the idea that penal codes should include "*mesures de sûreté*", which judges would apply to minors, mentally ill people or so-called delinquents;[31] such measures included civil commitment in mental institutions and reformatory schools, which were supposed to be more lenient that penitentiaries.

Another element in the AIDP's ideology was the influence of French law, French language and French ideas of economic solidarism. The AIDP's seat was France, the main language of its journal and congresses was French, and the Eastern European jurists who joined the organisation had either been educated in France or looked to the French legal system as the trendsetter. Furthermore, there were virtually no German, Austrian or German Swiss members in the AIDP in the 1920s and 1930s. (The Germans and Austrians published instead in the rival *Zeitschrift für die gesamte Strafrechtswissenschaft*, the house journal of the German national group of the IKV.) The AIDP's intention to build international criminal law and press for domestic penal reform became imprinted with certain French concepts. For example, debates on the repression of terrorism looked to French anti-anarchism laws in the nineteenth century as models, and the French government took the lead in calling for a League of Nations convention to repress counterfeiting and another convention to repress terrorism.

A third new feature in the AIDP was that it was explicitly founded "to promote the theoretical and practical development of international criminal law [*droit pénal international*], in order to achieve the concept of a universal criminal law, [and] the coordination of the rules of procedure and criminal inquiry".[32] What precisely the AIDP founders meant by "international criminal law" in this statement is a little hard to say. The IKV had taken up the issue of "international crime", meaning crime across borders, a problem it believed was increasing in 1905 due to the expansion of international trade and international communications. However,

General International System to Eliminate Dangerous Criminals and Habitual Delinquents], in *Revue internationale de droit pénal*, 1924, vol. 1, pp. 141–46.

31 "Tableau d'ensemble des voeux et des résolutions adoptées par les Congrès de l'Association internationale de droit pénal" [Collective Table of the Vows and Resolutions Adopted by the Conferences of the International Association of Penal Law], in *Revue internationale de droit pénal*, 1948, vols. 3–4, p. 391.

32 Article 1, point 3, Association Internationale de Droit Pénal, 1924, p. 17, see *supra* note 23.

the IKV did not formulate a legal definition of "international crime" or do much more than call on police forces in capital cities to join together and exchange information about it (something they began doing, incidentally, after the First World War). Another related problem was the attempt to unify extradition laws, so that states would be required to prosecute or extradite persons charged with certain offences. The sticking point was political crime: should a state be required to extradite a person who had not committed a crime on its territory (or against its citizens or subjects), but whose actions had allegedly injured the security of another state? The IKV had been trying to unify the rules of extradition, but this touched on the sensitive issue of state sovereignty, so states did not want to deal with it at upcoming Hague Conferences to codify international law.[33]

The extradition question was one of the main topics in the so-called "classical" field of "international criminal law" after the First World War. For example, Maurice Travers, a French criminal law scholar, proposed a system in 1922 based on the concept that the group (*groupement)*, not merely the state, used criminal laws to protect itself against social disorder; this was the doctrine of social defence. In Travers' system, each group only needed to refer to its own municipal criminal law and the threat to its own social order when determining whether to prosecute a person. The person's nationality and the place where the person committed the crime were not important; therefore, extraterritorial jurisdiction was possible. Groups (such as states) only co-operated with each other in sharing information about suspects, making arrests and extraditing suspects to protect their own interests, that is, to ensure that their own security would be guaranteed, *not* because states belonged to an international community, as previous scholars had asserted.[34] Travers, therefore, allowed for mutual assistance, but based his system on a very strong concept of sovereignty of the group (which could be a state). Hence, he rejected the idea of an international criminal court for war crimes and asserted that the accused should be prosecuted under a state's jurisdiction.

[33] Bellmann, 1994, pp. 107–11, see *supra* note 11.

[34] Maurice Travers, *Le droit pénal international et sa mise en oeuvre en temps de paix et en temps de guerre* [International Criminal Law and Its Application in Peacetime and Wartime], vol. 1, Librairie de la Société du Recueil Sirey, Paris, 1920, pp. 3–4, 11–12; Jesse S. Reeves, "*Le Droit Pénal International et sa mise en oeuvre en temps de paix et en temps de guerre*. Par Maurice Travers", in *American Journal of International Law*, 1922, vol. 16, no. 2, pp. 342–44.

15.4. The AIDP's Plan for an International Criminal Court, 1926–1928

AIDP scholars accepted the view that penal law should be employed for social defence, but several believed that states should co-operate because they indeed belonged to a community of nations – an idea embodied in the League of Nations. They also held that states should institute similar penal codes so that each one could prosecute individuals who committed crimes that were directed against the security or social order of foreign states; in other words, states were supposed to assist each other by prosecuting people who damaged persons, communication networks, financial systems or moral values that existed outside the framework of the prosecuting state. Therefore, several AIDP jurists, such as Saldaña, Donnedieu de Vabres and Pella, did not follow Travers' lead, instead developing the idea of an international criminal court in the early 1920s.[35] Essentially they synthesised social defence with mutual assistance and wanted an international jurisdiction to handle a variety of tasks: jurisdictional conflicts, the prosecution of criminals who worked across borders, the prosecution of crimes that could not be entrusted to a national court in the interest of fairness and the regulation of state behaviour for the prevention of war.

A series of concrete events had influenced their thinking. In the Versailles Treaty of 1919, the Allies had declared their intention to prosecute ex-Kaiser Wilhelm II with an international tribunal and extradite German nationals to stand trial before mixed military tribunals. In the Treaty of Sèvres, they declared that they would create tribunals to prosecute members of the Ottoman government responsible for the Armenian massacres of 1915. No international tribunals for these cases were actually held.[36] Pella blamed this on the defeated states, which did not want to

[35] Quintiliano Saldaña y García Rubio, *La justicia penal internacional* [International Criminal Law], Imprenta de Alrededor del mundo, Madrid, 1923; Henri Donnedieu de Vabres, "La Cour Permanente de Justice Internationale et sa vocation en matière criminelle" [The Permanent Court of International Justice and Its Role in Criminal Matters], in *Revue internationale de droit pénal*, 1924, no. 1, pp. 175–201; Vespasien V. Pella, *La criminalité collective des États et le droit pénal de l'avenir* [The Collective Criminality of States and the Criminal Law of the Future], Imprimerie de l'État, Bucarest, 1925, p. 119.

[36] For the general history, see James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Greenwood Press, Westport, CT, 1982; Walter Schwengler, *Völkerrecht, Versailler Vertrag und*

accept the jurisdiction of the victor powers. He also noted that these states had argued that there was no "regime of repression" (meaning an international criminal jurisdiction) that existed when their nationals committed actions that the Allies deemed were violations of the laws and customs of war, and crimes against humanity.[37]

Another influence was an attempt by the Belgian jurist, Baron Édouard Descamps, to add a criminal chamber to the Permanent Court of International Justice, a world court connected to the League of Nations that would handle interstate disputes. When he and other international jurists met in The Hague in 1920 to write the rules for that court, he proposed that the criminal chamber should prosecute individuals for "crimes against the international order" and "crimes against the law of nations". Other jurists were troubled by the prospect that the court might have the power to prosecute state officials for executing state policy. Nevertheless, they decided to transmit his proposal to the League of Nations Assembly, which rejected any further work on the idea ostensibly because there was no international penal code. (There were other political reasons, as well.)[38] Thus, AIDP jurists were inspired to create such a code.

The AIDP's effort to develop a statute for an international criminal court was also stimulated by the work of another international legal organisation, the International Law Association ('ILA'), which had gained a head start on the project in 1922. The movement was spearheaded by the British international lawyer Hugh H.L. Bellot, who had written during the

Auslieferungsfrage. Die Strafverfolgung wegen Kriegsverbrechen als Problem des Friedensschlusses 1919/20 [International Law, the Versailles Treaty and the Question of Extradition. The Criminal Prosecution of War Crimes as a Problem of the Peace Settlement, 1919–20], Deutsche Verlags-Anstalt, Stuttgart, 1982; Gerd Hankel, *Die Leipziger Prozesse: Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* [The Leipzig Trials: German War Crimes and Their Criminal Prosecution after the First World War], Hamburger Edition, Hamburg, 2003; Taner Akçam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, trans. Paul Bessemer, Metropolitan Books, New York, 2006.

37 Association Internationale de Droit Pénal, Projet de Statut d'une Cour de Justice Criminelle Internationale, précédé d'une introduction de M. le Conseiller Megalos A. Caloyanni et du rapport de M. Vespasien V. Pella, Professeur à l'Université de Jassy, Député [Draft Statute for a Court of International Criminal Justice, Preceded by an Introduction by Counsellor Megalos A. Caloyanni and with a Report from Mr. Vespasien V. Pella, Professor at the University of Jassy and Parliamentarian], Librairie des Juris-Clausseurs-Éditions Godde, Paris, 1928, p. 8.

38 Lewis, 2014, pp. 80–89, see *supra* note 2.

First World War about a need for an international tribunal to prosecute German officers. After the war, he was disappointed in the meagre results of the German government's trials of certain junior-level officers, which were heard by the German Supreme Court in Leipzig. He considered the trials

> absolutely fair and impartial […]. And yet they were unsatisfactory – not because in British eyes the sentences appeared inadequate, but because one of the worst offenders, Lieut.-Commander Karl Neumann, who sank without warning the British hospital ship *Dover Castle*, was acquitted on the plea of superior orders.[39]

Bellot wanted a neutral international tribunal to prosecute violations of the laws and customs of war in the future, a project that some German and Hungarian lawyers eventually supported in 1926.

Finally, the AIDP's interest in creating a jurisdiction that could prosecute states for aggression was stimulated when the League of Nations Assembly in 1924 passed the Geneva Protocol for the Pacific Settlement of International Disputes, which required that states submit their conflicts to an international arbitration panel; states that refused would be deemed aggressors. The Assembly also declared that war was an international crime (a cultural redefinition of war that stemmed from the First World War), yet the Protocol did not define aggression or explain what steps League members would be obligated to take to deal with an outlaw state. The whole change in scene – the establishment of a League to prevent aggressive war, the cultural outcry that war was a crime, the return of international organisations as a means of regulating world affairs – propelled Pella in 1924 to propose a plan for an international criminal jurisdiction to the Inter-Parliamentary Union, an international organisation of parliamentarians who wanted to codify international law as a whole. After discussing Pella's plan in 1925, the Union created a permanent subcommittee to study the causes of war and means to prevent it, but the organisation worked slowly and prioritised the grand codification project over Pella's concept for a criminal court.[40] Pella found a more receptive audience for his ideas inside the AIDP, since it specialised in criminology and

[39] Hugh H.L. Bellot, "A Permanent International Criminal Court", in International Law Association, *Report of the Thirty-First Conference Held at the Palace of Justice, Buenos Aires, 24th August–30th August, 1922*, Sweet & Maxwell, London, 1923, p. 73.

[40] Segesser, 2010, pp. 248–51, see *supra* note 2.

its members were also writing about international criminal courts and state liability for aggression.

Donnedieu de Vabres and Pella departed from nineteenth- and early twentieth-century debates on the prosecution of the violation of the laws of war in an important way: by adding much more weight to the concept that states could be held *criminally* liable under international law. Both thought that to improve the international security system, the Permanent Court should be invested with the power to decide if states (not simply individuals within them) were guilty of criminal aggression. If so, the court could punish them with various types of sanctions, suspensions of diplomatic relations, economic boycotts and revocation of colonial mandates – but not territorial annexations.[41] Pella called this system "interstate criminal law", distinguishing it from "classical" international penal law that dealt with questions of overlapping jurisdictions and extradition.[42] This reoriented the concept of criminal liability, showing the influence of the relatively new theories of collective psychology and sociology, which had developed in the pre-First World War era of social anxiety about masses, crowds and anomie. Pella argued that a state became aggressive when a power-hungry, chauvinistic *corps* within a country persuaded the intellectuals and youth that their existence as a nation was threatened. The instinct of "species defence" would trigger a type of robotic thinking that would lead the crowd to follow the aggressive leadership.[43] Pella viewed aggression as a social-psychological phenomenon, not merely the pursuit of political power through war and diplomacy. Although this was probably not the only interpretation of the First World War within the AIDP, it indicates that Pella (who was also a Romanian diplomat in the League) now analysed war as a type of collective criminality rooted in group behaviour, rather than the pursuit of politics for state interest.

Liberal internationalists in the 1920s wanted the League of Nations to function as a sort of nightwatchman over sovereign nation-states which had agreed to limit their power in key respects. But the criminological internationalists wanted to supervise and regulate international politics through criminal law. Criminal prosecution was supposed to be the main

41 Pella, 1925, pp. 217–23, see *supra* note 35.

42 *Ibid*., pp. 164–69.

43 *Ibid*., pp. 25–34.

enforcement mechanism, rather than the force of international public opinion, injunctions enunciated by the League Council or judgments from an international arbitration panel. This is a stark difference between the AIDP jurists who supported an international criminal court against aggressive war and the key figures in the United States and Britain, such as Salomon Levinson, Philip Kerr and James Shotwell, who developed some of the main ideas and transatlantic policy connections that pushed the US and French governments to negotiate the Kellogg-Briand Pact of 1928.[44]

At the AIDP's first conference in Brussels, held in 1926, the organisation voted in favour of establishing a criminal chamber inside the Permanent Court that would have jurisdiction over states for "unjust aggression and all violations of international law", and individuals for the crime of aggression, violations of international law in peacetime, and cases where the nationality of the accused was unknown or the sovereignty of the territory where the crime had been committed was contested. The ILA had completed its draft statute for an international criminal court in 1926, but it was only to have jurisdiction over individuals, while the AIDP statute was to be a "two-track" court, meaning one panel of judges would hear cases against individuals, and another would hear cases against states. All the infractions were to be defined in advance by international conventions, which would determine the penalties and *mesures de sûreté*, demonstrating that the social defence doctrine had penetrated international criminal law. The conference also resolved that the League of Nations Council would supervise the punishment of states, while an individual state, assigned by the Council, would supervise the sentence of an individual. The AIDP then turned the drafting of the criminal court's statute over to a special AIDP commission, consisting of Carton de Wiart (serving as the chair), Pella, Donnedieu de Vabres, Saldaña, Bellot (from the ILA), Megalos Caloyanni (a Greek judge who had served on the High Court of Appeals in Cairo), Georges Leredu (a former French Minister of Hygiene who helped found the AIDP), André Mercier (a Swiss professor at the University of Lausanne and president of the Franco-German Mixed Arbitral Tribunal in the 1920s), and Jean-André Roux (a French law pro-

[44] Daniel Gorman, *The Emergence of International Society in the 1920s*, Cambridge University Press, Cambridge, 2012, pp. 263–64, 267–77.

fessor at the University of Strasbourg and Supreme Court counsellor). They completed the project by July 1928.[45]

The court would have three essential functions: 1) to hear cases in which states disagreed about their jurisdiction over an individual, thereby reducing tension; 2) offer a neutral forum for the prosecution of individuals or states for "international military infractions" and violations of common law committed in occupied territory; and 3), most important for Pella and Donnedieu de Vabres, prosecute states for violations of international law, including aggression. The court would base its rulings on positive texts, either an anticipated international penal statute or international conventions among states.[46] Two types of chambers were envisioned: a 15-judge chamber for prosecutions against states, and a five-judge chamber for prosecutions against individuals. The plaintiff state and the defendant state would be allowed to each appoint one judge to the bench; this was supposed to make the process more just. On the other hand, the court would not have had an independent prosecutor. Instead, only a state would be able to bring a complaint against another state, and the League Council would have the power to decide whether a case could go forward. The prosecution of an individual could also trigger the prosecution of a state, if it emerged during proceedings that a state might be ultimately responsible; this too would have to be approved by the Council.

How liberal or conservative was this statute? Considering the nineteenth-century definition of liberalism (supporting liberty, penal reform, equality before the law, parliamentary government), the statute had some liberal elements. It was not to apply law retroactively; the accused would not be imprisoned during the proceedings; punishments did not only include prison but might include civil confinement or the payment of reparations; the death penalty was explicitly excluded because, the drafters wrote, "the contemporary moral conscience rejects [it]".[47] On the conservative side, several aspects of the statute preserved state power and the

[45] The commission started with a draft written by Pella, which was partly based on the International Law Association's draft. That draft had been largely shaped by Bellot, but ILA members had pushed for greater protection for the individual rights of defendants. Bellot also participated in the AIDP drafting project, and jurists such as Donnedieu de Vabres and Roux made important contributions. For some of the drafting issues, see Association Internationale de Droit Pénal, 1928, pp. 21–49, see *supra* note 37.

[46] Arts. 35 and 36, *ibid*., p. 43.

[47] *Ibid*., p. 32.

role of the Great Powers on the Council. Only states could have filed criminal complaints with the court, not individuals or representatives of minority groups; this prevented access to the citizenry of the world. The League Council, which had to reach its decisions unanimously, would have controlled which cases were actually heard; hypothetically it might have quashed cases when powerful states were accused. The drafters, however, did not see it this way, contending that the League Council would have protected states from the "continual menace of unseasonable prosecutions".[48] In the sense that conservatism means conserving the existing order, the statute did not specify any sanctions in case a state refused to extradite a suspect, so the statute did not solve this important problem. Finally, the statute stated that sitting heads of state did not have to testify, which might have significantly restricted a prosecution. Maintaining immunity based on political standing contradicted the liberal value of equality before the law.

The AIDP never succeeded in getting the League to consider its statute, much less pass it.[49] The central reason is that between 1926 and 1929 the League was preoccupied with revising the statute of the Permanent Court of International Justice to meet US demands. The United States had not acceded to the court but was willing to entertain the possibility if it could have an effective veto over the court's power to issue an advisory opinion on any question affecting US interests. The League appointed a committee of jurists to rewrite the statute along these lines in 1929, but after doing so, the US Senate still rejected ratification.[50] This project did not involve a criminal chamber. In any case, neither the League's Committee of Jurists nor the League's Legal Section were interested in taking up the idea of a criminal chamber. Carton de Wiart and Pella lacked the diplomatic weight to move the Council to act, plus there was little enthusiasm in the mid-1920s for an international jurisdiction, as states were divided into those that asserted territorial jurisdiction versus those that asserted extraterritorial jurisdiction.[51]

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48 *Ibid*., p. 29.

49 Lewis, 2014, pp. 110–113, see *supra* note 2.

50 F.P. Walters, *A History of the League of Nations*, Greenwood Press, Westport, CT, 1986 [1952], pp. 351–54.

51 J.J. Brierly, "Progressive Codification of International Law. Criminal Competence of States in Respect of Offences Committed Outside Their Territory", 14 December 1925, C.P.D.I.26, in League of Nations. Committee of Experts for the Progressive Codification

15.5. Drafting a Global Penal Code, 1930–1935

Instead of giving up on the international criminal court project, the AIDP pressed ahead with defining the international code that the court would use. Several developments, philosophical and political, influenced the organisation's decision. Philosophically, the drafters of the 1928 court statute believed that criminal law had to be based on positive legal codes. The Hague and Geneva Conventions, for example, did not specify precise penalties or even define violations as crimes incurring individual liability. Plus, the League Assembly in 1920 had shot down Descamps' proposal because there was not yet an international penal code. In 1925 (as mentioned above) another international organisation, the Inter-Parliamentary Union, started working on a code. This body comprised parliamentarians who had formed a type of non-official world parliament to codify international law and serve the cause of world peace. Pella, who was a member of the Romanian parliament, was active in the organisation, which had charged him with the task of defining the criminal acts – in this case, those dealing with individuals – that would go into the code.[52] Caloyanni believed that the parliamentarians were politically influential, so he wanted to create a code whose ideas would harmonise with the Inter-Parliamentary Union's. "[I]ts draft is prepared not only by jurists, but at the same time by parliamentarians, some of whom today occupy important positions in their country and even hold the portfolio of Minister", he said.[53]

Another important factor was the Kellogg-Briand Pact, signed by 14 states in August 1928 (later signed by 47 in total), which outlawed war

of International Law. Criminal Competence of States in Respect of Offences Committted Outside their Territory. C.50.M.27.1926.V.

[52] Union Interparlementaire, *Compte rendu de la XXIIIe conférence tenue à Washington du 1er au 7 octobre et à Ottawa le 13 octobre 1925* [Interparliamentary Union, Summary of the XXIIIrd Conference Held in Washington from the 1st to the 7th October and in Ottowa on 13 October 1925], Payot, Lausanne, 1926, pp. 45–50. See also "Procès-Verbaux de la Commission chargée de la rédaction d'un projet de code répressif international [Minutes of the Committee Charged with Writing a Draft International Repressive Code. Meetings of 11 and 13 January 1930]", in *Revue internationale de droit pénal*, 1930, vol. 7, pp. 255, 276–77.

[53] "Commission de rédaction d'un projet concernant les infractions internationales et leur sanctions" [Drafting Committee for a Draft Concerning International Infractions and Their Penalties. Meeting of 10 January 1933], in *Revue internationale de droit pénal*, 1935, vol. 12, p. 339.

as an instrument of national policy. American pacifists and religious reformers had formed a popular anti-war movement in the 1920s that pressured the US government to back such a pact instead of simply an international arbitration treaty. American, Canadian and British intellectuals and policy advisers also helped persuade US Secretary of State Frank Kellogg and French Premier Aristide Briand to negotiate a broad international agreement that would require the pacific settlement of disputes, rather than a more limited mutual security pact between the United States and France.[54]

For AIDP jurists, however, the Pact was vague and even seemed to be a retrogressive step, since the AIDP had voted in 1926 to create an international criminal jurisdiction with competence over both individuals and states, and the League Assembly, in 1924, had already declared that an aggressive war was an international crime. Donnedieu de Vabres and Pella pointed out that the Pact did not define aggression, an extremely complex issue, given all the possible ways that a state or non-state actor could threaten another state without necessarily starting a war. The Pact did not contain any penalties for violators or specify the authority that would determine whether a war was illegal. It did not state when self-defence was legitimate and at what point a state that entered a war to defend itself from an aggressive attack was guilty of using "excessive force". The Pact was not integrated with the League Covenant, which allowed other states to go to war to defend another League member if it had been illegally attacked.[55] When the AIDP learned that a special League of Nations "committee of experts" intended to examine the Pact and its relation with the League Covenant, the AIDP decided at its 1929 conference in Bucharest that this League committee should consider the AIDP's 1926 resolution for an international criminal jurisdiction encompassing both states and individuals. This essentially meant that the AIDP wanted to see a real criminal enforcement system for Kellogg-Briand, and not take a step backwards and accept that a general pact renouncing war was the last word on the matter.[56]

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54 Gorman, 2012, pp. 259–84, see *supra* note 44.

55 See Pella and Donnedieu de Vabres's discussion of these issues in Procès-Verbaux de la Commission chargée de la rédaction d'un projet de code répressif international [Meetings of 11 and 13 January 1930], 1930, pp. 294–300, see *supra* note 52.

56 See Pella's statement in *ibid*., pp. 257–58.

The AIDP formed a drafting committee to write the international criminal code, this time including Caloyanni (the chairman), Pella (the rapporteur), Donnedieu de Vabres, Mercier, Roux, Saldaña (who never attended meetings) and Emil Stanisław Rappaport, a criminal law professor from the University of Warsaw. The Yugoslav law professor and AIDP member Thomas Givanovitch later joined the committee. The committee held three meetings in 1930, 1931 and 1933 (always in January), with Pella finally producing a draft sketch in 1935 that was very similar to a more detailed report and projected code that he had presented to the Inter-Parliamentary Union in 1925.[57] The committee's three meetings were filled with legal disputes (which were entirely natural) but were hampered by controversies over the committee's working method and by the fact that various members were absent from different meetings. In fact, all members never met in the same place at the same time.

In January 1930 the key issues were whether the committee should first work on a code dealing with states or individuals; what should be done in relation to Kellogg-Briand; what types of infractions, based on other jurists' lists, should they include; whether there should be a public prosecutor; and whether they should collaborate with the International Law Association, since that had been a fruitful relationship when the AIDP brought Hugh Bellot onto its committee to draft the international criminal court statute of 1928. The controversy of starting with states versus individuals was settled in favour of individuals, mainly because this was easier to swallow from a traditional legal point of view. However, Pella, Donnedieu de Vabres and Rappaport all affirmed that the criminality of states had to be developed as a legal concept,[58] and the AIDP had already declared in 1926 its intention to create a two-track system of repression. The discussion about Kellogg-Briand was wide-ranging in its criticisms (some of which I enumerated above), though not much was decided other than the fact that they needed a clear definition of aggression. The controversy over whether there would be a public prosecutor was not

[57] Union Interparlementaire, 1926, pp. 204–42, esp. pp. 217–18, see *supra* note 52.

[58] For Rappaport's position in favour of a type of international criminal law that would repress the actions of collectivities, not just individuals, in the interest of social defence, see Emil Stanislaus Rappaport, *Le problème du droit pénal interétatique* [The Problem of Inter-State Criminal Law], Warsaw, 1930, League of Nations Archive (Geneva), Brochure and Pamphlet Collection: Droit International-Criminal, Location: B 65/shelf 10, Box 4/folder 15, pamphlet #258.

settled; jurists pointed out that the 1928 criminal court statute did not include one, and British and US jurists, whose support the AIDP eventually hoped to obtain, did not support one. The issue, though, was never raised again in later AIDP committee meetings. More significant was the fact that Caloyanni was able to obtain the collaboration of the ILA's Secretary General, Wyndham Bewes, who attended the meeting in 1931 (but not 1933). He acted in a private capacity but affirmed it was possible to reconcile the differences between Anglo-American and continental European law. This mainly had a symbolic effect on the committee, which believed that its project would be more truly international with ILA participation.

In addition to Bewes's participation, the main event during the 1931 meeting was that Pella presented an extensive oral report, giving his vision of an international code.[59] Briefly, it would be based on three principles: the international code must specify precise definitions of crimes (upholding the principle of *nullum crimen sine lege*); it would have primacy over national law when they were in conflict; and it would apply when a violation was committed on the territory of a signatory or when a violation was directed against a signatory. (Thus, if the violator was from a country that had not signed the code, but the injured party was, the code would apply.) For the system of punishments, he proposed two options. Crimes specified in the international code, such as a head of state who declared an aggressive war, could be "assimilated" to a particular crime in a national code (such as treason), and the penalty for that crime would apply. The other option was that the drafters could take the most common punishments from national codes (be they warnings, fines or prison) and write them into the code using non-controversial language. The international criminal court would then use these as guidelines. On a practical level, the League would assign a particular state to administer the sentence, whether it was confinement in a special wing of a prison or civil confinement in a non-penitentiary-type institution. Pella also intended that the code would have a special section defining culpability when a defendant was following a legitimate authority, though he did not indicate how he might define a legal defence of superior orders. Finally, he cited a series of concepts from "social defence" theory – judicial stays, conditional

[59] "Procès-Verbaux des travaux de la Commission chargée de la rédaction d'un projet de code pénal international [Minutes of the Work of the Committee Charged with Writing a Draft International Criminal Code. Meeting of 10 January 1931]", in *Revue internationale de droit pénal*, 1931, vol. 8, pp. 194–204.

liberty, pardons, defences under statutes of limitations – that would have to be worked out by the committee. However, the committee never debated these issues, so they were not included in the 1935 draft.

Pella in 1931 envisioned a second section of the code that would list the infractions applicable to states and individuals, just as he had done in 1925. He advanced two criteria for crimes that rose to the international level: they had to threaten international peace, and they could not be objectively adjudicated in a national court. As Pella told the committee,

> [t]he experience of the repression of crimes committed during the Great War, the fact that the inter-Allied tribunals were not able to function because they were supposed to be excessively severe, the circumstance that the judgment of the Leipzig court was the object of rather serious criticism, all that reinforces the objections against an excessive indulgence of national jurisdictions and necessarily compels the creation of an international jurisdiction.[60]

As for specific infractions, he urged that the committee think creatively. "To make a complete list in this matter is more a question of imagination than a legal question", he said, suggesting that the committee members should ponder the various possibilities that might lead to war or threaten international stability.[61] His own legal imagination naturally led him to the scenario of a head of state who declares a war (though interestingly he did not state that it had to be an illegal war) and a diplomat who abuses his privileges by working against the interests of a foreign state. Additionally, the code should cover terrorism and counterfeiting (both of which he had believed since the 1920s to be crimes that could disturb international relations), as well as disseminating pro-war propaganda and publishing documents that could "aggravate an international situation".[62] Regarding violations of the laws of war, he primarily saw these as limits on the means of warfare that states would use during a policing action against an aggressor. He maintained that various types of violations, including the execution of hostages, the destruction of merchant marine ships and the destruction of populations by epidemic diseases (biological warfare), were all illegal under a state's common law, so the committee should just draft a text that gave the international criminal court the com-

[60] *Ibid*., p. 200.
[61] *Ibid*., p. 201.
[62] *Ibid*.

petence to apply the national law of the accused. According to one of his more controversial positions, states should not be able to give asylum to persons accused of political crimes when they were sought by the international criminal court. A crime such as counterfeiting had "exceptional gravity" and therefore could not be considered a political crime eligible for extradition,[63] a position he later took with terrorism. His fundamental argument was that under the League of Nations Covenant, states were supposed to respect the sovereignty and territorial integrity of other League members; therefore, they should not provide assistance or asylum to persons who intended to injure League members.[64]

His positions regarding the source of law for the punishments and the treatment of political crimes were the most controversial within the committee, especially for Roux (who was French) and Mercier (who was Swiss). Roux wanted the international code to specify the penalties rather than having the court assimilate them from national codes. Furthermore, Roux did not want the international criminal court to handle political crimes, arguing that this would politicise the court and make it unstable. Mercier thought the same:

> It will be extremely dangerous to send acts considered political to the Permanent Court of International Justice[65] […]. In the same way that a State does not want to meddle in the domestic questions of foreign states, likewise would the international Court not be able to take on the judgments of these questions without running the same risks.[66]

Mercier argued that above all states signed various extradition conventions with each other that defined which crimes were extraditable and which were not, and Pella's interpretation of the League Covenant did not change that fact.[67]

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63 Vespasien V. Pella, *La coopération des États dans la lutte contre le faux monnayage. Rapport et Projet de convention présentés à la Société des Nations* [The Co-operation of States in the Struggle against Counterfeiting. Report and Draft Convention Presented to the League of Nations], Editions A. Pedone, Paris, 1927, p. 13.

64 Procès-Verbaux des travaux de la Commission chargée de la rédaction d'un projet de code pénal international [Meeting of 10 January 1931], 1931, pp. 217–20.

65 The reader will recall that the AIDP's 1928 statute created two chambers inside the Permanent Court, rather than creating a separate court.

66 Procès-Verbaux des travaux de la Commission chargée de la rédaction d'un projet de code pénal international [Meeting of 10 January 1931], 1931, pp. 216, see *supra* note 59.

67 *Ibid*., p. 215.

Apparently there was no meeting in 1932, and when the committee met again on 10 January 1933, the only members who attended were Caloyanni, Rappaport, Givanovitch and Donnedieu de Vabres. Pella was ill, getting medical treatment in Vienna, while Roux was absent because his son-in-law had been in some type of serious accident. Strikingly, the AIDP's drafting project (which technically began in 1929, when Caloyanni first sent a questionnaire to the committee) had started as a highly utopian project which the members thought was realisable, given the "spirit of Geneva" and the fertile intellectual work that the jurists had been involved in during the 1920s. But at the start of 1933 the international situation was in crisis. The Great Depression had spread across Europe; the collapse of the banking system and the decline in international trade caused massive unemployment in the Western industrialised countries as well as severe plunges in agricultural prices in Eastern Europe. The League's collective security system had failed in 1931, as members refused to take action against Japan for invading the Chinese province of Manchuria. The Nazi party had grown from a fringe party in Germany to the party obtaining the largest number of seats in the German parliament in the summer of 1932; Hitler became Chancellor on 30 January 1933, a few weeks after the AIDP's 1933 meeting.

On 10 January Rappaport commented on the general situation without naming specifics, hoping against hope that the AIDP could propel the project in spite of what he called the "political disorder and legal disorder".

> [T]he moment of our labours was unfavorable, the world finds itself in the presence of great difficulties of every kind; the general spirit, however, is not hostile to certain ideas of condemning certain acts that affect international peace; we must therefore carry out the work, pressing hard and above all not let others surpass us.[68]

He thought it was especially important to focus their work on the criminal repression of states, rather than individuals, first because individuals were already governed by domestic laws, and second because the League's Disarmament Conference had various plans on the table to sanction states that did not abide by terms to reduce their militaries and armaments. Caloyanni, though, stated that they had to start with a code for individuals

[68] Commission de rédaction d'un projet concernant les infractions internationales et leur sanctions [Meeting of 10 January 1933], 1935, p. 345, see *supra* note 53.

first, since a code for states raised more obstacles. He noted that the Inter-Parliamentary Union, which had met in Geneva in March–April 1932, had decided to concentrate on individuals first, and being politicians, that group was in a better position to know "whether the work of interstate law was already ripe or not".[69] Additionally, Caloyanni had learned in December 1932 that the ILA had agreed formally to collaborate with the AIDP, but it is unclear whether any meetings were held. Ultimately the AIDP committee agreed to engage in a general exchange of views at its next conference in Palermo in April 1933, then meet again the following year.[70]

Two years later, on 15 March 1935, Pella presented a report giving a sketch of the proposed world penal code.[71] Dubin speculates that Pella published it at this point because the next month, a special League committee was going to start working on a convention outlawing international terrorism, and Pella wanted to present an overall code to show how the repression of terrorism was supposed to fit into a broader international criminal jurisdiction.[72] This is possible. There is also the curious fact that the date Pella picked to sign the report (15 March 1935) was one day before Nazi Germany violated the terms of the Versailles Treaty by declaring general military conscription. His text was published in *Revue internationale de droit pénal* later that year, so he could have added that date at the end of his article later to make a symbolic point that his world system would have led to criminal charges against the Nazis.

The 1935 sketch used many of the same basic state and individual infractions that were in Pella's 1925 report, indicating that the 10-year interval and the committee's discussions had not changed the project significantly. For example, the crime of supporting armed bands that prepared or carried out an attack against a foreign state was in both documents; so was intervention into another state's internal affairs, recruiting troops and building up armaments beyond limits specified by treaty, conducting military moves designed to demonstrate belligerence, menacing another state with ultimatums of war and counterfeiting another state's

69 *Ibid*., p. 347.

70 *Ibid*., p. 344.

71 See "Plan d'un code repressif mondial. Rapport de M. Vespasien V. Pella" [Draft of a World Repressive Code. Report by Mr. Vespasien V. Pella], in *Revue internationale de droit pénal*, 1935, vol. 12, pp. 348–369.

72 Dubin, 1991, p. 25, see *supra* note 16.

currency. His 1925 report had made "aggressive war" the very first crime in the list without defining it, but the 1935 sketch broke it down into separate pieces. A state could be indicted for a war declaration; invasion or attack with terrestrial, maritime or aerial forces; a naval blockade; or the aforementioned support for armed bands. The 1935 sketch included infractions that his 1925 report did not, namely prohibitions against chemical, incendiary and biological weapons, and terrorist infractions, such as attacks against foreign public officials and international transportation networks. The introduction of terrorism-type offences, an issue that the AIDP had been discussing since the late 1920s, became more urgent in the mid-1930s as a result of high-profile assassinations (one of which is discussed below). Importantly, Pella did not deal with the controversial issues raised during the AIDP meetings, such as the public prosecutor, the extradition of political crimes or the system of punishments.

Pella then mapped various state infractions to individual infractions, so a head of state or other person, for example, could be held criminally liable for ordering an invasion or a blockade. Likewise, an individual could be held liable for participating in an armed band that invaded another state. Diplomats could be held criminally liable if they misused their privileges to execute an attack against a state or "public international order". There were also individual offences designed to repress pro-war propaganda, such as "spreading false documents or false news capable of compromising international relations", and committing an "outrage" against a foreign state by accusing it of "manifestly inexact actions" designed to "provoke hatred or mistrust" against that state.[73] These infractions left a lot of latitude for interpretation and might easily conflict with liberal principles of free speech and free press. The penultimate infractions on the list were crimes committed during international armed conflict: "international military offences and infractions of common law committed by civilians or military personnel belonging to an occupying authority in occupied territory". This language was taken directly from the AIDP's 1928 criminal court statute. Although Pella had disparaged the laws of war in his 1925 book, *The Collective Criminality of States*, arguing that it was absurd to speak of the laws of war once war was turned into a crime,[74] he backed away from that position in 1931, arguing that the

[73] Plan d'un code repressif mondial. Rapport de M. Vespasien V. Pella, 1935, p. 368, see *supra* note 71.

[74] Pella, 1925, pp. 10–11, 56–7, see *supra* note 35.

laws should govern the use of legitimate force, akin to the laws that govern a police officer who makes an arrest.[75]

The 1935 plan was a type of criminological international liberalism, utopian in nature. It contained the AIDP's earliest ideas about social defence on the international level but did not solve the question of political crimes, arrest and extradition that became central in the 1930s. As a sketch, the code was incomplete and not likely to get significant governmental support, especially as more violations of international law and treaties followed in the late 1930s. After the Second World War Pella wanted his draft to serve as a model for the International Law Commission's Draft Code of Offences against the Peace and Security of Mankind, though the Commission was actually charged with trying to create an international legal code based on the Nuremberg Judgment. That decision took as a given that an international tribunal could prosecute individuals for violations of the laws and customs of war and also tried to create individual criminal liability based on the Kellogg-Briand Pact. More controversial was the concept of conspiracy to prepare and wage crimes against the peace, a concept that was not contained in Pella's code and not discussed by the AIDP in the interwar period.

15.6. A Conservative Transformation to Protect States against Counterfeiting and Terrorism

During the same period that the AIDP was working on the world criminal code, its jurists turned to issues related to the internal security of states – counterfeiting and terrorism – stressing a more conservative ideology. The AIDP's involvement in these problems was a reaction to revisionism in Europe, meaning efforts by the losers of the First World War to overturn the Paris Peace Treaties and regain some of the territories that they had lost in Central and Eastern Europe. AIDP jurists also responded to domestic fears in their own countries about political assassinations and terrorist attacks committed by groups on the extreme left and right that received money and sanctuary from foreign governments. There were two specific criminal cases that exercised AIDP jurists: a 1925 plot by Hungarian nationalists (including a prominent Hungarian noble and members of the military's Cartographic Institute) to print and circulate millions of

[75] Procès-Verbaux des travaux de la Commission chargée de la rédaction d'un projet de code pénal international [Meeting of 10 January 1931], 1931, p. 203, see *supra* note 59.

counterfeit French francs throughout Europe, and a 1934 plot in which a Croatian terrorist organisation assassinated the French Foreign Minister and King of Yugoslavia in Marseille, France.

Counterfeiting foreign currency had turned into a major problem in Europe after the First World War, first because refugees with the technology and know-how freely circulated around Europe, and second because certain ultra-nationalists (especially in Hungary) wanted to counterfeit the currency of states such as Czechoslovakia and France in order to weaken their financial systems. This was a real concern in the early to mid-1920s, when governments faced high debt, price inflation and devalued currency. In the Hungarian counterfeiting case, Hungarian nationalists intended to use the proceeds either to influence elections in Slovakia, which had been part of Hungary before the First World War, or to prepare an attack against Romania to recover Transylvania.[76] This threatened the system of diplomatic alliances that France had created in Eastern Europe after the First World War. Counterfeiting French currency threatened France itself, which experienced a serious currency devaluation and period of governmental instability in 1925–1926.[77] Many of the jurists in the AIDP were French or from its Eastern European allies, so they were extremely concerned that international counterfeiting was an attack against the borders established by the Paris Peace Treaties. From their perspective, when the Hungarian government finally put the counterfeiters on trial, the penalties for forging a foreign currency were not as stiff as counterfeiting the national currency, and the French government, whose currency had been forged, did not have legal standing in the case. The trial also raised the possibility that the perpetrators could claim they acted from patriotic motives (to recover Slovakia and Transylvania) and that therefore their crime was political and not eligible for extradition to France, should it wish to prosecute them.

In the 1934 Marseille assassinations, the plot was organised by a group of fascist Croatian separatists, the Ustaša, who since 1929 had bombed train lines between Austria and Yugoslavia and murdered pro-Yugoslav journalists and officials in order to weaken a Serbian centralist

[76] David Petruccelli, "Banknotes from the Underground: Counterfeiting and the International Order in Interwar Europe", in *Journal of Contemporary History*, pre-published 2015, DOI: 10.1177/0022009415577003; Andor Klay, "Hungarian Counterfeit Francs: A Case of Post-World War I Political Sabotage", in *Slavic Review*, 1974, vol. 33, no. 1, pp. 107–13.

[77] Petruccelli, 2015, see *supra* note 76.

dictatorship and spark a Croatian separatist uprising.[78] Here the legal issues were intertwined with political ones. France had arrested several of the Ustaša operatives in Marseille (the actual assassin, a paid Macedonian terrorist, had been killed in the melee after the murders), but it could not obtain custody of several Ustaša leaders who were living in fascist Italy and Austria, because those countries were succouring the Ustaša as a way to destabilise Yugoslavia. Another problem was that the French police attempted to work with the Austrian and Hungarian police forces in its investigation, but since these police agencies had tolerated the presence of Ustaša on their territories, they were more interested in concealing information than helping.[79] Furthermore, Yugoslavia argued in the League of Nations that Hungary, striving to regain territories lost after the First World War, had actively supported the Ustaša, and Hungarian support for foreign armed groups should be viewed as a violation of the League Covenant. Overall, then, these were politically charged cases that brought questions of extradition, political asylum for so-called political crimes, police co-operation and state support for counterfeiting and terrorism to the fore.

The League of Nations became the forum for negotiating two conventions in response: the International Convention for the Suppression of Counterfeiting, a project begun in 1926 and completed in 1929, and the Convention for the Repression and Punishment of International Terrorism, negotiated between 1935 and 1937.[80] The counterfeiting convention required that states pass legislation that they would prosecute cases of both domestic and foreign counterfeiting and issue penalties with the same degree of severity, as well as fulfil extradition demands in accordance with their own national laws (which was not an absolute requirement

[78] Bogdan Krizman, *Ante Pavelić i Ustaše* [*Ante Pavelić and the Ustaša*], Globus, Zagreb, 1978, pp. 68–83; James J. Sadkovich, *Italian Support for Croatian Separatism, 1927–1937*, Garland, New York, 1987, pp. 125–9; Arnold Suppan, *Jugoslawien und Österreich 1918–1938. Bilaterale Aussenpolitik im europäischen Umfeld* [*Yugoslavia and Austria 1918–1938. Bilateral Foreign Politics in the European Environment*], Verlag für Geschichte und Politik, Vienna, 1996, pp. 395–414; Jozo Tomasevich, *War and Revolution in Yugoslavia, 1941–1945: Occupation and Collaboration*, Stanford University Press, Stanford, CA, 2001, pp. 17–33, 49–61; Mario Jareb, *Ustaško-domobranski pokret: od nastanku do travnja 1941. godine* [*The Ustaša-Home Guard Movement: From Its Founding to April 1941*], Školska knjiga, Zagreb, 2006, pp. 215–45, 303–43.

[79] Mark Lewis, "The Failure of the Austrian and Yugoslav Police to Repress the Croatian Ustaša in Austria, 1929–1934", in *Austrian History Yearbook*, 2014, vol. 45, pp. 186–212.

[80] Dubin, 1991, see *supra* note 16.

to extradite).[81] The terrorism convention defined terrorism as assassination of public officials, destruction of public property or "any wilful act calculated to endanger the lives of members of the public".[82] The convention only covered international actions, defined as acts in which perpetrators of one nationality carried them out in another country or when the perpetrators obtained refuge in another country. As in the counterfeiting convention, signatories were not absolutely required to extradite the accused, as extradition remained subject to a state's own laws or practices.[83] The inclusion of this clause was supported by Britain, Denmark, Sweden and Switzerland, which did not want to limit their right to offer political asylum.[84]

The AIDP had input into these conventions because four of its key members, Carton de Wiart, Pella, Givanovitch and Simon Sasserath (a Belgian criminal lawyer attached to the Belgian appellate court) were involved in the negotiations. Pella was selected to be on special League committees that wrote the drafts of both conventions. In fact, he provided the initial draft of the counterfeiting convention,[85] while the initial draft of the terrorism convention came from the French government.[86] Carton de Wiart was the president of the committee that wrote the terrorism convention, while Pella, Sasserath and Givanovitch represented their respective states during the diplomatic negotiations that finalised the terrorism convention in 1937. Thus, several main figures from the AIDP pressed their ideas about unifying criminal jurisdictions and eliminating "political crimes" from the list of non-extraditable crimes. Furthermore, Pella pro-

[81] Ernestine Fitz-Maurice, "Convention for the Suppression of Counterfeiting Currency", in *American Journal of International Law*, 1932, vol. 26, no. 3, pp. 541–46.

[82] League of Nations, Convention for the Prevention and Punishment of Terrorism, Art. 2(3), in *Proceedings of the International Conference on the Repression of Terrorism*, League of Nations, Geneva, 1938, C.94.M.47.1938.V., p. 5.

[83] Article 8(4), in *ibid*., p. 7.

[84] League of Nations, "Records of the Seventeenth Ordinary Session of the Assembly, Meetings of the Committees, Minutes of the First Committee, Constitutional and Legal Questions", in *Official Journal Special Supplement No. 156*, Geneva, 1936, p. 47.

[85] Pella, 1927, pp. 125–31, see *supra* note 63.

[86] League of Nations, *Bases pour la conclusion d'un accord international en vue de la répression de crimes commis dans un but de terrorisme politique* [Bases for the Conclusion of an International Agreement Regarding the Repression of Crimes Committed with the Goal of Political Terrorism], 10 December 1934, Geneva, C.542.M.249.1934.VII, in v. 1380 (Council and Member States Documents 1934.C.483.M.210 to C.583.M.274), League of Nations Archives (Geneva).

pelled the idea that the terrorism convention should also contain a statute for an international criminal court, which would serve as a third option for states: they could prosecute accused terrorists in their own courts, extradite them to other adherents to the convention, or send them to the international criminal court if they feared that the trials in another state would not be fair, or if they did not want to try the person at home, perhaps because the perpetrator's motives were supported by the public. However, the concept of the court was still extremely controversial and was ultimately made the subject of a separate convention, which was only signed by twelve states and never implemented.[87] Britain strongly opposed the court, arguing that national courts were more efficient, and "harm was done to international institutions generally by the establishment of an institution not supported by the general assent of public opinion".[88] Pella argued, however, that a state would still retain its right to use its own courts to prosecute cases, as well as to decide whether an offence was political. Still, there was a catch: if the state's jury found the offence political and hence non-extraditable, "the country was still responsible from an international point of view", Pella stated. "What was then the solution? Only one solution remained – namely, to refer the case to the international criminal court".[89] The bargain, then, was that states would relinquish some of their sovereignty in favour of expanded international responsibility, which, according to Pella, would maintain international solidarity and peace.

The AIDP maintained that the counterfeiting and terrorism conventions were progressive developments that ensured public security (social defence) and promoted more efficient police and judicial communication across borders – concepts first included in the 1910 International Convention for the Suppression of the White Slave Traffic and the 1923 International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications. However, liberal organisations opposed the terror-

[87] For the text of both conventions, see League of Nations, *Proceedings of the International Conference on the Repression of Terrorism*, Geneva, 1938, C.94.M.47.1938.V., pp. 4–33. By 1938 the criminal court convention was signed by Belgium, Bulgaria, Cuba, Spain, France, Greece, Monaco, the Netherlands, Romania, Czechoslovakia, the USSR, and Yugoslavia.

[88] League of Nations, *Proceedings of the International Conference on the Repression of Terrorism*, p. 54, see *supra* note 82.

[89] *Ibid*., p. 69.

ism convention because they feared it would give excessive repressive power to authoritarian states in the 1930s. This was indeed a legitimate concern, since both fascist Italy and the Soviet Union participated in the special League committee that wrote the terrorism convention, and both aggressively imprisoned political dissidents in the 1920s and 1930s.[90] The Howard League for Penal Reform, an anti-death penalty organisation in Britain that worked with the AIDP in the 1920s and 1930s to create standard minimum rules for the treatment of prisoners, urged the British government in 1935 to

> take the lead at Geneva in proposing a Convention on the lines of the Standard Minimum Rules which have been prepared by the International Penal and Penitentiary Commission and twice circulated to Governments by resolution of the Assembly. Such a convention should apply to the treatment of all persons deprived of their liberty for any offence, suspected or proved, political or non-political, and to all places where such prisoners are detained, whether police cells, prisons, concentration camps or other places of detention.[91]

The Howard League also stated that even if the terrorism convention were passed, some states would refuse to extradite suspects, which would still cause international friction, the very problem that the convention aimed to solve.

Emily Balch, a feminist-pacifist who helped found the Women's International League for Peace and Freedom ('WILPF'), presented a different set of liberal concerns. The WILPF was a radical anti-war organisation that grew out of the International Conference of Women at The Hague, held in 1915. In 1935 Balch wrote to Mussolini and the Secretary-General of the League of Nations to recommend that the terrorism convention frame

> the suggested provisions in such a way that they cannot be misused to prevent legitimate movements of political protest. It appears to the W.I.L.P.F. important to do nothing that might increase the present tendency of governments to as-

[90] On the origin of the Soviet camp system, see Anne Applebaum, *Gulag: A History*, Anchor Books, New York, 2004, pp. 3–57.

[91] Craven to Secretary of State for Foreign Affairs, 27 March 1935, League of Nations Archives (Geneva), R. 3758/15085/15105 ('LNA').

> sume that the maintenance of order and stability is possible only under a regime of suppression of liberty and normal human rights.[92]

The British government also opposed the convention on liberal grounds, expressing opposition to the requirement for extradition as well as a proposal to criminalise "private incitement" to commit terrorist acts. According to British delegate Sir John Fischer Williams, this "had an air of prying into private life and confidential communications. Moreover, private incitement was extremely difficult to prove, and any attempt to prove it probably meant using tainted evidence".[93] Pella's solution to this question was to drop the word "private" and only criminalise incitement if it was successful.[94]

The terrorism convention was signed by a number of dictatorial Eastern European, Caribbean and Latin American states,[95] suggesting that they saw value in an international system that would require the prosecution or extradition of persons who attacked their government officials and infrastructure. Advocates of strong state security found much to like in a system where all signatories would have to criminalise terrorist conspiracies and tighten their passport regulations.

15.7. Criticism of Authoritarian Systems

Those types of measures, as well as eliminating asylum for political criminals and creating an international legal system that states of all ideological stripes could take advantage of, may indeed seem illiberal. Yet during the same period of the 1930s, Donnedieu de Vabres and Pella, two of the AIDP's leading lights, criticised authoritarian measures in several settings. Nazi Germany in 1933 began requiring the sterilisation of the "hereditarily ill" according to a new law, and while this did not originally cover criminals or persons the Reich defined as "asocial", special health

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92 Balch to the Committee for the International Repression of Terrorism, the Secretary-General, and Mussolini, 30 April 1935, LNA/R. 3758/15085/17788.

93 League of Nations, *Proceedings of the International Conference on the Repression of Terrorism*, p. 90, see *supra* note 82.

94 *Ibid*., p. 91.

95 By 1938 the anti-terrorism convention was signed by Albania, the Argentine Republic, Belgium, India, Bulgaria, Cuba, the Dominican Republic, Egypt, Ecuador, Spain, Estonia, France, Greece, Haiti, Monaco, Norway, the Netherlands, Peru, Romania, Czechoslovakia, Turkey, the Soviet Union, Venezuela and Yugoslavia.

courts invented a loophole to include them.[96] Donnedieu de Vabres, however, opposed this measure for France. In a 1935 article that he published in the IKV's German journal, he took several liberal positions: the sterilisation of criminals should not be included in a new French penal code (despite the fact that some French medical societies wanted to include it); the mentally insane should not be given terms of confinement of an indeterminate length; and a doctor who hurt a patient due to negligence should be held criminally liable.[97] He opposed sterilisation because, he wrote, American and German use had not been proven effective in reducing crime, the procedure was not innocuous "from a physiological and psychological point of view, [and] its necessity in the struggle against hereditary criminality evoke too many doubts".[98]

Pella was strongly opposed to the unlimited detention of political prisoners. As he told the League Assembly in 1935, while the League was considering whether it should pass a standard set of rules for the treatment of prisoners (a project that had been blocked by the French and German governments since 1930),[99]

> [t]o deprive individuals of their liberty without informing them of the reasons for such action, without enabling them to plead not guilty, to leave them to perish morally and physically in prison cells, and even to forget their existence, was neither humanitarian nor was it elementary criminal justice.[100]

He also spoke out at the same time about the need for standard rules for prisoners to prevent abuses. At the time, violence was used to extract confessions from prisoners: female detainees were supervised by men, not women; prisoners were overworked and undernourished. He strongly defended the right to defend oneself against criminal charges:

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96 Michael Burleigh and Wolfgang Wippermann, *The Racial State: Germany 1933–1945*, Cambridge University Press, New York, 1991, pp. 135–40, 167–68.

97 H. Donnedieu de Vabres, "Les Médecins et la réforme du Code pénal", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1935, vol. 55, pp. 354–83.

98 *Ibid*., p. 365.

99 Dubin, 1991, pp. 28–29, see *supra* note 16.

100 See Pella's statement in Penal and Penitentiary Questions: Report of the Fifth Committee to the Assembly, in League of Nations, *Official Journal. Special Supplement No. 142. Records of the Sixteenth Ordinary Session of the Assembly. Meetings of the Committees. Minutes of the Fifth Committee (Humanitarian and General Questions)*, Geneva, 1935, p. 51.

> In any social organisation, whether based on liberalism, regarding the individual or mankind as the starting-point of its institutions, or whether it favoured the conception of a national state or simply the organic conception of the people, one fact was certain- namely, that, unless minimum guarantees were set up for the exercise of the right of defence, the idea of criminal justice was inconceivable.[101]

Here he was referring to the three dominant political ideologies at the time: the liberal state, based on individual freedom and rights; the fascist state, based on the dominance of the nation-state; and the *völkisch* Nazi state, based on the "organic" community of the people.

Donnedieu de Vabres took similar positions when he gave a series of lectures about the criminal policies of authoritarian states (fascist Italy, Nazi Germany and the Soviet Union) at the University of Damascus in 1937, which he rewrote and published in 1938. These three penal systems were anti-liberal he said, and all their underlying ideologies had rejected the nineteenth-century liberal state. He criticised the Italian system for increasing the types of political crimes that were prosecuted, which was based on the fascist Italian concept that the individual was insignificant and had to serve the state. He noted that the Nazi penal system did not judge people according to their objective acts but also according to their psychological intentions, and he further noted that the Nazis had legalised the forced sterilisation of socially undesirables and the mentally ill, all in the name of protecting the German race. The Soviet system, he argued, rejected "bourgeois" liberalism in the name of "revolutionary legality", so criminal proceedings were used to attack class enemies and protect the nationalisation of property. He roundly defended the French system of criminal justice that emerged under the constitutional phase of the French Revolution, stating that it had introduced three important concepts to criminal law: equality before the law, the use of jury trials and the principle that prosecutions had to be based on positive law.[102] Donnedieu de Vabres and Pella in the 1930s, therefore, clearly stated their opposition to penal systems that denied individual rights.

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[101] *Ibid*.

[102] Henri Donnedieu de Vabres, *La Crise moderne du droit pénal. La Politique criminelle des États autoritaires. Conférences faites à l'Université syrienne de Damas au mois de novembre 1937* [The Modern Crisis of Criminal Law. The Criminal Policy of Authoritarian States. Conferences Held at the Syrian University of Damascus in November 1937], Librairie du Recueil Sirey, Paris, 1938, pp. 3–19.

15.8. Rapprochement with Nazi Jurists

Yet the history of the International Bureau for the Unification of Penal Law, founded as an offshoot of the AIDP in 1928 and led by Pella and Carton de Wiart, raises the question of whether the organisation failed to defend those principles in actuality. In the 1930s the Bureau drew closer to Nazi jurists and wanted to work with them to develop common definitions of political crimes and improve transborder extradition procedures. The Bureau was founded in 1928 at a conference for the unification of criminal law held in Rome, where the AIDP member and President of the Court of Cassation in fascist Italy, Mariano D'Amelio, proposed the creation of the Bureau to prepare for future conferences to discuss unifying criminal legislation.[103] Initially the Bureau comprised mainly AIDP jurists. It intended to prepare draft criminal laws that could serve as models for states; the underlying goal was to unify states' criminal codes in the belief that this would allow more effective repression of criminality around the world. In September 1932 the Bureau reorganised after the League got involved in reforming penitentiaries and discussed minimum conditions for prisoners. The Bureau now intended to write legislative proposals based on resolutions passed by various penal reform congresses, including those held by the AIDP and the most prominent non-government organisation in this area, the International Penal and Penitentiary Commission.[104] In essence, it was to serve as a lobbying group so that criminological and penal reform organisations could have greater impact in the League.[105]

[103] Bureau International pour l'Unification du Droit Pénal, *Xe Anniversaire, 1928–1938* [International Bureau for the Unification of Penal Law, Tenth Anniversarary, 1928–1938], Editions A. Pedone, Paris, 1938, p. 6. Pella also mentions he established contact with the German jurists in a transcript from the Bureau's 1938 Congress in The Hague. See Assemblée générale, Bureau International pour l'Unification du Droit Pénal [General Assembly, International Bureau for the Unification of Penal Law], 27 December 1938, in LNA/3754/Jacket No. 2, 36272/5218, p. 8.

[104] Martina Henze, "Transnational Cooperation and Criminal Policy: The Prison Reform Movement, 1820s–1950s", in Davide Rodogno, Bernhard Stuck and Jakob Vogel (eds.), *Shaping the Transnational Sphere: Experts, Networks and Issues from the 1840s to the 1930s*, Berghahn, New York, 2015, pp. 203–6.

[105] Ernst Delaquis, "Internationale Zusammenarbeit auf dem Gebiete des Strafrechts" [International Co-operation in the Sphere of Penal Law], in *Schweizerische Zeitschrift für Strafrecht* [Swiss Journal for Penal Law], 1932, vol. 4, p. 414, in League of Nations Archive (Geneva), Brochure and Pamphlet Collection: Droit International- Criminal, Location: B 65/shelf 10, Box 4/folder 15, pamphlet #252.

The Bureau's executive committee was expanded in 1932 to include AIDP jurists (including D'Amelio, Roux, Rappaport, Givanovitch and Caloyanni) and key jurists from the German *Landesgruppe* of the IKV, Eduard Kohlrausch (Rector of Berlin University), Ernst Delaquis (Hamburg University), and Graf Wenzel von Gleispach (University of Vienna).[106] Von Gleispach supported Nazi ideology, while Delaquis, who left Germany in 1934, probably did not, though reportedly never took a public stand against it.[107] In fact, Kohlrausch and Delaquis, along with 15 other jurists, signed a statement on 10 June 1933, issued by the German *Landesgruppe* of the IKV, pledging that the "centralisation of political thought and will into a unified state concept of National Socialism has advanced the possibility of a systematic and effective struggle against crime, as the German *Landesgruppe* of the IKV has authoritatively demanded for decades".[108] According to the rest of the statement, they welcomed the fact that under the Nazi system the judge would employ strong punishment on behalf of the state and the consciousness of the people. State power would be able to pursue the "ruthless eradication" of career and professional criminals. The group stated this philosophy would totally vanquish "useless" efforts to rehabilitate people, instead imposing work as a way to make criminals conscious of their responsibility "to the people" and win them back over to the racial community (*Volksgemeinschaft*.) The IKV considered the establishment of a new German criminal code in accordance with these goals to be its foremost task.[109]

One can obtain further insight into the Nazi position on extradition and asylum from an article that von Gleispach wrote in 1935. He explained that Nazi criminal law asserted extraterritorial jurisdiction over German citizens, even if they committed an action abroad that was not considered a crime there but was considered to be one in Germany. He attacked the liberal concept of giving a person asylum for a political

[106] Letter to the Secretary-General of the League of Nations from the Executive Committee of the International Bureau for the Unification of Penal Law, 28 September 1932, Annex 1, League of Nations, *Official Journal. Special Supplement No. 108. Records of the Thirteenth Ordinary Session of the Assembly. Minutes of the Fifth Committee*, Geneva, 1932, pp. 39–40.

[107] Henze, 2015, p. 208, see *supra* note 104.

[108] "Der Vorstand der deutschen Landesgruppe der Internationalen Kriminalistischen Vereinigung" [The Board of Directors of the German Group of the International Union of Penal Law], in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1933, vol. 52, p. 347.

[109] *Ibid*.

crime, arguing that asylum should be eliminated. "The political offence, which Liberalism indeed allows as a foremost exception, is the worst and most dishonourable crime, because it injures the highest duty of the German, the duty to remain true to his *Volk*".[110] He stated that future extradition treaties would have to work within the framework of German extradition laws, and it appeared he expected that other states would extradite Reich citizens as well as foreigners back to Germany.

During the 1930s Pella gradually increased contacts between the Bureau and the Nazi legal bureaucracy.[111] He had already established relationships with German jurists in 1932, but he went further in 1935, meeting with senior members of the Reich Ministry of Justice, including Roland Freisler, a radical Nazi who was put in charge of the Reich's criminal law departments in order to extend the death penalty and impose more rigorous criminal law procedures. Apparently Pella believed he could extend the Bureau's work to make it more universal, but this seems extremely illusionary when dealing with the Reich, which already had 27,000 political prisoners in July 1933[112] and then instituted the Nuremberg racial laws in 1935. It is possible that Pella was taken in by the idea, held by the Reich Justice Ministry, that it intended to pursue a complete reform of the German penal code. But this turned out to run counter to what the Nazi political leadership preferred – the exercise of power to protect the state and "racial community" without being hampered by laws and procedures.[113]

In March 1938 a Reich ministerial director in the Justice Ministry, Leopold Schäfer, whom Pella had met several years before, wrote him to ask whether Germany could join the Bureau and sit on the executive board. The Germans were possibly interested in getting control of interna-

[110] Wenzel Graf Gleispach, "Das internationale Strafrecht nach dem deutschen Strafgesetz-Entwurf" [International Criminal Law According to the Proposed German Criminal Code], in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1935, vol. 55, p. 404.

[111] The general outline of the events leading to the entrance of Germany into the Bureau comes from a speech Pella made at the Bureau's conference in December 1938 in The Hague. See LNA/3754/Jacket No. 2, 36272/5218, pp. 8–11.

[112] Heinrich August Winkler, *Germany: The Long Road West*, vol. 2: *1933–1990*, trans. Alexander J. Sager, Oxford University Press, New York, 2007, p. 12.

[113] Diemut Majer, *"Non-Germans" under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe with Special Regard to Occupied Poland, 1939–45*, trans. Peter Thomas Hill, Edward Vance Humphrey and Brian Levin, Johns Hopkins University Press, Baltimore, 2003, pp. 325–28.

tional organisations involved in criminal law and policing; they pursued this goal in 1938 with the International Criminal Police Commission, an international organisation in which national police bureaus exchanged information about criminals through a central office in Vienna.[114] The Bureau's executive committee agreed in March 1938 to allow Germany to join and gave Schäfer a vice presidency. Shockingly, the Bureau was prepared to collaborate fully with the Germans at the Bureau's conference in The Hague, held in December 1938. By this point, the Nazi government had annexed Austria, seized the Sudetenland and had co-ordinated the destruction of hundreds of synagogues and Jewish businesses during *Kristallnacht* in November 1938. On the one hand, there do not seem to have been any real decisions taken by the Bureau which involved the Nazis – a yearly conference, scheduled for Brussels in 1939, was cancelled due to the war. [115] On the other, the willingness to work with Nazi jurists reflects a complete lack of judgment on the part of the AIDP jurists involved in the Bureau, if they believed that the pursuit of universality could include such extremists. It certainly must go in the column of events reflecting the jurists' conservative, pro-state security ideology during the 1930s. It corresponds to a point that Radzinowicz had made in his study of the IKV: social defence, protective custody and the discretion of the judge, when pushed to the limit, were extremely dangerous.[116]

15.9. The AIDP's Position on Minority Rights in the Interwar Period

The final pre-Second World War issue that weighs on the question of whether the AIDP was liberal or conservative was its position on minority rights and the creation of international criminal laws intended to prevent attacks against them, an issue that went right to the heart of the sovereignty of the modern nation-state. The AIDP took no official position on this

[114] Cyrille Fijnaut, "The International Criminal Police Commission and the Fight Against Communism, 1923–1945", in Mark Mazower (ed.), *The Policing of Politics in the Twentieth Century: Historical Perspectives*, Berghahn Books, Providence, RI, 1997, pp. 105–28.

[115] "Unification du Droit pénal, Bruxelles, 27–30 décembre 1939" [Unification of Penal Law, Brussels, 27–30 December 1939], LNA/3754/38570/5218; "Compte-rendu de Mission Par Emile Giraud. Réunion du Bureau International pour l'Unification du Droit Pénal à Paris les 27 et 28 décembre 1938" [Summary of Mission by Emile Giraud. Meeting of the International Bureau for the Unification of Penal Law in Paris, 27 and 28 December 1938], 27 March 1939, LNA/3754/Jacket No. 1, 36272/5218.

[116] Radzinowicz, 1991, p. 91, see *supra* note 13.

issue until 1946–1947, though Donnedieu de Vabres had described the Nazis' racial philosophy and criminal law system in detail in his 1937 Damascus lectures.[117] But officially, in its conferences and resolutions, the AIDP had not drawn from the lessons of the Armenian massacres of 1915–1916 when building new types of international criminal laws in the interwar period. It had not taken notice of pogroms against Jews in Ukraine and Poland at the end of the First World War, or similar events in Romania and Poland during the 1930s, even though two of its main jurists, Pella and Rappaport, were from there.

AIDP jurists had taken various intellectual positions on whether an international criminal court should have jurisdiction over "crimes against humanity", a concept that first appeared in an Allied note to the Ottoman government, demanding a halt to the massacre of Armenian Christians in 1915. Saldaña in 1924 had proposed that massacres of races were "attacks on humanity" and collective social crimes. They should therefore fall under the jurisdiction of an international criminal court.[118] Donnedieu de Vabres in 1924 was uncomfortable with the idea, writing: "But individual responsibility in play would hardly seem reconcilable to us with the necessary respect for the independence and international sovereignty of States".[119] In his view, individuals could not be held criminally liable under international law, but states could be held criminally liable for aggression. Pella, however, supported the idea that the extermination of races could be considered an international crime incurring both state and individual liability. In his 1925 book outlining his ideas for an international criminal court, he stated that international repression should not interfere with the state's internal government in principle, but when the state fails to respect the life and liberty of its citizens, as in the case of massacring races, intervention is justified.[120] Still, this issue was never the subject of an AIDP resolution. During discussions in 1930 about drafting the international penal code, Pella recommended that "attempts to denationalise the inhabitants of an occupied territory" (a concept mentioned in memos

[117] Donnedieu de Vabres, 1938, pp. 76–92, see *supra* note 102.

[118] Quintiliano Saldaña, *La défense sociale universelle, conférence donnée à la Faculté de droit de l'Université de Paris le 29 mars 1924* [Universal Social Defence, Meeting Held at the Law Department of the University of Paris on 29 March 1924], Cahors (Institut d'études hispaniques de l'Université de Paris), 1924, p. 24.

[119] Donnedieu de Vabres, 1924, p. 184, see *supra* note 35.

[120] Pella, 1925, pp. 145–46, see *supra* note 35.

to the Paris Peace Conference in 1919)[121] be included in the list of state crimes, but this did not appear in his 1935 version.[122]

The idea of an international criminal law to protect groups against attacks organised or condoned by their own government (and not merely by an occupying army) only emerged from the margins of the movement, and it did not become integral to it. In 1933, during a period when the League of Nations' supervision of the Minorities Treaties was breaking down, and an extreme right-wing nationalist party in Poland organised pogroms,[123] a Polish-Jewish prosecutor named Raphael Lemkin submitted a paper to the International Bureau for the Unification of Criminal Law's conference in 1933, to be held in Madrid. Lemkin had participated in the Bureau's debates about various definitions of terrorism (whether it was an international crime because it caused a common danger or whether it was a crime against the law of nations because its effects exceeded the locus where the offence occurred).[124] In 1933 he proposed that just like interna-

[121] "Mémoire de la délégation serbe déposé le 24 février 1919. Rapport de la Commission Interalliée sur les violations des Conventions de la Haye et du droit international en général commises de 1915 à 1918 par les Bulgares en Serbie occupée" [Memo of the Serbian Delegation Submitted 24 February 1919. Report of the Inter-allied Commission on the Violations of the Hague Conventions and of International Law Generally Committed from 1915 to 1918 by the Bulgarians in Occupied Serbia]; "Mémoire de la délégation hellénique déposé le 26 février 1919. Note sur les crimes commis par les Bulgares, les Turcs et les Allemands contre les populations helléniques" [Memo of the Greek Delegation Submitted 26 February 1919. Note on the Crimes Committed by the Bulgarians, Turks, and Germans against the Greek Populations]; "Mémoire de la délégation nationale arménienne déposé par la délégation hellénique le 13 mars 1919. Note sur les auteurs responsables des massacres des Arméniens" [Memo of the Armenian National Delegation Submitted by the Greek Delegation on 13 March 1919. Note on the Authors Responsible for the Massacres of Armenians]; in Albert de Lapradelle (ed.), *La Documentation Internationale, La Paix de Versailles. Responsabilités des auteurs de la guerre et sanctions* [International Documentation, The Peace of Versailles. Responsibilities of the Authors of the War and Penalties], Paris, Les Éditions Internationales, 1930, vol. 3, pp. 95–136, 223–25.

[122] Procès-Verbaux de la Commission chargée de la rédaction d'un projet de code répressif international [Meetings of 11 and 13 January 1930], 1930, p. 301, see *supra* note 52.

[123] Fink, 2004, pp. 337–343, see *supra* note 7; Ivan T. Berend, *Decades of Crisis: Central and Eastern Europe before World War II*, University of California Press, Berkeley, 1998, p. 315.

[124] Raphael Lemkin, *Faut-il créer un nouveau délit de droit des gens, nommé terrorisme?, Rapport spécial présenté à la Ve Conférence pour l'Unification de Droit Pénal à Madrid* [Is It Necessary to Create a New Offence against the Law of Nations Called Terrorism? Special Report Presented at the Fifth Conference for the Unification of Penal Law at Madrid], Imprenta de Galo Saex, Madrid, 1933, pp. 6–7.

tional terrorism, "acts of barbarism", defined as massacres, pogroms or collective cruelties against women and children, systematically organised against a "certain collectivity", were crimes against the law of nations that states should repress, wherever they occur. While acts of terrorism, he said, disrupt international relations, "acts of barbarism" shock the conscience of all civilised humanity".[125] Therefore, these acts should be prosecuted by all states, in the same way that international conventions had called for the prosecution of slave traders, drug traffickers, and "white slave" traders. The concept of "acts of barbarism" was Lemkin's early formulation of the concept of genocide, a problem which had exercised him since his youth after the First World War, but which he only defined with the new word genocide in 1944.[126] However, for anti-Semitic reasons, the Polish government denied giving Lemkin a passport to travel to Madrid to present his paper, so his concept was not discussed by the Bureau.[127] After 1933 the Bureau and the AIDP worked on the terrorism convention, the definition of political offences, ways to improve police and judicial requests for information about criminals in other states, and domestic laws that states could use to repress pro-war propaganda. This shows that in the international arena, their dominant concerns were the prevention of aggressive war and state security against criminals, not the protection of minorities. Thus, there was a major blind spot in the work of these legal organisations in the interwar era.

15.10. Inactivity during the Second World War and the Renewed Call for an International Criminal Jurisdiction after the War

The AIDP became inactive during the Second World War, partly because communication with cities under Nazi occupation was virtually impossible, and war zones made travel to conferences unthinkable. Certain AIDP

[125] *Ibid*., pp. 15–16.

[126] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government: Proposals for Redress*, Carnegie Endowment for International Peace, Washington, DC, 1944, p. 79.

[127] Donna-Lee Frieze (ed.), *Totally Unofficial: The Autobiography of Raphael Lemkin*, Yale University Press, New Haven, CT, 2013, p. 23. Lemkin claimed in his autobiography that his proposal was tabled; in fact, it was just never discussed. See Luis Jiménez de Asúa, Vespasien Pella and Manuel López-Rey Arroyo (eds.), *Ve Conférence internationale pour l'unification du droit pénal: actes de la Conférence Madrid, 14–20 octobre 1933* [Fifth International Conference for the Unification of Penal Law, Records of the Madrid Conference, 14–20 October 1933], Editions A. Pedone, Paris, 1935.

jurists because refugees; others lost family members in the war or became ill.[128] When the war ended in 1945 and the AIDP began publishing its journal again in 1946, the group asserted that it had stopped working during the war as an act of refusal. "It is voluntary that [the Association] had stopped during these years of mourning where the dignity of man and the respect for humanity were unknown and outrageously violated", Roux stated in an editorial appearing in the AIDP's first post-war journal. "Although it had been solicited many times, it constantly refused to give a barbarous conqueror the support of its reputation and its prestige in the world of jurists". Now in 1946, he said, the AIDP intended to reassert itself inside and outside Europe "in the same spirit of enlightened liberalism which, before this war, had earned it the adhesion of a very large number of criminalists".[129] The reference to liberalism was true in certain respects – the attempt to lessen severe punishment with probation and the support for a defendant's right to a fair trial. But in the realm of international criminal law, enlightened liberalism applied more to the AIDP's work to oppose aggressive war in the 1920s than to its advocacy of the terrorism convention in the 1930s or to Pella's overtures to Nazi jurists in 1938.

The AIDP's non-existence during the war meant that it had not been a centre of intellectual resistance to fascism, nor had it collected evidence of war crimes, as other legal organisations did. In 1944–1945 it did not directly influence governments to hold post-war trials (as the United

[128] Rappaport was held captive in Warsaw, which was destroyed by the Germans. After the war he fled to Łódź, where Poland's Supreme Court was transferred. Simon Sasserath, who headed the Belgian national group of the AIDP, had lost a son during the war, while Roux had lost a daughter. Caloyanni at the end of 1945 was recovering from an illness. Donnedieu de Vabres' son-in-law, who was in the French Resistance, was killed in 1944, while Donnedieu de Vabres himself remained inside Vichy France. Lemkin fled Poland in October 1939 and went to Lithuania, Latvia, Sweden, and then the US in 1941. Pella remained a Romanian diplomat in Switzerland until October 1944 and then stayed in the country through 1946. See Henri Donnedieu de Vabres to Lemkin, 28 December 1945, Raphael Lemkin Collection, P-154, Box 1/Folder 18, Collection of the American Jewish History Society, Newton Center, MA, and New York, NY; Emil Stanisław Rappaport, "Vingt ans après", in *Revue internationale de droit pénal*, 1946, nos. 1–2, pp. 4–5; "Procès-verbal de la réunion de l'AIDP siège du Tribunal Militaire International (Nuremberg) 18 mai 1946" [Minutes of the Meeting of the AIDP sitting at the International Military Tribunal (Nuremberg) 18 May 1946], in *Revue internationale de droit pénal*, 2002, vol. 73, no. 1–2, p. 322; Frieze, 2013, pp. 29, 60, 62–3, 79, see *supra* note 127; Lewis, 2014, pp. 193–4, see *supra* note 2.

[129] J.-A. Roux, "Editorial", in *Revue internationale de droit pénal*, 1946, nos. 1–2, pp. 1–2.

Nations War Crimes Commission did), nor did its jurists advise the four victorious Allied powers that negotiated the London Agreement and Nuremberg Charter in 1945.[130] Thus, it would be difficult to argue that the AIDP's 1928 court statute or its 1935 draft penal code influenced the victor powers to stage a post-war international tribunal for alleged war criminals whose crimes extended across multiple countries. The basic concept of an international trial in which Nazi government leaders and chief members of the SA, SS and Gestapo would be tried for "conspiracy to commit murder, terrorism, and the destruction of peaceful populations in violations of the laws of War" was an American plan invented by Murray Bernays, the chief of the US War Department's Special Projects Office.[131] The concept of "crimes against the peace" came from Aron Trainin, a Soviet professor of criminal law; however, his 1944 work *The Criminal Responsibility of the Hitlerites* seemed to borrow many of the component crimes of aggression that the AIDP had developed in the 1930s.[132] The term "crimes against humanity", used at trial to denote systematic racial and religious persecution and extermination, was suggested by Hersch Lauterpacht, the British international law scholar.[133] Moreover, the court's procedure, using elements of both the continental system (practised by France and the Soviet Union) and the Anglo-American system, was not foreseen by any AIDP plan.[134]

The Nuremberg trial, which opened in November 1945, elevated the importance of British, American and Soviet legal principles (and politics) in an international proceeding in ways that the AIDP had not foreseen in the interwar period, since its concepts were largely continental European, especially coming from the Latin/Roman tradition. Still, the

[130] On the role of the United Nations War Crimes Commission, see Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, University of North Carolina Press, Chapel Hill, NC, 1998. The French delegate to the UNWCC, André Gros, played a leading role in advising the French government during the Nuremberg Charter negotiations; see Tusa and Tusa, 1986, pp. 74, 76–77, see *supra* note 1.

[131] Quoted in Bradley F. Smith, *The Road to Nuremberg*, Basic Books, New York, 1981, pp. 50–53.

[132] Hirsch, 2008, pp. 706–8, see *supra* note 1.

[133] Tusa and Tusa, 1986, p. 87, see *supra* note 1.

[134] For the Soviet perspective on this hybrid, see A.N. Trainine [Trainin], "Le Tribunal militaire international et le process de Nuremberg" [The International Military Tribunal and the Nuremberg Trial], in *Revue internationale de droit pénal*, 1946, nos. 3–4, pp. 267–69.

fact that Donnedieu de Vabres was France's chief judge at Nuremberg gave the AIDP an important connection – not in directly influencing the judgment, but to begin reorganising the group. In May 1946, during the defence phase of the trial, Donnedieu de Vabres organised a meeting in Nuremberg (symbolically in the same audience chamber used for the trial) to discuss the reconstitution of the AIDP.[135] Chaired by Francis Biddle, the US Chief Judge at Nuremberg, the meeting was attended by major Nuremberg figures: Sir David Maxwell-Fyfe (Britain's chief prosecutor for the trial), Aron Trainin (now the Soviet chief prosecutor) and Iona Nikitchenko (the Soviet chief judge). Donnedieu de Vabres asked important questions: Should Paris remain the seat of the organisation? Should its primary language still be French in an era when simultaneous translation (through the type of system used at the Nuremberg trial) was now a reality? Shouldn't the AIDP really be concerned with worldwide developments in criminology, not just continental Europe, and therefore expand the fertile exchange of ideas that the Nuremberg trial had sparked?[136] Should German and Italian jurists be allowed into the organisation? These major issues, however, were only lightly discussed and left to a subcommittee to decide.[137] And in July 1947, when the AIDP held its first post-Second World War conference, much about the event rekindled the past. The conference was held at the University of Geneva; the city was the home of the old League of Nations, which was being replaced by the new United Nations Organisation. (The United Nations Legal Department did send a representative to the conference, who praised the AIDP's past work with the League and hoped it would help the United Nations codify the Nuremberg principles.)[138] In any case, the AIDP's conference was organised by a committee that was predominantly Swiss and did not reflect the global aspirations voiced in 1946. The primary topics – the use of domestic criminal law to maintain international peace, the issue of whether punishment should be purely retaliatory or use social defence methods,

[135] Procès-verbal de la réunion de l'AIDP siège du Tribunal Militaire International (Nuremberg) 18 mai 1946, 2002, pp. 321–35, see *supra* note 128.

[136] *Ibid*., p. 323.

[137] *Ibid*., pp. 329–30.

[138] For a provisional report about this conference, see Jean Graven, "Le Ve Congrès international de droit pénal (28–30 juillet 1947)" [The Fifth International Conference of Penal Law (28–30 July 1947)], in *Revue internationale de droit pénal*, 1947, Numéro spécial, pp. 1–67. A short summary of the remarks of Schreiber, the United Nations legal counsellor, can be found on pp. 10–11.

and the repression of juvenile crime – were all old subjects for the AIDP.[139]

There was an attempt to open the doors to new ideas, though this showed the split between the continental, criminological approach and an American approach, based largely on prosecuting war crimes. The AIDP invited Telford Taylor, then the chief counsel for the US Military Tribunals at Nuremberg, to the 1947 conference, where he gave a speech calling for the codification of international criminal law based on the London Agreement that established the International Military Tribunal ('IMT').[140] Yet Taylor's vision was different from the AIDP's in two key ways. Donnedieu de Vabres, France's chief judge at Nuremberg, held that when the IMT had prosecuted individuals for ordering violations of the laws of war, the laws themselves were well established. The only real innovation, Donnedieu de Vabres said, was that the court prosecuted instigators rather than the immediate criminals who killed and tortured with their own hands.[141] Throughout the interwar period, the AIDP had not paid much attention to whether the laws of war needed to be improved in light of changing technologies of war. Taylor, however, mentioned that the Second World War had shown that aerial and submarine warfare had totally outstripped the rules in The Hague and Geneva Conventions. (What types of bombing were legal? What was the exact definition of an undefended city? Did a submarine crew have to save all survivors of a torpedoed vessel if it was going to come under aerial attack while doing so?) The rules governing the treatment of hostages had to be hammered out too, since some military codes allowed armies to execute them but did not specify

[139] Programme du Vme Congrès international de droit pénal convoqué à Genève (Suisse) par l'Association internationale de Droit pénal sous le haut patronage du Gouvernement de la Confédération Suisse, 28 au 31 juillet 1947 [Program of the Fifth International Conference of Penal Law Held in Geneva (Switzerland) by the International Association of Penal Law under the High Patronage of the Swiss Government], Geneva, 1947, pp. 5–8, in Telford Taylor Papers, Box 148, Folder 10–0–1–5, Rare Book and Manuscript Library, Columbia University Library ('TTP').

[140] For Graven's summary of the speech, see Graven, 1947, pp. 13–17, see *supra* note 138. For Taylor's original French and English texts, see "Le Droit interne et la préservation de la paix" and "Domestic Law and the Preservation of Peace", TTP/148/10–0–1–5 and TTP/148/10–0–1–6. He delivered the speech in French.

[141] Henri Donnedieu de Vabres, "The Nuremberg Trial and the Modern Principles of International Criminal Law", in Guénaël Mettraux (ed.), *Perspectives on the Nuremberg Trials*, Oxford University Press, Oxford, 2008, p. 232.

the precise rules.[142] A second major difference was that Taylor supported an international criminal jurisdiction for the control of narcotics, violations of the laws of war and genocide, wishing to begin with these rather than the more prickly political definition of aggression. "[I]t will be wise to proceed cautiously rather than over-ambitiously, lest the whole project founder on the rocks of political controversy before it is fairly launched."[143]

Aside from these intellectual differences, several AIDP jurists took the Nuremberg Judgment to be a watershed in establishing individual criminal liability for aggression and for expanding criminal liability to include organisations. Still, they believed there was much work ahead. Caloyanni noted with some disappointment that the preparatory conference to establish the new United Nations Organisation did not foresee an international system with an enforceable international criminal code covering both individuals and states.[144] Pella, too, stated that a system that did not hold states criminally liable would remain incomplete. A state that is only defeated military will pursue revenge, he argued, while a state prosecuted, found guilty and punished fairly would not. Furthermore, he claimed that the past 25 years of totalitarian states had proved that if one ignored the criminal liability of states, they would hyperextend their sovereignty, surpass legal limits and start wars.[145] Thus, although the Nuremberg and the Tokyo Tribunals were partial steps, Pella looked back to the AIDP's earlier concepts of an international criminal jurisdiction with two-track criminal liability (for individuals and states) and the 1935 draft penal code as the correct directions for the future.

All was not backward-looking, however. Pella now took a much stronger position against state-sponsored crimes committed against groups than he had in the interwar period. He had not totally neglected them in his own work, but now, in 1946–1947, he defended Lemkin's concept of genocide and similar concepts developed by Eugène Aronéanu, Saldaña

[142] Taylor, "Le Droit interne et la préservation de la paix", pp. 6–8, see *supra* note 139.

[143] I have taken the quote from the English version on p. 10, which accurately translates the French on p. 13.

[144] Mégalos A. Caloyanni, "La guerre-crime et les criminels de guerre" [War Crime and War Criminals], in *Revue internationale de droit pénal*, 1946, nos. 1–2, p. 8.

[145] V.V. Pella, "L'Association internationale de droit pénal et la protection de la paix" [The International Association of Penal Law and the Protection of Peace], in *Revue internationale de droit pénal*, 1946, nos. 3–4, pp. 207–9.

and himself.[146] "To kill, persecute, or enslave a man or a collectivity due to their race, their nationality, their religion, or the opinions that they profess is to attack the fundamental principle of the diversity that belongs to the constitution of the human universe", he stated,[147] using the type of cultural diversity argument that was a keystone of Lemkin's post-war politics. Pella in 1946 went much further than Donnedieu de Vabres, who, in his 1947 analysis of the Nuremberg Judgment, defended the way crimes against humanity had been heavily limited by the judges.[148] Pella, though, viewed crimes against humanity as independent crimes in their own right, not simply large-scale common crimes covered by domestic law, as Donnedieu de Vabres did. They had to be prosecuted by all states, wherever they occurred. However, if they were committed by state agents, and in accordance with a state's laws, Pella said they had to be referred to an international criminal court for prosecution. Therefore, when the plenary assembly of the Bureau for the Unification of Criminal Law met at the end of December 1946 in Paris, it decided that the Bureau's next conference should formulate a legal definition of crimes against humanity, which it did in Brussels in 1947.[149]

Thus it would be unfair to call the AIDP excessively utopian or nostalgic, merely trying to recreate its interwar ideas for the post-Second World War period. Jurists such as Caloyanni, Pella and Donnedieu de Vabres felt that in the interwar period the AIDP had been avant-garde, while the political system had remained behind, pinned down by fears and over-reliance on state sovereignty. After the war, many AIDP jurists supported a project in the United Nations to codify both the Nuremberg Charter and Judgment and turn them into a statute for a permanent international criminal court. Pella in particular stated that he hoped the United Nations would not ignore the AIDP, as the League of Nations had supposedly done.[150] However, one cannot ignore the fact that Pella believed that in order to ensure international peace, states needed to imitate controversial laws in Romania and Poland, which had criminalised pro-war propaganda

146 *Ibid*., p. 220.

147 *Ibid*., p. 221.

148 Donnedieu de Vabres, 2008, pp. 240–42, see *supra* note 141.

149 Pella, 1946, p. 222, see *supra* note 145; Donnedieu de Vabres, 2008, p. 239 n 69, see *supra* note 141.

150 Pella, 1946, p. 212, see *supra* note 145.

in the interwar period.[151] The basis for those laws was a French law from 1881, which criminalised publishing or disseminating "false news or articles that are fabricated, falsified, or falsely attributed to third parties, when, committed from bad faith, it would trouble the public peace or would be susceptible to trouble it".[152] Pella steadfastly maintained that states needed to join together and pass similar domestic legislation to maintain collective peace.

> [C]riminal law is a supreme instrument for the defense of the social order and international order, and that the more the criminal- the individual or nation- occupies an elevated position in national life or international life, the more the punishment must be exemplary and intimidating.[153]

Sceptics outside the AIDP contended that the regulation of international relations through criminal law did not work in the 1920s and 1930s and could not work after the Second World War either. In a review of Pella's 1946 book, *La guerre-crime et les criminels de guerre. Réflexions sur la justice pénale internationale, ce qu'elle est et ce qu'elle devrait être* [War Crime and War Criminals. Reflections on International Criminal Justice, What It Is and What It Should Be],[154] international lawyer Jacob Robinson, who had advised US prosecutors at Nuremberg on behalf of the Institute of Jewish Affairs, stated:

> It is difficult to agree with the implicit assumption of the author of the thesis that an International Criminal Court would have survived the war untouched. Why should this Court have fared better than the Permanent Court of International Justice or the League of Nations?[155]

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[151] V.V. Pella, "Plan for a World Criminal Code", in *Revue internationale de droit pénal*, 1946, nos. 3–4, p. 256, fn. 2.

[152] See Loi sur la liberté de la presse du 29 juillet 1881 [Law on the Freedom of the Press of 29 July 1881], Art. 27 (http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000877119). From 1881 to 1994, the law called for imprisonment and a fine; the prison term and fines were increased in 1994, but prison time was eliminated in 2000.

[153] Pella, 1946, p. 224, see *supra* note 145.

[154] Vespasien V. Pella, *La guerre-crime et les criminels de guerre Réflexions sur la justice pénale internationale, ce qu'elle est et ce qu'elle devrait être* [War Crime and War Criminals, Reflections on International Criminal Justice, What It Is and What It Should Be], Revue de droit international de sciences diplomatiques et politiques, Geneva, 1946.

[155] Jacob Robinson, "La Guerre-Crime et Les Criminels de Guerre (Review)", in *American Journal of International Law*, 1946, vol. 40, no. 3, pp. 682–83.

Neither of those institutions had prevented the war, and it did not appear to Robinson that the world was ready for a permanent international criminal court, given that the statute for creating the terrorism court in 1937 never came into force.

15.11. The Impact of Cold War Ideologies on the Attempt to Draft an International Penal Code after the Second World War

The Nuremberg codification project got off the ground – and then came crashing down, attacked by jurists as unrealistic or dangerous to state sovereignty, and by Western governments that thought it would limit their policies in the confrontation between Western capitalist democracy and Soviet communism. Consequently, the AIDP was thrust into the Cold War. Donnedieu de Vabres initially worked on the codification of the Nuremberg principles in 1947, but the United Nations then transferred the project to the International Law Commission ('ILC'), a group of international jurists, selected by the General Assembly, who were technically supposed to act in a "private capacity", rather than as representatives of their governments. The ILC turned the project into an effort to write a global penal code, called the Draft Code of Offences against the Peace and Security of Mankind. The Draft Code was the descendant of the AIDP's 1935 code; it enumerated a set of crimes revolving around state aggression, state-sponsored terrorism, territorial annexations contrary to international law, and coercive economic and political measures, all crimes that the interwar jurists had discussed.[156] The post-Second World War plan was that after the ILC defined these crimes in a code, it would create a statute for an international criminal court that would have jurisdiction over these crimes in certain circumstances. Pella, who became AIDP President in 1946 after Carton de Wiart retired, came to New York in 1947 and worked on the code behind the scenes as a special adviser to the UN Secretary-General.[157]

There were two key differences between the AIDP's 1935 code and an ILC draft completed in 1951, however. In the ILC's Draft Code, only

[156] "Report of the International Law Commission to the General Assembly", in *Yearbook of the International Law Commission 1951*, vol. 2, United Nations, New York, 1951, pp. 131–37.

[157] John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention*, Palgrave Macmillan, New York, 2008, pp. 218–22.

individuals, not states, were to be held criminally liable, and the various components of crimes of genocide (taken directly from the 1948 Genocide Convention) were included. (The 1935 draft did not include such crimes.) However, several jurists on the ILC disagreed about the definition of aggression or did not think an international criminal court was necessary. During the early 1950s the US government started opposing the Draft Code because it believed the provisions regarding terrorism would prevent it from supporting the Voice of America, an anti-communist information service in Eastern Europe, and interfere with US financial support for anti-communist groups behind the Iron Curtain. The legal and political problems with the Code quashed the idea of an international criminal court with jurisdiction over aggression and other assorted crimes for much of the Cold War.[158]

Although the AIDP during the interwar period did not develop or vote on an international criminal law designed to protect group rights for minorities, three AIDP jurists – Lemkin, Pella and Donnedieu de Vabres – were selected by the UN Secretariat's Legal Department and Human Rights Department to write the first draft of the Genocide Convention in 1947.[159] On the surface, it would appear that the AIDP was again getting a unique opportunity to influence directly an international criminal law project, as it had done with the counterfeiting and terrorism conventions. In fact, there were similarities in how all three of these conventions, in their initial drafts, would require states to prosecute or extradite the accused (and prohibit them from giving suspects asylum on political grounds). All three draft conventions also proposed that states should create national warning bureaus which would then exchange information through an international office, which actually was only implemented in the counterfeiting convention. Yet the first draft of the Genocide Convention did not represent a united "AIDP front", as personal, legal and political differ-

[158] Lewis, 2014, pp. 278–82, see *supra* note 2.

[159] Lemkin was recommended because he was, "if not the godfather of the idea, at least the inventor of the word 'genocide'". Donnedieu de Vabres was brought in because he was France's representative on the General Assembly's Committee on the Development and Codification of International Law, a committee that was supposed to be consulted by the main United Nations committee (the Economic and Social Committee) working on the convention. The United Nations Archives do not state precisely why Pella was chosen, but it was probably because of his reputation, knowledge, and the fact that he was president of the AIDP. See Humphrey to Laugier, 13 May 1947, UN Archives, Geneva, SOA/318/1/01 (1)A; Laugier to Pella, 21 May 1947, UN Archives, SOA 318/1/01 (4).

ences separated the three jurists. During the war, Lemkin had become a refugee and later learned his most of family had been exterminated by the Nazis in Poland, while Pella had remained a Romanian diplomat under the Antonescu military dictatorship, which had definite responsibility for the murder of Jews and Roma in Transnistria. However, Pella claimed that he did what he could to play a mitigating role and declared he had tried to negotiate Romania's exit from the war.[160] A Swiss diplomatic report about his appointment to become Romania's Minister to Berne in August 1943 states that he opposed Romania's fascist party, the Iron Guard.[161]

The trio was very divided in 1947 about whether a genocide law should prohibit attacks against political groups as well as racial, religious and national ones. Donnedieu de Vabres, fearing communist attacks against the bourgeoisie, thought it should, but Lemkin, who thought political groups did not have a permanent identity, disagreed. They also differed about the type of court that should be used to repress genocide. Lemkin foresaw that genocide would be an international crime that any state could prosecute, regardless of where it occurred; he only supported an *ad hoc* international court for prosecuting state officials and heads of organisations (similar to the Nuremberg model). Pella supported an international criminal court for genocide, using the AIDP's 1928 statute.[162] Additionally, the trio disagreed about whether genocide could be construed to mean the destruction of a group's culture, such as its religious sites and educational institutions, not just the murder of the group. Lemkin believed that such cultural suppression could be used to eliminate a group, even if it was not physically destroyed, but Donnedieu de Vabres and Pella believed that this problem was a civil one, not a criminal one – an issue that the interwar Minorities Treaties covered. The problem, however, was that several Great Powers did not want to maintain them after the war, fearing that if they were expanded into "human rights" instruments, they would interfere with their colonial policies.[163] The trio, then,

[160] Lewis, 2014, pp. 192–95, see *supra* note 2.

[161] Swiss ambassador in Romania to Pilet-Golaz, 20 July 1943, Swiss Federal Archive (Berne), E4001C#1000/1571 BD: 42, Folder: B.22.21.Ro., Pella, Vespasien. Ministre plénipotentiaire, Chargé de mission. Berne.

[162] Lewis, 2014, pp. 195–99, see *supra* note 2.

[163] Mark Mazower, "The Strange Triumph of Human Rights, 1933–1950", in *Historical Journal*, 2004, vol. 47, no. 2, pp. 379–98.

handed the United Nations a draft that did not solve several major issues. Many were worked out during ruthless political negotiations over the next 18 months in the United Nations, leading to a convention that did not protect political groups and did not require the use of an international criminal court. Instead, such a court could be used if it were ever created, and signatories recognised its jurisdiction.[164]

During 1948 and the years that followed, Lemkin took an increasingly hostile position towards the ILC, which he believed wanted to roll up the Genocide Convention into the Draft Code and thereby neutralise it, and towards Pella, whom he saw as the *éminence grise* behind the Draft Code. Lemkin feared that the more narrowly focused Genocide Convention, passed by the United Nations in December 1948 and then implemented with the ratification of 20 states in October 1950, would be quashed if the Draft Code included genocide. He claimed that advocates of the Draft Code, including Pella, intended either to subordinate it to crimes against humanity or attach it to aggressive war.[165] Pella, however, protested to Lemkin in a long letter from November 1950, explaining all the numerous steps he had taken to support the Genocide Convention. For example, at a 1949 meeting of non-governmental organisations with consultative status with the United Nations, Pella, as President of the AIDP, had introduced a motion calling on these NGOs to do everything possible to ensure the ratification of the Genocide Convention. This passed 38 to three.[166]

Another aspect of Lemkin's growing antipathy toward Pella was his incorrect appraisal that Pella was working with the Soviet Union. Lemkin had grown close to groups of anti-communist Eastern European refugees in the United States, believing in 1949 that the Soviet Union was committing genocide by deporting Lithuanian intellectuals and priests to Siberia.

> I saw Soviet instructions to deport husbands and wives in different trains and in different directions, allegedly for sanitary reasons. The real purpose of this separation is to stop procreation within this Catholic nation so that it will finally die out [...].

[164] Lewis, 2014, pp. 199–228, see *supra* note 2.

[165] Cooper, 2008, p. 187, 209–22, see *supra* note 157.

[166] Pella to Lemkin, 2 November 1950, Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati Campus, Hebrew Union College, Jewish Institute of Religion, Raphael Lemkin Papers, Manuscript Collection No. 60, Box 2/Folder 11 ('Lemkin-AJA').

Lemkin said the above in a 1949 letter to Cardinal Francis Spellman in New York.[167] Lemkin began working with Lithuanian and Polish associations in the United States to lobby the US Senate and federal government to oppose the Draft Code, arguing that it would only make genocide punishable when connected with aggressive war (which was not required under the Genocide Convention), as well as outlaw underground anti-communist groups.[168] The associations, assisted by Lemkin, sent protest letters to the US Joint Chiefs of Staff and the US Congress, attacking the Draft Code and claiming that Pella was working on behalf of the Romanian Communist Party and the Soviet Union. In a front-page article, the *New York Times* in September 1951 reported on the associations' letters under the headline "Proposed U.N. Code Criticized As Bar to Anti-Red Undergrounds". In the article, Pella defended the code, stating that the provision against state support for armed groups practising terrorism was not supposed to harm liberation movements, but "was a reflection of General Assembly resolutions denouncing attempts to stir up civil war, as in the case of Greece".[169] Pella followed this up with an editorial to the *New York Times*, published in October 1951. Signing the article as the President of the AIDP, he stated: "It should be obvious that it is states of the free world which are menaced by the actions of fifth columns and that these provisions of the draft code were directed at that threat alone". He added that he had actually authored Romanian legislation in 1924 (when he was a Romanian deputy in Parliament) outlawing the communist party, and that subsequently, after the Second World War, he had been stripped out his Romanian citizenship and feared he would be sentenced to death if he returned to Romania. As for the Genocide Convention, he stated he had always favoured its ratification and maintained that "the autonomy and individuality of that convention should be assured".[170] In this way, the AIDP's President was thrust into the middle of the ideological conflict

[167] Lemkin to Spellman, 13 September 1949, Lemkin-AJA/1/14. See also Anton Weiss-Wendt, "Hostage of Politics: Raphael Lemkin on 'Soviet Genocide'", in *Journal of Genocide Research*, 2005, vol. 7, no. 4, pp. 551–59.

[168] Memorandum on Genocide, calling for opposition to the Draft Code and to Article 3 of the "Draft Covenant on Human Rights", Lemkin to Rozmarek, 23 May 1952, Lemkin-AJA/2/12, see *supra* note 166.

[169] A.M. Rosenthal, "Proposed U.N. Code Criticized As Bar to Anti-Red Undergrounds", in *New York Times*, 23 September 1951, p. 1.

[170] Vespasien V. Pella, "Letters to the Times: Proposed U.N. Code: Provisions Said to Be Directed at Threat of Fifth Column", in *New York Times*, 3 October 1951, p. 32.

between Western capitalist democracy and Eastern socialist "people's republics".

The late 1940s and early 1950s saw both the AIDP and the Bureau for the Unification of Criminal Law trying to reassert some of their liberal ideas from the interwar period. In late 1949 the United Nations Human Rights Division asked the Bureau whether it could contribute some studies for a United Nations report on the condition of women suspects and prisoners, continuing the penal reform projects that the League had pursued. The United Nations specifically wanted to know whether women got the same legal protection as men when it came to gathering proof before arresting them; whether pregnant women obtained health care in prisons; and whether women prisoners who were forced to work obtained jobs that had some type of professional utility after they were released. The Bureau arranged for Zara Algardi, an attorney for the Court of Cassation in Rome, and a female Swiss doctoral student named Dado-Péquignot to produce reports that were submitted to the United Nations.[171]

However, in 1950 the AIDP and Bureau were experiencing fairly serious problems in their finances, leadership and communications. Pella had written some materials about the AIDP and the Bureau's past and present work in which he only mentioned himself and neglected the contributions of several important people – Carton de Wiart (the former AIDP president), Donnedieu de Vabres (one of the founders), Sasserath (a co-founder of the Bureau and one of its vice presidents) and others. Donnedieu de Vabres and Sasserath were "insulted or flabbergasted" by these omissions, accusing Pella of being too "authoritarian" and "dictatorial" in his leadership style.[172] Jean Graven, a Swiss criminal law scholar who was the Bureau's assistant secretary-general after the Second World War, painted a grim picture of the AIDP and Bureau in 1950. Pella was busy in New York, while the European directors did not know what the AIDP or the Bureau's future plans were. The Bureau was supposed to have a conference in Paris in 1950, but apparently nothing had been planned. Caloyanni, the Bureau's treasurer, had died, but the group's accounts were in disarray, and it had no regular budget. Graven urged Pella, whom he considered the "soul" of the organisation, to come to Europe

[171] Humphrey to Bureau, 20 December 1949; Graven to Pella, 13 January 1950; Algardi to Graven, 1 February 1950, Archives de l'Etat du Valais (Sion, Switzerland), CH AEV, Jean Graven, 292. All further references come from this archive unless stated otherwise.

[172] Graven to Pella, 20 May 1950.

and sort out the mess.[173] That never happened, however, because Pella died in 1952, and so did Donnedieu de Vabres. Carton de Wiart had died the previous year and Paul Cornil, Belgium's Secretary-General in the Justice Ministry, took over the AIDP presidency, putting it in Belgian hands again.

The question of the Bureau, however, was pricklier. Graven, based in Switzerland, wanted it to continue under a new president. The group had consultative status with the United Nations, and he believed that if it disappeared, the jurists and social activists involved with it would lose their role in advising the United Nations on the treatment of women in the criminal justice system and would not be able to continue working on a United Nations general plan to deal with juvenile delinquency. Graven discussed whether Léon Cornil, the Belgian Prosecutor General and uncle of Paul, would be willing to take over the presidency of the Bureau, but Léon refused, citing poor health.[174] Graven solicited Sasserath next, who at first agreed on the condition that Graven find a French or Swiss treasurer, but after Graven and Sasserath got into a disagreement about who had the power to communicate with United Nations officials about attending a conference on juvenile delinquency in late 1952, the relationship soured.[175] In June 1953, at a meeting of the AIDP's Board of Directors, Sasserath declared that the Bureau no longer existed, a decision that Graven said was "absolutely unjust, false, and inopportune".[176] At the AIDP's conference in Rome in September 1953, the Board discussed whether it could take over the Bureau, but Paul Cornil said this was impossible, because the Bureau was totally independent of the AIDP and had its own statute. It was then officially disbanded, which made Graven quite bitter.[177] As he told two of his close collaborators on the Bureau, the lawyer Max Habicht and children's advocate Hélène Romniciano:

> The President (Carton de Wiart), the treasurer (Caloyanni), the Secretary-General (Pella) were not replaced; one of the vice presidents (Rappaport) no longer gives signs of life; the other, serving as President (Sasserath) condemned the Bu-

[173] *Ibid*.

[174] Graven to Léon Cornil, 4 September 1952; Léon Cornil to Graven, 11 September 1952.

[175] Sasserath to Graven, 12 September 1952; Sasserath to Graven, 17 November 1952; Graven to Sasserath, 21 November 1952.

[176] Graven to Romniciano and Habicht, 27 December 1953.

[177] Graven to Paul Cornil, 27 December 1953; Graven to Sasserath, 27 December 1953.

> reau and prevents all attempts to transform it. The assistant Secretary-General (myself) is leaving Geneva and the Bureau will no longer have an address. This is the liquidation, therefore, which is imposed on us, and this decision fills me with confusion and regret. It would discourage our master and our friend Pella, the soul of the Bureau.[178]

The AIDP continued and had to confront other problems besides Cold War politics and personal disagreements. One was an ideological trend coming from the new breed of "realist" international lawyers who claimed that political order was based on hegemony and power, and states simply used law to support their own interests.[179] This posed a challenge to the interwar criminological internationalism of the AIDP,[180] which had believed world peace could be assured if an enforceable system of international criminal law could be erected. Why did AIDP jurists believe this system was still possible after the Second World War, when League efforts to create one had come to naught, and the League collective security system had not stopped Japanese aggression in Manchuria, Italian aggression in Ethiopia or Nazism in Europe? They believed that the interwar period's error was that it had *not* created a strict enforcement system; it had only been based on collective security. If a true international criminal court system with the power to sentence individuals and states had been established, the argument went, the threats of sanctions and penalties would have kept aggressive states, militarist parties and dictators in check. They really had no answer to mass movements such as Nazism, as well as its Eastern European analogues, that rejected internationalism and were not afraid to act without restraint. Another problem with the AIDP's theory of peace through international criminal law was that the jurists assumed that an international criminal jurisdiction could truly operate free of politics, that there would be no back-room deals, but merely automatic commitments in line with court rulings.

There was another ideology that the AIDP was going to have to contend with as well: national liberation movements directed against colonial rulers. The draft international criminal court and penal code of the

[178] Graven to Romniciano and Habicht, 27 December 1953.

[179] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960*, Cambridge University Press, Cambridge, 2002, pp. 457–61.

[180] By way of analogy, see Koskenniemi's analysis of post-First World War liberal rationalism, *ibid*., pp. 407–11.

interwar period had provisions to criminalise state support for foreign-armed bands and prevent intervention in foreign states; these laws were directed at states that supported paramilitaries and nationalist separatists in the 1930s. After the Second World War Pella's comments about the Draft Code provision on terrorism suggested that it was directed against "fifth column" communists in Greece. How far was the AIDP willing to go in erecting international legislation to repress anti-colonial insurgencies? This question demands further research, particularly an investigation of the criminological jurists' attitudes toward colonialism in the 1920s and 1930s, whether these influenced their post-Second World War ideas, and, following a generational change in the AIDP in the 1950s, how the organisation dealt with the rise of anti-colonial movements that claimed violence was legitimate.

15.12. Conclusion: Phases of Liberalism and Conservatism

The AIDP was neither wholly liberal nor wholly conservative in the area of international criminal law from its founding in 1924 through the early Cold War. Its 1926 resolution for an international criminal jurisdiction, which included a concept of state criminality, and its 1928 statute for an international criminal court, represented a criminological liberal internationalism whereby an international criminal court could resolve interstate conflicts through prosecution and judgment. Still, the AIDP would have given control over prosecutions to the Great Powers sitting on the League Council. The 1930s – a decade of economic collapse, the retreat into economic and political nationalism, terrorist incidents aimed at overthrowing the Paris Peace Treaties and violations of the League Charter – produced an ideological change: more emphasis on state security, more efforts to eliminate political asylum, more willingness to work with authoritarian states, including the Nazis. During the Second World War, the organisation was inactive, which it said was a refusal to work with the Nazi overlords. While this was probably true, the group did not develop an active centre in Geneva, London, New York or Washington, where it might have been able to shape war crimes trials and the new United Nations Organisation. Rebuilding in the late 1940s, the organisation returned to its criminological liberal internationalism of the 1920s, despite questions about whether this could actually be effective against highly aggressive states with no intention of obeying international law. Its jurists worked on several important projects – the Nuremberg Judgment, the Genocide Conven-

tion and the Draft Code – all showing an evolution in the individual jurists' philosophies, as they attempted to rework interwar ideas to confront Nazi criminality. At the same time, they had to adjust to the fact that a strong defence of the state in the interest of international peace had to be balanced by greater consideration for the legal rights of the accused and the protection of minorities. The Draft Code project can be traced to the AIDP's 1935 sketch of a world penal code, but in the early 1950s, it ran aground on the shoals of Cold War political conflicts, specifically the controversy over whether state support for political partisans was a form of criminal intervention (that is, support for terrorism). The AIDP's most ambitious project, then, the creation of a permanent international criminal jurisdiction covering both state aggression and international crimes committed by individuals, was not realised, showing that state governments still feared this idea. The crisis and collapse of the international system prior to the Second World War led to a post-war reconstruction of a system that actually reinforced sovereignty and rejected permanent enforcement based on penal law.

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This fourth volume in the series Historical Origins of International Criminal Law concentrates on institutional contributions to the development of international criminal law rather than taking a chronological (Volumes 1 and 2) or doctrinal (Volume 3) approach. It analyses contributions made by institutions such as the Nuremberg, Tokyo, ex-Yugoslavia and Rwanda tribunals, INTERPOL, the International Association of Penal Law, the Far Eastern and Pacific Sub-Commission, and internationalised fact-finding mandates. It considers the role played by some jurisdictional principles and work methods of international and national institutions. Part 4 also looks at wider trends in the development of international criminal law

The contributors include Wegger Christian Strømmen, LING Yan, Anuradha Bakshi, ZHU Wenqi, Volker Nerlich, David Re, LIU Daqun, Serge Brammertz, Kevin C. Hughes, Patricia Pinto Soares, Mareike Schomerus, Seta Makoto, Natalia M. Luterstein, Hilde Farthofer, Itai Apter, Md. Mostafa Hosain, Helge Brunborg, Mutoy Mubiala, Yaron Gottlieb, Mark A. Lewis, Marquise Lee Houle, Tina Dolgopol, Rahmat Mohamad, Barrie Sander, Furuya Shuichi, Chris Mahony, ZHANG Binxin and the editors.

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