

## War Crimes, or When International Law Moved Ahead of Domestic Law

Eulalia W. PETIT DE GABRIEL\*

*Abstract:* War crimes are the cornerstone of the concept of international criminal responsibility. This essay tries to elucidate whether the definition of such crimes and the methods of prosecution thereof were initially a domestic criminal law concern in certain states that found its way towards international law cooperation efforts and regime or whether the domestic regulation has been the result of *ex novo* international legal obligations. This is called the *epic question*. For that purpose, the study analyses the evolution of international treaties on the topic while confronting them with two national legal orders, the United States of America and Spain's legislation on war crimes, mainly from nineteenth century onwards. These two very different legal orders show various options, including a dual path for military and ordinary criminal definition and prosecution of war crimes at a national level under shifting international and domestic rules. The result of the cross-checking clarifies an interpretation that answers the epic question accordingly.

*Key words:* War Crimes, International Criminal Responsibility, Humanitarian Law Codification, Military Criminal Jurisdiction over War Crimes, Criminal Jurisdiction over War Crimes.

### (A) DEFINING THE EPIC QUESTION

International criminal responsibility goes hand in hand with the recognition of extended degrees of international subjectivity for individuals. At its best, international criminal responsibility must be understood as a two-tier approach: the description of specific types of conduct from which criminal responsibility arises (the *definition* of a crime) and the regulation of how the author responsible of such conduct must be held accountable (the *prosecution* of that crime). Should these conditions be regulated under international law, we could start talking about the international criminal law *origin*, independently of the different prosecution options offered both in theory and practice (i.e., a pure international prosecution<sup>1</sup> versus a pure national one, or mixed models either on the basis of the complementarity principle between international and national jurisdictions or based on international conditioning of domestic jurisdiction).<sup>2</sup> The fact that the description of conduct and the means of prosecution are both governed by international rules leads us to refer to international criminal law and international individual criminal responsibility.

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\* Associate Professor of Public International Law, University of Seville. Email: eulalia@us.es.

<sup>1</sup> Most international legal scholars limit themselves to consider international criminal law as the prosecution by international or mixed tribunals, such as A. Cassese, *International Criminal Law* (2<sup>nd</sup> ed., Oxford, New York, 2008) [doi: 0.1093/he/9780199694921.001.0001], or K. Kittichaisaree, *International Criminal Law* (Oxford University Press, New York, 2001).

<sup>2</sup> Cherif Bassiouni, in his *Introduction to International Criminal Law* (2<sup>nd</sup> rev. ed., Martinus Nijhoff Publishers, Leiden, Boston, 2013) [doi: 10.1163/9789004231696], draws a distinction in international criminal law between a "Direct" and an "Indirect Enforcement System" in the sense we retain in our text.

While studying the origins of international criminal law in a historical perspective, a simple but basic question appeared and remained unresolved.<sup>3</sup> This essay will address the enigma of *Which came first, the chicken or the egg?*, as applied to the definition of international war crimes, the cornerstone of international criminal responsibility. *Were* the definition of such crimes and the methods of prosecution it entailed initially a domestic criminal law concern in certain states that found its way towards international cooperation efforts and regimes? Or has domestic regulation been the result of *ex novo* international legal obligations? Have international conventions therefore, by identifying a common interest, outlawed warfare misconduct before domestic law did? Was the protection of individuals against other individuals' war crimes a separate concern of state responsibility from war crimes committed by their respective armies? Consequently, when did a common value arise, and through which means did it make its way from mere ideas to an actual legal regime whose objective has been to humanize war and to establish accountability for war crimes as individual and not only state misconduct? These questions are addressed in what we will shortly refer to as the *epic question*.

As simple or incidental a question as it may appear to be, to answer it entails thoughtful consideration of different perspectives, which may not all be dealt with accordingly in an essay of this nature, short of pages and in need of far more reflection time.

First of all, a need to satisfy historical knowledge hunger is our departing point. As J. A. Maravall wrote,

“History builds our present by the ordination and logical articulation of the past we represent. We are the past insofar as we rise above the sediment of forms of life left behind, of cultural forms that other men have been practicing, and at which level each present stands. We are all that because we live for and from it. Thus, for man, to exist is to be above time.”<sup>4</sup>

We are facing dark times for the long-awaited international criminal prosecution model — the International Criminal Court. Domestic prosecution of internationally defined crimes in time of conflict is the alternative choice. Broadening our understanding of the historical developments and historical differences in national legal orders, however, is not an option, but a duty.

Second, tracking such an answer would highlight whether international humanitarian law is a rare legal frame where community values have arisen, taking precedence over national concerns and interests to restrain sovereign rights. We are more used to the reverse process, where international rules arise out of national common interests; national regulations being a first step in the legal and social values identification and development process, as was the case with the law of the sea or, stepping into the “humanitarian” field, human rights legal regime. The revealed path would also put

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<sup>3</sup> E. W. Petit de Gabriel, “Erase una vez... la responsabilidad penal internacional: del impacto de la Primera Guerra Mundial en su evolución conceptual y pre-normativa”, in Y. Gamarra Chopo and C. R. Fernández Liesa, *Los orígenes del Derecho internacional contemporáneo. Estudios conmemorativos del centenario de la Primera Guerra Mundial* (Institución Fernando el Católico, Zaragoza, 2015), at 247–271, and specifically at 248, n. 4.

<sup>4</sup> “La historia nos construye el presente merced a la ordenación y articulación lógica que lleva a cabo en el pasado que somos. Somos el pasado en la medida en que nos levantamos sobre el sedimento de formas de vida que se han quedado detrás de nosotros, de formas culturales que otros hombres han ido ensayando, y a nivel de las cuales se encuentra cada presente. Somos todo eso porque sobre ello y de ello vivimos. Por eso existir es para el hombre existir sobre el nivel del tiempo”, J. A. Maravall, *Teoría del saber histórico* (Revista de Occidente, 2<sup>nd</sup> ed., 1958), at 203 (translation by the author).

forward that law is for people and for protecting them from the establishment, despite international law having been first conceived as a tool for states and the individual status in international law having taken long and hard to develop. This is more of a philosophical question related to why and for what purpose international law exists, what interests and values it protects, and where and how states “set the limit to legal limits”.

Third, and perhaps not last or least, the confrontation of international law with two different legal systems representing military justice and criminal prosecution systems concerning “war crimes” — from common law and civil law traditions, respectively — may induce future reflections on the international-domestic law relationship. Although used to a monist-dualist theoretical approach, today’s practice is far more complex, in particular when description of crimes is concerned and the *nullum crimen sine lege* is at stake. The American dual military system of prosecution is a clear example.

As stated above, two national legal systems have been chosen for analysis. Both are rich in legal history relating to international humanitarian rules and criminal reforms. One is the United States’ system. The United States’ participation in the codification of international law of war is well known, specifically for the tribute due to the Lieber Code, named after the man who inspired and wrote it (being Prussian before becoming a US citizen is an interesting point to underline). The Lieber Code, in fact, inspired all international codification of warfare efforts, non-governmental (the Oxford Manual of 1880) and governmental alike (during the peace conferences held in The Hague in 1899 and 1907). As we will see, modern history of prosecution of war crimes in the United States may not be easily considered to be honoring this glorious past. In any case, a dual military system — one ruled by statute or domestic law and the other governed directly by international law — and a late ordinary criminal law inclusion of war crimes description are intriguing enough possibilities whose study should not be dismissed. At the same time, contemporary problems concerning violations of the laws of war by American soldiers abroad and the parallel prosecution of “illegal combatants” detained by US forces after the 2001 terrorist attacks and as part of the so-called counter-terrorism war are facts that may justify an analysis of the history of its domestic legal frame.

The second country chosen for analysis is Spain. Several are the reasons that made this country worthy of study. Its military history is long, and so is its legal regulation of the armies. Similarly, its history of criminal law codification — both military and ordinary — has been very prolific, which does not necessarily mean that it has been careful in terms of international law-related matters. So the study is merited. Besides, the National Red Cross Society undertaking to promote international humanitarian law compliance dates back to the nineteenth century and has been especially fruitful in the late twentieth and early twenty-first centuries, which increases the interest of this country for the study, as it may represent a case where governmental reforms are paired with Red Cross views and values.

It cannot be denied that other countries could add more sound conclusions to this study:<sup>5</sup> for instance, Germany and France (especially in terms of the legal regime of the nineteenth and early twentieth centuries, in relation to their position in the Franco-German wars), the United Kingdom (as a dualist country for conventional obligations), or Belgium (as a modern country with an accomplished system for war crimes prosecution through universal jurisdiction and with a historical connection to the codification of the laws of war based on the work of the *Institut de Droit International* and the Oxford Manual). But this essay was aimed as a short “chronicle”, and it finally took a longer way. So, future research is open for more than one reason. The epic question is a never-ending story.

The methodology proposed is twofold: a) to analyse the evolution of international treaties on the topic, and b) to explore two different domestic legal orders. This will ease the path to cross-check the main findings and possible interpretations of a(n) (un)clear answer to the epic question and, if any, to look for the origins of war crimes criminalization and prosecution at a domestic level.

## (B) AS INTERNATIONAL RULES GO BY

We will first consider the evolution of international law concerning war conduct,<sup>6</sup> but we will not draw the distinction between Geneva and The Hague law. Even though this opposition is commonly established, Geneva law is more present in The Hague than thought, as can be seen through the renewal of several Geneva treaties through The Hague conventions. We will not mainly rely on the doctrines of international scholars, nor will we assume non-governmental efforts to “codify” warfare law, such as the Oxford Manual of 1880, short of pages, although these may summarize the state of the art at a precise historical moment.

Warfare is an old branch of international law. Originally, customary law was developed over centuries, establishing limitations on the rights of the belligerents and determining means and methods of warfare as well as protected places or persons. Regarding the punishment of violations, no

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<sup>5</sup> Substantive contemporary criminal rules in a comparative law approach, describing criminal conduct in violation of the laws of war in different domestic regulations, can be found in “Propuesta de modificación del ordenamiento penal español, como consecuencia de la ratificación por España de los Protocolos de 1977 adicionales a los convenios de Ginebra de 1949”, *Revista Española de Derecho Militar* (1990–1991), no. 56/57, at 709–713 (summary of common principles) and at 773–845 (detailed mention of the legal descriptions of crimes in every one of the described national systems). For a comparative institutional point of view (how military justice is imparted in different countries), see J. L. Rodríguez-Villasante y Prieto, “El derecho militar del siglo XXI (segunda parte): la organización de la jurisdicción militar. Diversos sistemas de Derecho y legislación comparada”, *Revista Española de Derecho Militar* (2004), no. 83, at 59–96. The author explains the main contemporary characteristics of an important set of military criminal domestic jurisdictions both in common law and civil law states, including the United States and Spain. This author, nevertheless, does not explore the historical origins of these systems, as his article is devoted to the content of the workshop held in Rhodes in October 2001, organized by the *Société Internationale de Droit Militaire et Droit de la Guerre* specifically on the military jurisdiction organization in several countries, along with a meeting held in Madrid (October 2003) among Latin-American experts on judicial rights and guarantees in international humanitarian law in relation to military jurisdiction.

<sup>6</sup> All historical humanitarian law declarations, treaties, and documents will be cited according to the International Committee of the Red Cross web page, except when expressed otherwise in a note. Links to specific texts will be included when convenient.

one ever questioned the natural and sovereign right to prosecute nationals for violations of the laws of war, although these laws were rarely enforced. Generally, the conduct of the members of the armed forces in time of war was not subject to ordinary criminal law, and disciplinary — later military criminal law — measures were conceived for the orderly organization of the armed forces. It was not usual to consider the enemy as a “victim/right holder” in terms of domestic criminal law. An additional question was the right to extend criminal jurisdiction over armed forces crimes when perpetrated abroad and/or by enemy combatants against national forces. As J. F. Witt asserts when analysing the state of the law in early nineteenth century:

“To be sure, violations of the laws of war were met with forceful sanctions. But sanctions were not conceived of as punishing an individual offender for an infraction against the rules of warfare. The notion of punishing individual members of the enemy’s armies for violations of the laws of war was almost completely absent. William Blackstone, the English jurist with whom every American lawyer in the first half of the nineteenth century was familiar, wrote that when an individual violated a rule of the law of nations, it was the obligation of the violator’s own government to see to it that he was punished. [...] The victim government’s recourse, by contrast, was not to the criminal law but to diplomacy and ultimately retaliation.

It was retaliation — not criminal punishment — that formed the eighteenth- and early nineteenth-century law of war mechanism for responding to violations.”<sup>7</sup>

International law has codified the limitations on the conduct of parties during hostilities since the Declaration Respecting Maritime Law, signed in Paris on 16 April 1856.<sup>8</sup> A number of treaties had

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<sup>7</sup> J. F. Witt, *Lincoln’s Code. The Laws of War in American History* (Free Press, New York, 2012), at 128. Retaliation as an answer to warfare violations is not the purpose of this essay, but we must briefly mention that it was common state of the art the admission of this reaction among nineteenth- and early twentieth-century scholars. Among others (citations are in chronological order), see T. D. Woolsey, *Introduction to the Study of International Law Designed As an Aid in Teaching, and in Historical Studies* (1<sup>st</sup> ed., 1860; 5<sup>th</sup> ed., Sampson, Low, Marston, Searle & Rivington, London, 1879), at 219; F. de Martens, “Tratado de Derecho internacional, prólogo y notas de Joaquín Fernández Prida”, *La España Moderna* (Madrid, 1894), t. III, at 248; R. y P. Sánchez Covisa, *Derecho internacional público. Contestaciones adaptadas al programa oficial de dicha asignatura en la Universidad Central* (Librería Sánchez Covisa, Madrid, 1896); Henry Bonfils and Paul Fauchille, *Manuel de droit international public (droit des gens), destiné aux étudiants des facultés de droit et aux aspirants aux fonctions diplomatiques et consulaires, de Henry Bonfils* (7<sup>th</sup> rev. ed., updated by P. Fauchille, Librairie Arthur Rousseau, Paris, 1914), at 726–731; W. E. Hall, *A Treatise on International Law* (8<sup>th</sup> ed., P. Higgins, 1924), at 497; K. Strupp, *Éléments du droit international public, universel, européen et américain* (Lib. A. Rousseau, Paris, 1927), at 230. However, retaliation measures were not limitless. Specifically, violations of the laws of war as means of retaliation were condemned among scholars. Interesting testimony is given in an article dated 1912 but written around 1864 by H. W. Halleck, General of the United States, as it was found among his personal writings at the time of his death, H. W. Halleck, “Retaliation in War”, 6 *American Journal of International Law* (1912), at 109. In a similar vein, see C. Calvo, *Derecho internacional teórico y práctico de Europa y América* (Pédone, Paris, 1868), t. II, at 12; A. Mérignhac, “Les pratiques anglaises dans la guerre terrestre”, *Revue Générale de Droit International Public* (1901), t. VIII, at 115–116; A. Mérignhac, 3 *Traité de droit public international* (Librairie Générale de Droit et de Jurisprudence, Paris, 1912), at 349–358; L. Le Fur, *Précis de Droit international public* (1<sup>st</sup> ed., Dalloz, Paris, 1931), at 485.

<sup>8</sup> The declaration is a true international treaty. Having being signed by 55 states, it was worded in the following terms concerning its binding force: “The present Declaration is not and shall not be binding, except between those Powers who have acceded, or shall accede, to it.” Spain signed the declaration on 18 January 1908. The United States proposed an amendment that “aimed at a complete exemption of private property from capture at sea”. Although the amendment was not accepted by all the powers, it withheld its formal adherence. “In 1861, at the beginning of the Civil War, the United States announced nevertheless that it would respect the principles of the Declaration for the duration of the hostilities. Equally, in 1898 during the war against Spain, it was affirmed that the policy of the government of the United States would be to abide

been produced before any of them included a clause on the obligation of state parties to legislate on the definition of the specific crimes arising out of the violation of the text in their domestic legal orders, or the obligation to internally prosecute authors of such violations. We will refer to this obligation as the *domestic criminal law compliance clause*.

Specifically, neither the 1856 Paris Declaration Respecting Maritime Law nor the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field,<sup>9</sup> and neither the 1868 additional articles relating to the Condition of the Wounded in Maritime War<sup>10</sup> nor the 1868 Saint Petersburg Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles,<sup>11</sup> asserted the obligation upon the parties to include the definition, or prosecution, of crimes among the duties laid out in the texts.

The 1899 Peace Conference in The Hague — which transformed the humanitarian rules for maritime warfare of 1868 into the III Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864<sup>12</sup> and further developed the II Convention on the Laws and Customs of War on Land<sup>13</sup> and the Declaration to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature<sup>14</sup> — didn't even mention the domestic criminal law compliance clause.

Time and some debate<sup>15</sup> was needed until an article (Article 28 of the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field,<sup>16</sup> renewing the

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by the provisions of the Declaration throughout the hostilities. The rules laid down in the Declaration were later considered as part of general international law and even the United States, which is not formally a party thereto, abides by its provisions", International Committee of the Red Cross, [explanatory note to the declaration](#) (emphasis added).

<sup>9</sup> The treaty counts on 57 state parties. Spain signed it on 22 August 1864 and ratified it on 5 December 1864. The United States became a party through accession on 1 March 1882.

<sup>10</sup> The additional articles were never to enter into force, as they were not ratified. The only state party to ratify the articles was the United States through accession on 1 March 1882. Spain was the sole state party to the 1864 convention who did not even sign the 1868 articles. See "Comité International. Espagne", *Bulletin International des Sociétés de Secours aux Militaires Blessés* (1872), at 11–12. Nevertheless, the articles were in application to several conflicts through special agreements between the parties at the instance of the Red Cross Committee. That was the case for the Franco-Prussian War of 1870–1871 and the Spanish-American War of 1898. See, specifically, P. des Gouttes, "Les articles additionnels de 1868", 18 *International Review of the Red Cross* (1936), no. 211, at 527–536 [doi: 10.1017/S1026881200126297].

<sup>11</sup> The declaration, a true treaty, is still in force for 20 states, but neither Spain nor the United States ever ratified it or acceded to it.

<sup>12</sup> In force for 51 state parties, among them Spain (who signed it on 29 July 1899 and ratified it on 29 July 1899) and the United States (who signed it on 4 September 1900 and ratified it on 4 September 1900).

<sup>13</sup> This treaty is still in force for 17 of the original 51 state parties. Spain is among those state parties who have not ratified the 1907 succeeding convention. Spain signed it on 29 July 1899 and ratified it on 4 September 1900 but never became a party to the 1907 convention. The United States signed the 1899 treaty on 29 July 1899 and ratified it on 9 April 1902, and it was a party to the 1907 convention (signing it on 18 October 1907 and ratifying it on 27 November 1909).

<sup>14</sup> This declaration constituted a true treaty with 24 state parties (among them Spain, who signed the text on 29 July 1899 and ratified it on 4 September 1900) and two state signatories, among them the United States (29 July 1899).

<sup>15</sup> The question of the sanction for violations of the 1864 convention and the 1868 additional articles had been discussed at length soon after their approval among renowned scholars of the epoch; see, for instance, K. A. Brodrück, *Kriegsrecht des neunzehnten Jahrhunderts*. The debate gave birth to the first project ever of an international tribunal for individual criminal liability for violations of those rules; see G. Moynier, "Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève", *Bulletin International des Sociétés de Secours aux Militaires Blessés* (1872), at 123–131. An early reaction was published by the Spanish Assembly of the International Association for the

1864 convention, under the heading of a Chapter VII entitled “Repression of Abuses and Infractions”) stated such a clause for the first time in international law history:

“In the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present convention.

They will communicate to each other through the Swiss Federal Council the measures taken with a view to such repression, not later than five years from the ratification of the present convention.”<sup>17</sup>

This text sheds some light on the late inclusion of the obligation. By asserting “[i]n the event of their *military penal laws being insufficient*”, we could understand that contracting states assumed at the time that domestic law was already effectively in charge of the definition of these crimes and the prosecution thereof as an exclusively military legal question and an inherent right for sovereign states wishing to proscribe the specific types of conduct detailed therein: robbery and ill treatment of the sick and wounded, along with the usurpation of military insignia or of the Red Cross flag and/or emblem, notwithstanding the military or civil conditions or the perpetrator (unless he is a protected person according to the convention — a reference, we must conclude, made in relation to sanitary staff).

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Assistance of the Wounded in the Field — nowadays Spanish Red Cross Society. A report was commissioned to Antonio Balbín de Unquera y Gregorio Robledo and signed on 28 April 1872, cited with other scholars’ reactions in G. Rolin-Jaequemyns, “Convention de Genève: Note sur le projet de M. Moynier, relatif à l’établissement d’une institution judiciaire internationale, protectrice de la convention”, 4 *Revue de droit international et de législation comparée* (1872), at 325–346. On G. Moynier’s note, see Ch. K. Hall, “The first proposal for a permanent international criminal court”, *International Review of the Red Cross* (1998), no. 322 [doi: 10.1017/S0035336100062985]; E. W. Petit de Gabriel, “La propuesta del tribunal penal internacional de Gustave Moynier, un proyecto antiguo recientemente rescatado”, in J. A. Carrillo Salcedo, ed., *La Criminalización de la barbarie: la Corte Penal Internacional* (Consejo General del Poder Judicial, Madrid, 2000), at 31–87. It even originated some proposals of international conventions addressing the topic: Den Beer Portugael, *Le droit de la guerre* (1872); G. Roszkowski, “La révision de la Convention de Genève”, 4 *Revue de Droit International et de Législation Comparée* (1902), at 446. There were open discussions in the *Institut de Droit International* on the violations of the 1864 convention during 1894–1895. Two options were on the table, national or international accountability regimes for violation of the Geneva Convention. The majority of the members were in favour of the national prosecution option which was finally the one chosen for the approved project. See “De la sanction pénale à donner à la Convention de Genève”, *Annuaire de l’Institut de Droit International* (1895), t. XIV, at 19. These scholarly debates were the foundation of the 1906 domestic criminal law compliance clause and the 1929 convention double option including both a national (Art. 29) and an international accountability model (Art. 30) for the repression of its violations. See Petit de Gabriel, *supra* n. 3, at 247–271.

<sup>16</sup> The convention counted on 52 state parties and five state signatories. Spain signed it on 6 July 1906 and ratified it on 11 October 1907. The United States signed on 6 July 1906 and ratified it on 9 February 1907.

<sup>17</sup> From a different point of view, Art. 27 was to establish an obligation to protect the emblem of the Red Cross from illegal trading and diverted commercial purposes: “The signatory powers whose legislation may not now be adequate engage to take or recommend to their legislatures such measures as may be necessary to prevent the use, by private persons or by societies other than those upon which this convention confers the right thereto, of the emblem or name of the Red Cross or Geneva Cross, particularly for commercial purposes by means of trade-marks or commercial labels. The prohibition of the use of the emblem or name in question shall take effect from the time set in each act of legislation, and at the latest five years after this convention goes into effect. After such going into effect, it shall be unlawful to use a trade-mark or commercial label contrary to such prohibition” (emphasis added both in Art. 27 herein and in Art. 28, *supra*).

On the other hand, and also according to the period and perhaps because of the novelty of the technique, this domestic criminal law compliance clause was apparently imposed on the (signatory) government and not the state (party) itself, so that the legislative activity was not directly imposed by international law but rather pursued and “recommended” to the legislative body by the (signatory) government.

The domestic criminal law compliance clause of 1906 (or explicit obligation) didn’t become the rule at the time. The Peace Conference treaties of 1907 didn’t continue the “new wave”, though, since they didn’t include a similar prescription for any of the treaties adopted.

A scarcely cited convention, perhaps due to its lack of entry in force, the Declaration concerning the Laws of Naval War signed in London, on 26 February 1909, stated in Article 66 that:

“The Signatory Powers undertake to insure the mutual observance of the rules contained in the present Declaration in any war in which all the belligerents are parties thereto. They will therefore issue the necessary instructions to their authorities and to their armed forces, and *will take such measures as may be required in order to insure that it will be applied by their courts, and more particularly by their prize courts.*”<sup>18</sup>

Although it is not worded in terms of criminal prosecution, it is a variation of the domestic compliance clause.

These two texts (the Geneva Convention of 1906, in force, and the London Declaration of 1909, never in force) address the domestic criminal law compliance clause, inducing the idea that domestic regulations were already developed to grant full effect to the conventions, including the (criminal) sanctions of their violations.

Accordingly, and even addressing directly the concept of *individual criminal responsibility* arising out of violations of the laws of war, the Treaty relating to the Use of Submarines and Noxious Gases in Warfare, signed in Washington, on 6 February 1922, at the Conference on the Limitation of Armaments, stated in Article 3 that:

“The Signatory Powers, desiring to ensure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that *any person in the service of any Power who shall violate any of those rules*, whether or not such person is under orders of a governmental superior, *shall be deemed to have violated the laws of war and shall be liable to trial and punishment* as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.”<sup>19</sup>

In this case, the state parties would have assumed a two-fold obligation: to regulate the violation of the rules contained in the treaty as a war crime, of an equivalent gravity to piracy at least, and, for the territorial state where the presumed perpetrator was found, to bring him to trial either before civil (i.e., ordinary criminal courts) or military courts. This double jurisdiction system appears here for the

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<sup>18</sup> Emphasis added. Again, under the title “Declaration”, a true convention was passed. Although not in force, we should not underestimate the fact that both Spain and the United States were signatories to the declaration as of the date of adoption on 26 February 1909.

<sup>19</sup> Emphasis added.

first time and will be addressed in more detail when discussing national rules. We should underscore, however, that this convention imposed an obligation to prosecute, restricting the freedom to exercise jurisdiction, which is tantamount to sovereignty.

Interestingly, this article fixes the acts to be prosecuted (attacks upon and the seizure and destruction of merchant ships), a referential penalty (at least the same as for piracy), and the proscription of the defence of superior orders. Unfortunately, due to the failure of France to ratify it,<sup>20</sup> the convention did not enter into force. Article 5 of this treaty relates to the use of noxious gases, whereas the other provisions deal with submarine warfare. The treaty did not enter into force by reason of doubts concerning the latter provisions.

In the same vein, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (signed in Geneva, on 27 July 1929, renewing the 1864 and 1906 conventions, and in force until the I Geneva Convention of 1949)<sup>21</sup> included a general and domestic obligation to repress violations of the treaty in time of war, compelling the state parties to take all legislative measures to ensure this goal. Article 29 states:

*“The Governments of the High Contracting Parties shall also propose to their legislatures should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention.*

*They shall communicate to one another, through the Swiss Federal Council, the provisions relative to such repression not later than five years from the ratification of the present Convention.”<sup>22</sup>*

The clause is somehow limited, as prosecution in time of war is the only scenario considered. This restriction is compensated by the broad extension of crimes to be prosecuted, “any act contrary to the [...] Convention”. Again, confidence is over the table, as states are presumed to have primary and adequate penal legislation for repression of such crimes. Up to that convention, none of the in-force treaties except the Geneva Law (law governing the assistance to the sick and wounded) had ever introduced such a rule. Warfare law, on the contrary, remained void of such a clause.

It was not until 1948 that the gap was filled. Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide, signed on 9 December 1948,<sup>23</sup> set it clear. Although not

<sup>20</sup> According to Art. 6, the treaty would have entered into force once ratified by the five victors of World War I (the United States, the United Kingdom, France, Italy, and Japan). The treaty never entered into force because France did not ratify it. The treaty was nevertheless signed and ratified by 10 states, among them the United States (signature on the date of adoption and ratification, 9 June 1923). Spain never signed the treaty. Superior order defence is a topic that has been long studied. A contemporary essay — albeit not founding the analysis of the customary character of the defence in old texts such as the one we mention — is P. Gaeta, “The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law”, 10 *European Journal of International Law* (1999), at 172–191, specifically at 183–188.

<sup>21</sup> The convention had 60 state parties and eight signatories. Spain signed it on the date of adoption, 27 July 1929, and ratified it on 6 August 1939, four months after the civil war ended. The United States signed it on the date of adoption and ratified it on 4 February 1932.

<sup>22</sup> Emphasis added.

<sup>23</sup> The convention, still in force, has 147 state parties and one signatory. Spain signed it on 13 September 1968 and ratified it on 13 September 1968. The United States signed it on 11 December 1948 and ratified it on 25 November 1988. The latter made two reservations and some interpretative declarations. One of them concerned the fact that “nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.” On 29 December 1989, Spain added a declaration

specifically part of the laws of war — with the crime being also liable to be committed during peacetime — the treaty was nevertheless a direct consequence of World War II warfare. Thus, the crime of genocide becomes a core part of the system of international criminal law subject to our research. “*The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article II.*”<sup>24</sup> In this case, the wording of the article underlines the fact that domestic legislation was effectively short of a specific crime definition for genocide comprehensive conduct, although the disaggregated and unintentional results of genocide could already be criminalized in most national legal systems. No concern related to the jurisdiction — military or ordinary — is justified, as genocide can be committed both in peace and war times.

By 1949, the language was improved significantly. Article I, common to the four Geneva Conventions,<sup>25</sup> states: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”<sup>26</sup> Moreover, the four Geneva Conventions address the question of repression of abuses and infractions;<sup>27</sup> introducing an international state responsibility regime through an enquiry procedure. Besides, the 1949 four conventions add the need for domestic individual criminal responsibility — at least for the core concept of grave breaches of the convention. The domestic criminal obligations regime is expressed as follows:

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

Each High Contracting Party shall be under *the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.*

Each High Contracting Party shall *take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.*

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva

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concerning this reservation by the United States, for Spain considered that the meaning of such reservation was that “legislation or other action by the United States of America will continue to be in accordance with the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.”

<sup>24</sup> Emphasis added.

<sup>25</sup> All four conventions were signed on 12 August 1949. All four conventions count today on 196 state parties. Spain signed the texts on 8 December 1949 and ratified them on 4 August 1952. The United States signed them on 12 August 1949, making some reservations upon signature that were maintained upon ratification on 2 August 1955.

<sup>26</sup> On the meaning and scope of this obligation in relation to domestic law compliance regimes, see, among Spanish scholars, M. Pérez González, “El Derecho internacional humanitario en busca de su eficacia”, *Revista Española de Derecho Militar* (2001), no. 77, at 337–347.

<sup>27</sup> Although under different headings (“Chapter IX. Repression of Abuses and Infractions” in Convention I; “Chapter VIII. Repression of abuses and infractions” in Convention II; “Part VI. Execution of the convention” in Convention III; and without any specific heading in Convention IV), they all include the same rules.

Convention relative to the Treatment of Prisoners of War of August 12, 1949.<sup>28</sup>

This article comprises three different obligations: 1) the obligation to legislate to include in domestic criminal law the *grave breaches* as a crime; 2) the obligation to investigate and prosecute the presumed authors or instigators of the grave breaches crimes or, alternatively, to extradite such a person to a third party where a case is already made (which summarizes the *aut dedere aut judicare* principle);<sup>29</sup> 3) a general obligation of surveillance and control of any other breach of the convention that does not amount to a grave breach as defined in the conventions and that may be translated into a non-jurisdictional or non-criminal regime.

It could be argued that the obligation to legislate any grave breaches of the Geneva Conventions is set as an *ex novo* obligation. If we consider it this way, and if domestic law had already criminalized an earlier version of war crimes, it should be updated to accommodate the grave breaches conduct as defined by the Geneva Conventions. This would not exclude other crimes related to violations of the conventions, as the first article and the end phrase of the last cited article suggest. That being said, we believe that the Geneva Conventions considered *acquis* the existence of domestic law on war crimes but introduced the “grave breaches” as a new concept to be legislated internally.

Article 85 of Additional Protocol I of 8 June 1977 incorporated the grave breaches regime to the Protection of Victims of International Armed Conflicts, although Protocol II (relating to the Protection of Victims of Non-International Armed Conflicts) did not.<sup>30</sup>

During the 25<sup>th</sup> International Conference of the Red Cross in 1986, Resolution 5 “urge[d] the governments of States Parties to the Geneva Conventions and, as the case may be, to the Additional Protocols to fulfil entirely their obligation to adopt or supplement the relevant national legislation, as well as to inform one another, as stated above, of the measures taken or under consideration for this purpose”.<sup>31</sup> Accordingly, and two years later, the International Red Cross Committee sent a memorandum on national measures for implementation to the states parties to the Geneva Conventions and Protocol I and to the National Red Cross and Red Crescent Societies urging states and societies to engage into action.<sup>32</sup>

<sup>28</sup> This same wording is reproduced in Art. 49 of Convention I; Art. 50 of Convention II; Art. 129 of Convention III; and Art. 146 of Convention IV.

<sup>29</sup> A first mention of this principle can be found in the never-in-force 1937 League of Nations Convention for the Prevention and Punishment of Terrorism, Arts. 9 & 10, of the interwar period. See C. Eustathiadès, “La Cour pénale internationale pour la répression du terrorisme et le problème de la responsabilité internationale des États”, *Revue Générale de Droit International Public* (1936), t. XLIII, 385–415; A. Sottile, “Le terrorisme international”, *Recueil des Cours de l’Académie de Droit International de La Haye* (1938), t. LXV, at 89–184. For a contemporary analysis, see J. Pueyo Losa, “Derechos Humanos, crímenes de guerra y globalización de la Justicia”, *Revista Española de Derecho Militar* (2004), no. 83, at 11–58.

<sup>30</sup> Both Protocols have been signed by the United States on 12 December 1977, although they have never been ratified. President Reagan’s intention was to submit Protocol II to the Senate, justifying on different grounds his opposition to Protocol I. In any case, none of them were ratified in the end. See the presidential letter to the Senate and an appeal for ratification signed by Hans-Peter Gasser in “Agora: The U.S. Decision not to ratify Protocol I to the Geneva Conventions on the protection of war victims”, *American Journal of International Law* (1987), at 910–925. On its part, Spain signed both protocols on 7 November 1978 and ratified them on 21 April 1989.

<sup>31</sup> See Resolution 5 of the 25<sup>th</sup> International Conference of the Red Cross, Geneva, 23–31 October 1986.

<sup>32</sup> “Propuesta ...”, *supra* n. 5, at 698.

## (C) DOMESTIC LEGAL ORDERS EVOLVE

We will now turn to domestic law, considering both American and Spanish law in order to compare two different evolutionary scenarios. Both countries differ in their approach, although they have been deeply and historically — or contemporarily — committed to international humanitarian values and norms.

## (1) The American Way

The history of the United States runs parallel to war. The War of Independence in the eighteenth century and the Mexican-American War, American Civil War, and Spanish-American War in the nineteenth century were, among other conflicts of the time, prime examples for the application of military regulations regarding the means of war. Both World Wars in the twentieth century and the so-called War on Terror in the twenty-first century represent instances that offered a renewal of old discussions regarding war crimes prosecution and yielded innovative means to approach the matter.

The opposition between the legal use of force in war (as opposed to the ordinary criminal consideration of murder, fire wounds, property destruction, etc.)<sup>33</sup> and the abuse of that same legal use of force in such conflicts was ruled quite early in US history, compared with other countries and taking into account the recentness of the nation.

The Second Constitutional Congress established on 30 June 1775 a set of 69 Articles of War to govern the conduct of the Continental Army.<sup>34</sup> Shortly afterwards, in 1788, the US Constitution Article I, Section 8, provided that “The Congress shall have the power [...] [t]o make rules for the Government and Regulation of the land and naval forces.” Long is the history of US Army regulations honouring this article, in which an early development concerning war crimes was included.<sup>35</sup>

On April 1806,<sup>36</sup> the United States Congress enacted 101 Articles of War that were in force over a century, and which were not amended significantly until 1916, when the term “war offenses” was included officially for the first time.<sup>37</sup> New reforms were introduced in 1920<sup>38</sup> and 1948 for the

<sup>33</sup> The evolution of warfare rules soon faced the question of irregular combatants not being “officially commissioned” by a belligerent, as in the Mexican-American War. See Witt, *supra* n. 7, at 124–132 & 344–345.

<sup>34</sup> *Journals of the Continental Congress, 1774–1789*, vol. 2 (ed. Worthington C. Ford et al., Washington, D.C., 1904–37), at III–123.

<sup>35</sup> A short recollection of this history can be found in Ch. Jenks, “Self-Interest or Self-Inflicted? How the United States Charges Its Service Members for Violating the Laws of War”, in *Military Self-Interest in Accountability for Core International Crimes*, SMU Dedman School of Law Legal Studies Research Paper (2015), no. 195, at 263–265.

<sup>36</sup> Full text in J. Q. Adams (1767–1848), *Arts. of war, military laws, and rules and regulations for the Army of the United States* (1816).

<sup>37</sup> For the renewal and authorship of the new *Rules of Land Warfare*, see Witt, *supra* n. 7, at 362–365. A detailed official comparison of the Articles of War of 1806 and the reformation proposal of 1912, which would end up in the 1916 version, can be found in *Comparison of Proposed New Arts. of War with the Present Arts. of War and Other Related Statutes* (Washington, Government Printing Office, 1912). War offences included were the following: Misbehaviour before the enemy (Art. 74); Subordinates compelling commander to surrender (Art. 75); Improper use of countersign (Art. 76); Forcing a safeguard (Art. 77); Captured property to be secured for public (Art. 78); Dealing in captured or abandoned property (Art. 79); Introducing

Continental Army. The Lieber Code — which we will discuss at length *infra* — was thought primarily as a revision of the Articles of War of 1806 but was finally adopted as Instructions for the Army in the Field amidst the civil war. For its part, the navy was first included in the Articles of War of 1806, but in 1930 the Articles for the Government of the United States Navy, known as “Rocks and Shoals”, were adopted. In both cases (army and navy) military justice was to adjudicate on violations. A unified regime for all US armed forces was passed by Congress on 5 May 1950, entering into force on 31 May 1951 under the Uniform Code of Military Justice.<sup>39</sup>

The Articles of War of 1806 foresaw the delivery to ordinary justice of soldiers and/or officers accused of having perpetrated ordinary crimes such as capital crimes, violence, and/or offences against persons and properties under common law, and hence the possibility to be brought to trial.<sup>40</sup> More interestingly, the articles defined the establishment of a court martial and its procedural rules.<sup>41</sup> The offences for which a court martial may be convened were substantially disciplinary wrongs, in no case connected with in-the-field operations excesses and/or the law of war (i.e., international law).<sup>42</sup>

However, it was not until 1863, with General Order No. 100, concerning Instructions for the Government of Armies of the United States in the Field — or Lieber Code — that the epic question was directly addressed. Adopted by Abraham Lincoln in the harsh moments of the American Civil War, the Lieber Code was at the same time a limit to warfare and a shield for military necessity to

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goods into enemy territory (Art. 80); Relieving, corresponding with, or aiding the enemy (Art. 81); Spies (Art. 82). As can be seen, they are not exactly representative of our current “war crime” concept.

<sup>38</sup> The reformation process for 1916 and 1920 and the full reformed text of the Articles of War can be accessed through the US Library of Congress.

<sup>39</sup> *The background of the Uniform Code of Military Justice*, prepared [sic] at the Judge Advocate General’s School, U.S. Army, 1959.

<sup>40</sup> Articles of War of 1806, Art. 33.

<sup>41</sup> Arts. 64–93. The articles also included the possibility of creating courts of enquiry (specifically, Arts. 91–93).

<sup>42</sup> The complete list of military crimes according to the Articles of War of 1806 is as follows: misbehaviour at a place of worship (Art. 2), profane oaths (Art. 3), chaplain absenting himself from his duties (Art. 4), disrespectful words against the president, congress, or state legislatures (Art. 5), disrespect of commanding officer (Art. 6), mutiny (Art. 7), knowledge of intended mutiny (Art. 8), striking or disobeying a superior officer (Art. 9), false certificates respecting absentees (Art. 14), false musters (Art. 15), mustering officer accepting any thing by way of gratification (Art. 16), false returns (Art. 18), neglect or omitting monthly returns (Art. 19), desertion (Art. 20), absence without leave (Art. 21), advising desertion (Art. 23), reproachful speech (Art. 24), duelling (Arts. 25–27), officer or soldier upbraiding another for refusing to fight (Art. 28), officers not keeping good order or not redressing all abuses, grievances and disorders (Art. 32), wrongs caused by a superior officer to an inferior officer or soldier (Art. 35), embezzlement, waste or neglect of public property (Art. 36), neglect or waste of ammunition (Art. 36), sale, loss or damage of horse, arms, clothing or accoutrements (Art. 38), embezzlement or misapplication of public moneys (Art. 39), non-commissioned officers and soldiers found a mile from the camp without written permission (Art. 41), no officer or soldier to lie out of his quarters without leave (Art. 42), non-commissioned officers and soldiers not retiring at retreat beating (Art. 43), officers and soldiers neglecting to appear on parade or exercise, or quitting the same without leave (Art. 44), drunkenness on duty (Art. 45), sleeping on post (Art. 46), soldier hiring another to do his duty (Art. 47), officers and non-commissioned officers conniving at, or allowing, hiring of duty (Art. 48), officers occasioning false alarms (Art. 49), officer or soldier quitting his guard or platoon without leave (Art. 50), violence to persons bringing provisions or other necessities into the camp (Art. 51), misbehaviour before the enemy (Art. 52), giving watchword to persons not entitled thereto or giving parole or watchword different from the one received (Art. 53), disorderly behaviour of officers and soldiers by committing waste in enclosures, or injure property of inhabitants of the United States (Art. 54), forcing safe guard (Art. 55), relieving or harbouring an enemy (Art. 56), holding correspondence with, or giving intelligence to, the enemy (Art. 57), not securing public stores taken from the enemy (Art. 58).

achieve the ends of war as a driving force.<sup>43</sup> Known for having influenced European countries in their effort to codify the rules on warfare throughout the nineteenth and twentieth centuries,<sup>44</sup> it was also a source of inspiration to several foreign domestic regimes regarding war conduct.<sup>45</sup>

The interesting point of this new piece of legislation is the inclusion of crimes directly related to the way war was fought (means and methods) and not, as seen in the Articles of War of 1806, exclusively related to military discipline.

The Lieber Code concerned types of conduct against “the law of war”,<sup>46</sup> a branch of the law of nations (according to Article 27),<sup>47</sup> or more precisely against “the law and usages of war”.<sup>48</sup> Article 40 explicitly states that “[t]here exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.” By this, we can conclude that American law, as reflected in this code, considered these types of conduct not as brand-new domestic concepts but rather as an incorporation of internationally established war crimes concepts. Definition of the crime was made by way of reference to internationally regulated set of conduct, operated by customary international law. The state, nevertheless, remained sovereign (i.e., free) to exercise jurisdiction over those cases. And the definition of military jurisdiction as the one in charge was also a free and sovereign one.

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<sup>43</sup> Art. 14 states that “Military necessity, as understood by modern civilized nations, consists of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.” Other articles allow extreme measures like starvation (Art. 17) or surprise bombing of inhabited places without prior notice (Art. 19) or retaliation against prisoners of war (Art. 59), even to give no quarter (Arts. 60 & 61), if military necessity demands it. Although at the same time there is an acknowledgement of modern European limitations of non-combatants protection and non-disturbance of private relations (Arts. 21–25).

<sup>44</sup> Recognition of the codifying sense of the Lieber Code concerning pre-existing customary law and its impact on the later codification through international conventions and private efforts of the laws of war was soon made. See J. C. Bluntschli, *Le droit international codifié* (trans. C. Lardy, Librairie Gillaumin, Paris, 5<sup>th</sup> ed., 1895), at 5–6; E. Nys, *Le droit international. Les principes, les théories, les faits* (1<sup>st</sup> ed., Alfred Castaigne Éditeur, Bruxelles, 1904), t. I, at 183; G. B. Davis, “Doctor Francis Lieber’s Instructions for the Government of Armies in the Field”, 1 *American Journal of International Law* (1907), pt. 1, at 22–23; B. Scott, *The Hague Conferences of 1899 and 1907. A Series of Lectures Delivered Before the Johns Hopkins University in the Year 1908* (Johns Hopkins Press, Baltimore, 1909), cited according to the 1927 French text, vol. II, at 448; E. Nys, “Francis Lieber: His life and work”, 5 *American Journal of International Law* (1911), at 391; E. Root, “Francis Lieber”, 7 *American Journal of International Law* (1913), at 456; R. B. Baxter, “Le premier effort moderne de codification du droit de la guerre: Francis Lieber et l’Ordonnance générale N° 100”, *International Review of the Red Cross* (1963), at 234–235 [doi: 10.1017/S0035336100142765]; R. Abi-Saab, *Droit humanitaire et conflits internes. Origines et évolution de la réglementation internationale* (Pedone, Paris, Institut Henry-Dunant, Genève, 1986), at 20. For the impact of the code and the views of the US delegation in the 1899 and 1907 Peace Conferences, see Witt, *supra* n. 7, at 338–353.

<sup>45</sup> See Witt, *supra* n. 7, at 2 & 342–353. R. Abi-Saab (*supra* n. 44, at 23) details a long list of examples: the Netherlands prepared a manual for its military academies in 1871; France adopted a *Manuel de droit international à l’usage des officiers de l’armée de terre* in 1877; Russia prepared a manual including the principles set in the Declaration of Brussels (1874), which drew inspiration from the Lieber Code; Serbia published in 1877 an ordinance instructing the army on the Geneva Convention prescriptions and created a commission to draft a manual on warfare rules based on the Lieber Code; Argentina adopted in 1881 a version of the Oxford Manual, which was also drafted under the influence of the Lieber Code.

<sup>46</sup> Expressly in Art. 11, Art. 27, Art. 30, Art. 33, Art. 52, Art. 77, Art. 8, Art. 90, Art. 98, Art. 101, Art. 102, Art. 103, and Art. 148 of the Lieber Code.

<sup>47</sup> “The law of war can no more wholly dispense with retaliation than can the law of nations, of which is a branch [...]” Emphasis added.

<sup>48</sup> Expressly in Art. 60 and Art. 70.

The Lieber Code, without repealing the Articles of 1806, introduced the prohibition of certain conduct against the laws of war (international law-based definition of war crimes) and, at the same time, the way in which such violations could be prosecuted (domestic criminal law compliance clause). While the first part of the question (definition of the crimes) was solved by reference to international rules, the second part (jurisdictional approach) was a sovereign decision. In a way, we could date the epic question back to 1863, apparently, at least, in what concerns American law.

The Lieber Code introduced the idea that individual violations of the laws of war could and should be prosecuted. Offenders should be held individually responsible. For the Lieber Code, this was a military jurisdiction question, not an ordinary penal one. Military courts were, according to the code, responsible for martial law violations in case of individual offenders. Article 12 thus states that “[w]henever feasible, *Martial Law is carried out in cases of individual offenders by Military Courts.*”<sup>49</sup>

Although “[a]ll civil and penal law shall continue to take its usual course in the enemy’s places and territories under Martial Law”,<sup>50</sup> for ordinary non-compliance cases and unless otherwise decided by the occupying military authority substituting for the military rule and force (Article 4), violations of war regulations were a specific domain.

These military jurisdictions were foreseen basically for crimes committed by the military, but in case a suspension of ordinary penal law had been issued by the occupying authority, military jurisdiction was also to adjudicate cases of violations by resident population in occupied zones.

Specific “military” crimes were detailed throughout the articles of the code, such as violations of religion, morality, private property, personal integrity (especially of women), and the sacredness of domestic relations (Article 37). All wanton violence against persons and destruction of property not commanded by an authorized officer (robbery, pillage, sacking, rape, wounding, maiming, or killing in the invaded countries) was prohibited “under death penalty or such severe punishment as may seem adequate for the gravity of the offense” (Article 44). In case these acts were committed by an American soldier in a hostile country against its inhabitants, they were “not only punishable at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred”.<sup>51</sup> Other stated violations of the law and usages of war were “the use of poison in any manner, be it to poison wells, or food, or arms”,<sup>52</sup> intentional additional wounding or killing of already disabled enemies (Article 71), spying (Articles 88–89), treason (Articles 90–92), deception (Article 101), and parole violation (Article 130).

That said, the code’s peculiar approach was to draw a double path for this military criminal responsibility implementation, as stated in Article 13:

“Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must

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<sup>49</sup> Emphasis added.

<sup>50</sup> Art. 6, Lieber Code.

<sup>51</sup> Art. 47, Lieber Code.

<sup>52</sup> Art. 70, Lieber Code.

be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial, while cases which do not come within the “Rules and Articles of War”, or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.”

This double standard is still a feature of the US war crimes prosecution system; although, as we will see, reforms have been introduced after 1996, and critiques to the model in the post-September 2001 “war against terrorism” have arisen.<sup>53</sup>

The prosecution double option (courts martial and military commissions) is *ab origine* a distinction for applying statute law vs. common law of war. Statute law is to be applied by courts martial, whereas common law is to be applied by military commissions. Nevertheless, statutes can broaden courts martial jurisdiction, according to Article 13 of the Lieber Code; that is, they may restrict military commissions’ jurisdiction. Courts martial are, consequently, ruled by statute law. They are the jurisdictional expression for the United States Army, whether in US territory or not, and for certain crimes committed against US military interests by civilians, as described historically first by the Articles of War and later by the Uniform Code of Military Justice of 1950.<sup>54</sup> Yet the Uniform Code of Military Justice does not include a war crimes definition *per se* as a distinct crime, dismissing the Lieber Code’s approach. The present US position concerning military jurisdiction of

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<sup>53</sup> Severe critiques have been made against the use of military commissions to convict individuals in the “war against terrorism” era. In institutional terms, observations have been made to the United States Government by the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers in 2002 (and a follow-up on the question of the establishment of special courts, in particular for the trial of terrorism-related cases). See [A/HRC/20/19](#); [A/HRC/11/41](#); [A/HRC/8/4](#); [E/CN.4/2005/60](#); [E/CN.4/2004/60](#); and the United Nations High Commissioner for Human Rights (Statement Of High Commissioner For Human Rights On Detention Of Taliban And Al Qaida Prisoners At U.S. Base In Guantánamo Bay, Cuba, 16 January 2002) or the European Parliament (European Parliament resolution on the detainees in Guantánamo Bay, [P5\\_TA\(2002\)0066](#)), all cited in M. Pérez González and J. L. Rodríguez-Villasante y Prieto, “El caso de los detenidos de Guantánamo ante el Derecho Internacional humanitario y de los derechos humanos”, 54 *Revista Española de Derecho Internacional* (2002), no. 1, at 13–14. These authors include a detailed résumé on a petition to the Inter-American Commission on Human Rights — currently undisclosed — on the Guantánamo detainees’ status as prisoners of war, at 34–36. Later, on 6 August 2008, the Center for Constitutional Rights and the Center for Justice and International Law filed a petition before the Inter-American Commission on Human Rights against the United States on behalf of Djamel Ameziame for having been “subjected to many acts that amount to torture, cruel and degrading treatment, including the deliberate deprivation of medical attention, religious abuse, and lack of contact with his family; [and considering] that the legality of his detention has not been determined by a competent court, and therefore he is still subject to arbitrary detention; and that he is at risk of being transferred back to Algeria, where he would be at risk of serious harm. Thus, Mr. Ameziame is currently seeking to have a proper judicial review of the legality of his detention and to be adequately resettled in a safe location”. The case has been declared admissible on 20 March 2012 and is pending final resolution ([Report No. 17/12, Petition P-900-08, Admissibility, Djamel Ameziame, United States](#)). There exists a vast array of critical works by American scholars on the topic. We will cite, for example, D. Cole, “Military Commissions and the Paradigm of Prevention”, in *Guantánamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (eds. F. Ni Aoláin and O. Gross, New York, Cambridge University Press, 2013), at 1–16. The author considers that both the ordinary criminal system for terrorist acts and the courts martial system for war crimes were possible jurisdictional paths. The decision to turn to military commissions “may permit easier convictions of individuals, and may allow prosecutors to avoid confronting the consequences of the United States’ systemic reliance on torture and cruel, inhuman, and degrading tactics in its interrogations of detainees. In this respect, the commissions are best understood not as a legitimate forum for trying war crimes, but as an avenue for short-circuiting legal processes that might hold us accountable for our wrongs”, at 3.

<sup>54</sup> [Uniform Code of Military Justice](#).

courts martial is that war crimes, according to US international legal obligations, are not defined as specific crimes but, rather, are covered by common types of conduct (murder, wounds, robbery...). Prosecution and adjudication are to be based on those types of conduct first and foremost,<sup>55</sup> or in cases not comprised therein by the general clause included in Article 134 after the 1956 amendment.

“Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.”

The second military way in which war crimes are punished is through military commissions. This jurisdiction has been historically considered part of the military government activities, mainly under occupation regime but not only, as it is deemed to include universal jurisdiction over war crimes based on Article I, Section 8, of the US Constitution, where the powers of Congress are detailed, including “[t]o define and punish [...] offenses against the Law of Nations”.<sup>56</sup>

The traditional interpretation has been that military commissions were dependent upon international law and the president’s power to rule on questions of procedure as a manifestation of Article I, Section 2, of the US Constitution, which grants the president the power as commander-in-chief to deal with occupied territory. Later, Article 36 of the Uniform Code of Military Justice of 1950 authorized the president to prescribe the procedure and modes of proof in cases before courts martial and military commissions. According to Major H. D. Hodges, in the absence of action, international standards were to be applied in military commissions: “International law requires only that the accused receive a ‘fair trial’ and that he not be ‘denied justice.’”<sup>57</sup> No procedural or other type of regulatory framework was established on military commissions until 2006. The powers of these commissions are directly deduced from international law, as it was originally considered that under occupation neither the occupant domestic law nor the occupied territorial law was to be applied as a general rule. International law invests the occupying authority with all powers — legislative, administrative, and judicial — to apply the laws of war and to prosecute offenders even without a

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<sup>55</sup> A very interesting guide for practitioners is to be found in Major Martin N. White, “Charging War Crimes: A Primer for the Practitioner”, *The Army Lawyer* (February 2006, DA PAM 27-50-393). The guide explains the different options for charging war crimes at a moment when no such definition of a crime existed either in the Uniform Code of Military Justice or the US Criminal Code, by way of reference to specific and defined types of conduct such as rape and assault, conspiracy, cruelty and maltreatment, and so on. References to the Abu Ghraib incidents are included. More recently, a comparative analysis on “US military prosecuting its own service members who violate the laws of war under different criminal charges than it prosecutes enemy belligerents who commit substantially similar offences” and the possible explanations for such a war crime prosecution policy has been undertaken and published by Jenks, *supra* n. 35. The research contains a detailed comparison of a specific set of misconduct, their elements and maximum penalties both in the Statute of the International Criminal Court and in the Uniform Code of Military Justice.

<sup>56</sup> Major H. D. Hodges, *The Juridical Character of Nonstatutory Military Tribunals. A Thesis Presented to the Judge Advocate General’s School* (April 1963, typed), at 13; and see again later, connecting it with the Lotus Case, pages 46–50. References to this study must include the following statement: “The opinions and conclusions expressed in the thesis are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General’s School or any other governmental agency.”

<sup>57</sup> Hodges, *supra* n. 56, at 145–146.

territorial or personal connection. In a sense, military commissions as such are not under US ordinary or military jurisdictions, for judicial reviews or certain procedural guarantees have been historically precluded from military commissions operations, i.e., the Supreme Court had no power to review or reconsider the decisions, and the habeas corpus action was not supposed to be granted to the offender, as due process rights before military commissions were not set by domestic statutes and rules of procedure but by international law rules. That, at least, has been a long-standing interpretation,<sup>58</sup> although recent evolution in legislative terms and Supreme Court case law has reversed this state-of-the-art description.

Throughout US history, military commissions have been set up to adjudicate over dissimilar, and not always peaceful, categories of events: the Mexican-American War guerrillas, Civil War confederate belligerents (mid-nineteenth century), Lincoln's own assassination, or the Philippine-American War.<sup>59</sup> The latest in these series of events has been the Bush administration's response to the 11 September 2001 attacks and the following War on Terror. George W. Bush, as president and as commander-in-chief of the Armed Forces of the United States, issued the Military Order of 13 November 2001 concerning Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. Section 4.a) established that

"Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed."<sup>60</sup>

In fact, no domestic rule has been enacted concerning the establishment and functioning of military commissions and their procedural aspects until US Supreme Court ruling in *Hamdan v. Rumsfeld* on 29 June 2006<sup>61</sup> declared procedurally flawed and unconstitutional several aspects of the military commissions already in place, including the authority of the president to enact them and the lack of fair trial standards required by the Geneva Conventions of 1949. The US Congress passed, as a consequence of these findings, the Military Commissions Act of 2006,<sup>62</sup> pressed by the Bush administration. Critical voices soon spoke against the deficiencies of the act, given that it redefined "combatancy" status, excluded the invocation by the accused of any right arising out of the Geneva

<sup>58</sup> Hodges, *supra* n. 56, at 13–34 & 148.

<sup>59</sup> Hodges, *supra* n. 56, at 51–57, referring to several cases related to post-American Civil War, Mexican-American War, and Spanish-American War events in which military commission jurisdiction was built on the basis of the universal jurisdiction principle, which is neither territorial nor personal, for international law violations (law of war); see also Witt, *supra* n. 7, at 124–130 (Mexican-American War), at 267–274 (American Civil War), at 287–296 (Lincoln's assassination), at 308–317 (American Civil War), at 357–358 (Spanish-American War), and at 370–373 (Guantánamo Bay cases). In the same sense, and containing a praise on the virtues of the model, see also D. F. Vagts, "Military Commissions: A Concise History", 101 *American Journal of International Law* (2007), at 35–48. A brief historical note is also present in Cole, *supra* n. 53, at 4.

<sup>60</sup> Military Order of November 13, 2001, concerning Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. On the "preventive approach" — and its consequences — justifying the military commissions option, see Cole, *supra* n. 53, at 7–9.

<sup>61</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>62</sup> The United States Military Commissions Act of 2006 was also known as HR-6166. It was an act of Congress signed by President George W. Bush on 17 October 2006. On "the making of" "in a rush" of the 2006 Act, see C. M. Vázquez, "The Military Commissions Act, the Geneva Conventions and the Courts: A Critical Guide", 101 *American Journal of International Law* (2007), at 73–75.

Conventions, added offences to the law of war borrowed from the domestic criminal law, rejected vague — as opposed to grave — violations of common Article 3 and rejected the reference to “Non-U.S. sources of law”.<sup>63</sup> But it was after the United States Supreme Court ruled in *Boumediene v. Bush* (12 June 2008)<sup>64</sup> that detainees had to have access to US federal courts to challenge their detentions through habeas corpus, which was barred by the 2006 act,<sup>65</sup> that a reformation law was adopted improving some procedural aspects. Besides, upon taking office in 2009, President Obama temporarily halted military commissions. In May 2009, the Obama administration announced that it was considering restarting the military commissions system with some changes to the procedural rules.<sup>66</sup> Consequently, on 28 October, the US Congress enacted the Military Commissions Act of 2009, including backdated effect to any alien detention after 11 September 2001.<sup>67</sup>

The Military Commissions Act of 2006 stated that “a military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”<sup>68</sup> No such point is included in 2009, although in a more subtle way is also mentioned when stating that

“[a] military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war, whether such offense was committed before, on, or after September 11, 2001, and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized under this chapter. A military commission is a competent tribunal to make a finding sufficient for jurisdiction.”<sup>69</sup>

<sup>63</sup> For a harsh critique of the 2006 act, see J. M. Beard, “The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorism Operations”, 101 *American Journal of International Law* (2007), at 56–73; Vázquez, *supra* n. 62, at 73–98.

<sup>64</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>65</sup> Military Commissions Act of 2006, Section 7: “No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

<sup>66</sup> J. K. Elsea, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, Congressional Research Service, 4 August 2014, at 1–55. For an extended review of Obama’s policy on civilian protection and the prevention of international crimes, see B. Van Schaack, “Crimes Against Humanity: Repairing Title 18’s Blind Spots”, *Stanford Public Law Working Paper No. 2705094* (December 17, 2015), at 2–4 [doi: 10.2139/ssrn.2705094].

<sup>67</sup> Formally, the amended act is Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, 123 *Stat.* 2190, enacted 28 October 2009, Title XVIII, Military Commissions Act, at 2574.

<sup>68</sup> Military Act of 2006, Sec. 948b. Military commissions generally, (f), Status of Commissions Under Common Article 3.

<sup>69</sup> Military Commissions Act of 2009, Sec. 948d, Jurisdiction of military commissions. Unquestionably, steps forward have been taken: review by the United States Court of Military Commissions and by the United States Court of Appeals for the District of Columbia Circuit and a writ of certiorari to the Supreme Court had been included in 2006. The habeas corpus petition expressly prohibited under the Military Commissions Act of 2006, and unconstitutional under *Boumediene v. Bush*, is no longer prohibited according to the Military Commissions Act of 2009. Military Commissions Act of 2009, Subchapter VII. Post-Trial Procedure and Review of Military Commission, Sec. 950a to 950h. For a comparison between the 2006 and 2009 guarantees in general, and specifically concerning review, see Elsea, *supra* n. 66, at 40–55.

Nevertheless, criticisms are partially based on the diversion effect of war crimes and terrorism-related prosecution of non-citizens from federal courts to military commissions,<sup>70</sup> along with doubts about the charges as violations of international humanitarian law. Today, after the consequences of the 2001 War on Terror over the military commissions institution, the Department of Defense's Law of War Manual of June 2015 states that military commissions are to prosecute "alien unprivileged enemy belligerents"; that is to say, combatants not covered by the traditional rules of warfare (as is allegedly the case of terrorists, Al Qaeda members, etc.).<sup>71</sup>

According to the latest version of the act, the subject matter jurisdiction of military commissions includes any violation by any alien "unprivileged enemy belligerent"<sup>72</sup> of the law of war (international law),<sup>73</sup> as well as offences like spying and aiding the enemy,<sup>74</sup> among others. The crimes currently defined and considered to be committed under the forms of perpetration, attempt, conspiracy,<sup>75</sup> or solicitation are the following: murder of protected persons, attacking civilians, attacking civilian objects, attacking protected property, pillaging, denying quarter, taking hostages, employing poison or similar weapons, using protected persons as a shield, using protected property as a shield, torture, cruel or inhuman treatment, intentionally causing serious bodily injury, mutilating or maiming, murder in violation of the law of war, destruction of property in violation of the law of war, using treachery or perfidy, improperly using a flag of truce, improperly using a distinctive emblem, intentionally mistreating a dead body, rape, sexual assault or abuse, hijacking or hazarding a vessel or

<sup>70</sup> Human Rights Watch, *Questions and Answers: Military Commissions Act of 2006*, at 4.

<sup>71</sup> Department of Defense's *Law of War Manual* of June 2015, 18.19.3.7 U.S. Military Commissions. This has been heavily criticised by some scholars, considering that the illegal use of violence in such cases is not covered by the law of war, so authors should be treated as ordinary criminals, i.e., to be prosecuted under ordinary criminal courts and laws. See Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, UK, Cambridge University Press, 2004), at 30–33 and again at 233–237; J. Hafetz, "Diminishing the Value of War Crimes Prosecution: A View of the Guantanamo Military Commissions from the Perspective of International Criminal Law", 2 *Cambridge Journal of International and Comparative Law* (2013), no. 4, at 800–824, and *Seton Hall Public Law Research Paper No. 2405704*, at 814–816; in a different sense and considering there is a legal presumption of "belligerent status" while a judicial decision is pending, see Pérez González and Rodríguez-Villasante y Prieto, *supra* n. 53, at 22–24.

<sup>72</sup> Military Commissions Act of 2009, Sec. 948c, Persons subject to military commissions.

<sup>73</sup> Military Commissions Act of 2009, Sec. 948b(a) and 948d.

<sup>74</sup> Military Commissions Act of 2009, Sec. 948d, referring to 10 U.S. Code §904, Art. 104, Aiding the enemy, and §906, Art. 106, Spies.

<sup>75</sup> Doubts were already cast in *Hamdam v. Rumsfeld*, when a Supreme Court plurality of four judges, although not a majority, concluded that "conspiracy" was not a war crime under the laws of war, in Cole, *supra* n. 53, at 2 and again at 11 [doi: 10.1017/CBO9780511920721.001]. On the topic of conspiracy status, see R. Wala, "From Guantanamo to Nuremberg and Back: An Analysis of Conspiracy to Commit War Crimes under International Humanitarian Law", 41 *Georgetown Journal of International Law* (2010), no. 3, at 683–709. This author concludes that "[t]he legacy of Nuremberg and the treatment of conspiracy in modern IHL instruments and jurisprudence show that conspiracy to commit war crimes—as an inchoate offense and a source of vicarious liability—have been repudiated. What remains of conspiracy after the post-World War II war crimes trials is JCE [Joint Criminal Enterprise] liability, which continues to develop within the jurisprudence of international criminal tribunals", at 709. On his part, J. Hafetz puts forward an alternative argument for basing conspiracy and other forms of vicarious commission on a so-called separate "US common law of war", as has been advanced in some Guantánamo cases by the US Administration, *supra* n. 71, at 800–824. For a detailed and comprehensive analysis on the topic comparing common and civil law traditions on conspiracy (as an independent crime or attempted participation) and the international law rules for this concept (genocide convention, ICC statute), see J. R. Amenge Okoth, *The Crime of Conspiracy in International Criminal Law* (Asser Press, The Hague, 2014) [doi: 10.1007/978-94-6265-017-6].

aircraft, terrorism, providing material support for terrorism, wrongfully aiding the enemy, and spying.<sup>76</sup>

Stepping out of military jurisdiction, ordinary (i.e., non-military) criminal law in the United States has been kept ignorant of specific war crimes proscription for a very long time.<sup>77</sup> It was considered that ordinary criminal law was complying with international legal obligations to charge perpetrators with ordinary crimes, such as murder, torture, etc., in those cases when the presumed authors were not subjected to military jurisdiction.

When the Geneva Conventions were ratified by the United States in 1955, the Senate Foreign Relations Committee “believed that the obligations imposed by the Conventions’ ‘grave breach’ provisions were met by existing federal law and no further legislation was required. [...] However, in 1996, the House Committee on the Judiciary found that in some cases the United States was legally unable to prosecute persons for the commission of grave breaches of the conventions, including when members of the armed forces were found to have committed war crimes only after military discharge.”<sup>78</sup>

The United States Code has been amended only recently, through the War Crimes Act of 1996, in order to include such crimes. After a very short legislative path,<sup>79</sup> this act was aimed to comply with the war crimes definition binding the United States in order to carry out its international obligations under the Geneva Conventions and to provide criminal penalties for certain crimes of war through reformation of Title 18 of the US Code (Crimes and Criminal Procedure). Although the initial proposal was conceived to guarantee a jurisdictional base for prosecution of offenders when the victim was a US Army member (for example, North Vietnamese soldiers who tortured US military personnel during the Vietnam War), the final text applies if either the victim or the perpetrator is a national of the United States or a member of the US armed forces. This extension on subject matter was recommended by the Department of Defense considering that, because the United States generally followed the conventions, doing so set a high standard for others to follow. Nevertheless, recent US legislative action has been criticized for being short of ambition, lacking a “crimes against

<sup>76</sup> Military Commissions Act of 2009, Sec. 948d, as developed at 950t, “Crimes triable by military commissions”. For a discussion of the character of this list and the critical points as extensions of international law of war crimes definition, see Elsea, *supra* n. 66, at 11–16.

<sup>77</sup> For the purpose of this essay we have limited our research to federal criminal law rules. Some literature exists, however, on the various possibilities and difficulties of criminal prosecution for war crimes at the state level. See, for example, B. Davis, “Research Report on Criminal Prosecution in California Courts of Former President George Bush for Conspiracy to Commit Murder and Murder”, *University of Toledo Legal Studies Research Paper No. 2012-12* [doi: 10.2139/ssrn.1981275].

<sup>78</sup> M. Lattimer and Ph. Sands, eds., *Justice for Crimes Against Humanity* (Hart Publishing, Oxford, 2003), at 248–249; and M. J. Garcia, *The War Crimes Act: Current Issues* (Congressional Research Service, January 22, 2009), at 1, n. 3.

<sup>79</sup> It was a personal proposal of Walter Jones, a Republican congressman, as is told in M. J. Matheson, “The Amendment of the War Crimes Act”, 101 *American Journal of International Law* (2007), at 49. The War Crimes Act proposal was introduced in the House as H.R. 3680 on 19 June 1996. The committee in charge of consideration was the House Judiciary, who passed it onto the House on 29 July 1996, where it was voice voted. It was passed in the Senate on 2 August 1996, receiving unanimous consent. Bill Clinton signed it into law on 21 August 1996. It was later amended by the Military Commissions Act of 2006, already referred to *supra*.

humanity” statute. Besides, the 1996 War Crimes Act does not include all possible Geneva Convention obligations and avoids any express mention of command responsibility, along with the exclusion of the universal jurisdiction arising out of the *aut dedere aut judicare* principle.<sup>80</sup>

The scope of the War Crimes Act of 1996 has endured through reformation both a broadening and a cutback, which may need further consideration. The original text explicitly made an offence (§2441) any grave breaches of the Geneva Conventions or of any protocol to any such conventions to which the United States is a party, importing the international “grave breaches” concept as such. In 1997, “war crime” was substituted for a “grave breach of the Geneva Convention”. This change was thought to enlarge the scope of conduct that could be punishable: besides the grave breaches as defined by the Geneva Convention (§2441(c) (1)), other war crimes could be prosecuted as well.<sup>81</sup> Specifically, all violations of Common Article 3 were included as “war crime”, since the reformed definition of war crime found in §2441(c) (3) referred to any conduct “which constitutes a violation of Common Article 3 of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict”.<sup>82</sup> Unfortunately, after the *Hamdam v. Rumsfeld* Supreme Court decision, the Military Commissions Act of 2006 restricted this latter paragraph to exclude any violation of Common Article 3, with the exception of its grave breaches, in case of a non-international armed conflict. Also, the amendment referred the precise meaning of grave breaches of Common Article 3 to several types of conduct included in detail in §2441(d):

“[...] the term “war crime” means any conduct—

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; [...]

(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character.”<sup>83</sup>

The types of conduct included in subsection (d) as grave breaches of Common Article 3 include torture, cruel or inhuman treatment, the performing of biological experiments, murder, mutilation or

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<sup>80</sup> Van Schaack, *supra* n. 66, at 27. This author evaluates “various elements for a possible crimes against humanity statute and other discrete statutory amendments, drawing upon previous draft bills, international criminal law, and other federal statutes”. She focuses on “demonstrating that the United States can implement the proposed changes and exercise leadership in atrocities prevention and response without increasing the risk that U.S. personnel or service members will be subjected to litigation overseas” (at 2). J. Paust, in “Universality and the Responsibility to Enforce International Criminal Law: No U.S. Sanctuary for Alleged Nazi War Criminals”, 11 *Houston Journal of International Law* (1989), no. 337, offers a different perspective to the *aut dedere aut judicare* principle and war crime prosecution according to United States legislation — before the 1996 War Crimes Act was enacted — by considering universal jurisdiction part of the customary international law on war crimes enforcement responsibilities.

<sup>81</sup> It was done so at the suggestion of the State and Defense Departments. See Garcia, *supra* n. 78, at 1.

<sup>82</sup> Amended by Pub. L. 105-118, §583.

<sup>83</sup> As amended by the Military Commissions Act of 2006, Pub. L. 109-366 §6.

maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and the taking of hostages.<sup>84</sup>

Although the Military Commissions Act of 2009 improved the Military Commission Act of 2006 concerning guarantees in those commissions, it did not amend the War Crimes Act definition of offences at any stage, despite the legislative proposals introduced in the 110<sup>th</sup> Congress.<sup>85</sup>

Thus, at present American law considers three main and different investigation and prosecution systems for war crimes:<sup>86</sup> ordinary criminal law (federal criminal courts applying US Code, Title 18, Chapter 118, §2441, with a specific but restricted concept of war crimes applied to non-international conflicts), military criminal law (courts martial applying the Uniform Code of Military Justice through general charges), and military commissions (prosecuting under the international law of warfare definition of crimes and the Military Commissions Act of 2009).

## (2) The Spanish Path

Spain has endured a tempestuous and complex military history.<sup>87</sup> In modern times, and since the Catholic Monarchs, the armies professionalized and were governed by military ordinances both for land and naval forces.<sup>88</sup> Among land forces ordinances, commonly cited by relevance, we could

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<sup>84</sup> For further analysis of the problems posed by the definition of crimes, see García, *supra* n. 78, at 5–8. Sound critiques on this reform and restriction can be found in Matheson, *supra* n. 79.

<sup>85</sup> García, *supra* n. 78, at 10–11, in connection with S. 576 H. R. 1415 (110<sup>th</sup> Congress), Sec. 13, concerning the implementation of treaty obligations to include denial of trial rights among war crimes offences. The proposal was introduced in the House on 8 March 2007. Other sections of the proposal concerned military commissions jurisdiction and their procedural matters, which were later covered by the Military Commissions Act of 2009.

<sup>86</sup> A comprehensive explanation of the procedures in the federal, civilian, and criminal investigation systems versus their military counterpart in regard to the laws of armed conflict violations, detailing extraterritorial rules and specific categories of individuals, such as civil contractors status in conflict areas, can be found in S. Watts, “Domestic Investigation of Suspected Law of Armed Conflict Violations: United States Procedures — Policies and Practices”, 14 *Yearbook of International Humanitarian Law* (December 2011), at 85–105 [doi: 10.1007/978-90-6704-855-2\_3].

<sup>87</sup> For a history on the institutional aspects of military jurisdiction as special forum, see N. González-Deleito y Domingo, “La evolución histórica de la jurisdicción penal militar en España”, *Revista Española de Derecho militar* (1979), no. 38, at 9–66, especially at 32–66 for post-Catholic Monarchs evolution; J. V. Lorenzo Jiménez, “El fuero militar y el ámbito competencial de la jurisdicción militar a finales del antiguo régimen”, *Revista Española de Derecho Militar* (2014), no. 101, at 171–203. With regard to substantive criminal rules, see A. Millán Garrido, “Pasado, presente y futuro de la legislación penal militar española. Antecedentes y breve análisis del proyecto de nuevo Código Penal Militar”, *Revista Española de Derecho Militar* (2014), at 299–320.

<sup>88</sup> The Ordinances for the Navy were among the oldest in the Kingdom of Aragon: a first refunded text appears as *Costumes of the Sea* (*Costums de la Mar*) and Ordinances for the Shore of Barcelona (*Ordinaciones de la Ribera de Barcelona*), by James I in 1258. Along with the Capitulations of King Peter IV (*Capitols del Rey en Pere*) of 1340, these constitute the basis for the Book of the Consulate of the Sea (*Libro del Consulado del Mar*), which in Chapter IV deals with “Ordinances for the Armies and plunder”. The Kingdom of Castile created its naval force around 1248, when Ferdinand III conquered Seville. For more information regarding the initial centuries of a royal navy in Castile, see F. J. García de Castro, *La marina de Guerra de Castilla en la Edad Media* (1248–1474), (Universidad de Valladolid, Valladolid, 2014), at 17–34. The Castilian navy was further regulated by the Ordinances for Galleys (*Ordenanzas de Galera*) in 1621 and the Ordinances for the Good Management of the Navy of the Ocean Sea (*Ordenanzas del Buen Gobierno de la Armada del Mar Océano*) in 1633, applying to the Atlantic Ocean routes. The navy was created in 1717, and the ordinances were adopted. Amended in 1748 by Ferdinand VI through His Majesty’s Ordinances for the Economic, Political and Military Governance of His Navy

mention the ordinances promulgated by Philip IV in 1632.<sup>89</sup> These were formally abrogated (although other norms were passed in between) by the ordinances of 1728.<sup>90</sup> Ferdinand VI approved His Majesty's Ordinances for the Economic, Political and Military Governance of His Navy,<sup>91</sup> and in 1768 Charles III passed His Majesty's Ordinances for the Regime, Discipline, Subordination and Service of His Armed Forces, which were subsidiary norms for the navy.<sup>92</sup> These were the first to grant a special and separate military justice forum.<sup>93</sup> They were completed with the Ordinances for the Artillery in 1802 and the Ordinances for the Engineers in 1803. Several revisions were commanded, and some were operated by the new laws on the Armed Forces in 1821<sup>94</sup> and 1878<sup>95</sup> and a Regulation for the Service in the Fields, approved by law in 1882.<sup>96</sup>

Thus, it is among these ordinances where we first have to look for the epic question. The Ordinances and Regulations for the armies are a rudimentary approach to armed forces responsibility regime. The Regulation of 1882 defined the law governing the conduct of war. Before 1882, there was no reference to any related war crime concept. Nevertheless, military jurisdiction over misconduct of the armed forces and civilian attacks of military interests and places already existed under courts martial. Military crimes considered in the Regulations of 1768 were comprised of blasphemy, outrage upon religion and religious signs and sites, disobedience, disrespect of commanding officers, slanders and insults, sedition, desertion and/or helping desertion, giving intelligence to the enemy, duelling, disturbances, neglect on post, absence without leave, treachery, spying, disorder, robbery, misconduct while on parade, counterfeiting money, rape and dishonest conduct, perjury, arms, robbery, robbery with death result, smuggling, and cowardice.<sup>97</sup>

The Regulations of 1882 were the first to include a reference to the laws and usages of war as a normative framework for what was legal in war. But this doesn't mean the epic question was broached then. Title VIII, Chapter XXVI, concerning "Authority, Discipline and Orders", stated that "[k]nowledge of the Military Code in some cases and of the law and usages of war (according to next

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(*Ordenanzas de Su Magestad para el Gobierno Militar, Politico, y Económico de Su Armada Naval*) and later by Charles IV in 1793, they were completed in 1802.

<sup>89</sup> *Ordenanzas Militares de Felipe IV* (Madrid, 28 June 1632, manuscript).

<sup>90</sup> *Ordenanzas de Su Magestad para el Regimen, Disciplina, Subordinacion, y Servicio de la Infanteria, Cavalleria, y Dragones de sus Exercitos en Guarnicion, y en Campaña* (Imprenta de Juan de Ariztia, Madrid, 1728). Access to full facsimile text.

<sup>91</sup> *Ordenanzas de Su Magestad para el Gobierno Militar, Político, y Económico de Su Armada Naval* (Imprenta de Juan Zúñiga, Madrid, 1748). Access to full facsimile text.

<sup>92</sup> *Ordenanzas de S. M. para el Régimen, Disciplina, Subordinación y Servicio de sus Exercitos* (Oficina de A. Marín, impresor, Madrid, 1768).

<sup>93</sup> A. I. Simón Alegre, "Corregir, castigar y olvidar a los díscolos soldados. La justicia militar en el primer tercio del siglo XX", *Segle XX. Revista catalana d'història* (2013), at 38–39.

<sup>94</sup> Decreto XXXIX, de 9 de junio de 1821. *Ley Constitutiva del Ejército*.

<sup>95</sup> *Ley Constitutiva del Ejército* (1878).

<sup>96</sup> *Reglamento para el Servicio de Campaña*, aprobado por ley de 5 enero de 1882.

<sup>97</sup> For example, *Ordenanzas de S. M. para el Régimen, Disciplina, Subordinación y Servicio de sus Exercitos* (Oficina de A. Marín, impresor, Madrid, 1768). The Eighth Book on Justice Matters addresses this question.

chapter), in others, is enough to guide armed forces in the field, both in respect of the enemy and in respect of inhabitants and of the foreign and home country.”<sup>98</sup>

Chapter XXVII, titled “Notions of the Law of Nations and the Laws of War”,<sup>99</sup> introduced basic notions of *ius gentium* in general and of the law and usages of war specifically. When coming to the fundamentals of the latter, it recalls the role of two opposing principles: necessity and humanity — the second limiting what is permitted by the first.<sup>100</sup> The regulation deals exclusively with those limitations of war-making that are “generally admitted and respected”<sup>101</sup> and summarises the state of the art, describing the main consuetudinary and conventional rules. Nevertheless, a careful comparison with the Lieber Code — not undertaken in this writing — could show that the state of the art was not clear, as prohibited types of conduct not always happen to meet.

The regulation makes reference to the following rules:<sup>102</sup> no quarter war is prohibited, and war does not admit of cruelty or the infliction of suffering for the sake of suffering; it admits of deception, but disclaims acts of perfidy; spying can be admitted in certain circumstances; taking hostages is not permitted; guerrilla war must be clearly identified, and the guerrilla combatants are either criminals or irregular troops; the latter being considered as such under the law of warfare and the former under ordinary criminal law as bandits; prizes, occupation administration, messengers, prisoners of war, desertion, siege, truce, armistice, end of hostilities, and capitulation are also regulated situations. The regulation considered compulsory the non-discriminatory medical care of the wounded and sick and the inviolability of medical sites and transportation,<sup>103</sup> as well as the indecorous the improper use of the Red Cross emblem. Conventions specifically cited are the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight of 29 November 1868<sup>104</sup> and the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864.<sup>105</sup> Yet there is no reference to the violation (and the prosecution thereof) of the regulated types of conduct or to any such conduct amounting to a war crime under court martial prosecution. In fact, the regulation considers that the only guarantee for the law and usages of war is good faith.<sup>106</sup> We could state, therefore, that no proper law on military jurisdiction existed at the time

<sup>98</sup> Reglamento para el Servicio de Campaña, aprobado por ley de 5 enero de 1882, par. 781: “El conocimiento del Código penal militar en unos casos, y en otros el de las leyes y usos de la guerra (que se indican en el capítulo siguiente), bastan para guiar al militar en campaña, tanto en su conducta respecto al enemigo, como en el trato con los habitantes del país extraño o propio.”

<sup>99</sup> Ibid., Ch. XXVII, “Nociones del derecho de gentes y leyes de la guerra.”

<sup>100</sup> Ibid., “828. Todas las reglas ó instituciones de derecho internacional tienen que girar forzosamente sobre dos principios, á veces contradictorios. El de la necesidad, que justifica el empleo de la fuerza, de la violencia, en los límites razonables para conseguir el objeto de la guerra; y el de humanidad, que limita al primero y prescribe que los estragos y extorsiones no deben alcanzar á los ciudadanos pacíficos de los estados beligerantes.”

<sup>101</sup> Ibid., “En cada caso concreto, según el legislador y el tratadista se incline á uno de estos dos extremos, las conclusiones pueden ser opuestas: y aquí, por brevedad, solo se expondrán aquéllas generalmente admitidas y respetadas.”

<sup>102</sup> Ibid., Pars. 860–868; 871–880; 886–887, and 890–957.

<sup>103</sup> Ibid., Pars. 890–893.

<sup>104</sup> Ibid., Par. 865.

<sup>105</sup> Ibid., Par. 893. It is worth noting that Spain was a party to the 1864 treaty but not to the 1868 declaration.

<sup>106</sup> Ibid., “851. Las restricciones, las reglas de procedimiento y conducta para dañar al enemigo; las reservas de humanidad, convencionales, para reducir la devastación á lo meramente indispensable; la norma asegura la lealtad de la lucha constituyen

nor was there any reference in the Regulation of 1882 to any court martial, like those foreseen in the Regulations of 1768. The above-mentioned Military Criminal Code (par. 781 of the Regulations of 1882) was still at a legislative project stage, since the codification commission was born in 1882. The 1821 law officially establishing the Armed Forces foresaw the existence of a special military jurisdiction for specific military crimes,<sup>107</sup> but crimes and sanctions were to be detailed by a military criminal code adopted by law and not by regulations.<sup>108</sup> Surprisingly, the new Law of the Armed Forces of 1878 kept silent on this matter.

Although historically older than the United States, in legal terms Spain bears no comparison. Unified territorial administration and legislation dates back to the eighteenth century and the enthroning of the Bourbon dynasty, when the *Nueva Planta* Decrees overturned territorially based legislation for the Valencia and Aragon Kingdoms and Catalonia Principality. But the complex political history of nineteenth-century Spain prevented the adoption of unified codes in several areas before the second half of the century. Codification for ordinary criminal law was soon adopted in 1822, yet a Criminal Code for the Armed Forces was only first approved in 1884.<sup>109</sup> This was abrogated by the Military Code of Justice in 1890.<sup>110</sup> Naval forces were granted a specific Criminal Naval Code. Unification was conducted under the Military Code of Justice in 1945. This was further renewed to comply with the legal standards of the 1978 Constitution through the adoption of a Military Criminal Code in 1985. This has been recently abrogated with the promulgation of the Military Criminal Code in 2015.

The Criminal Code of the Armed Forces (*Código Penal del Ejército*) of 1884 shifted from a disciplinary approach defined by the Army Regulations into a formal set of crimes and penalties to be imposed through a special jurisdiction, and not exclusively through a superior's administrative powers. It introduced an egalitarian system in which penalties were dependent on the specific misconduct achieved, and not on military hierarchical status—as was common practice in the regulations and ordinances of previous times.<sup>111</sup> This special jurisdiction was justified by three categories of situations: the perpetrator condition as an armed forces member; the definition of the crime by the military code

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lo que se llama leyes de la guerra: sin más garantía que la buena fé, como todo el derecho internacional, pero que van logrando dar á la guerra carácter más humano y caballeresco, aminorando antiguos é inútiles desastres.”

<sup>107</sup> Decreto XXXIX, de 9 de junio de 1821. *Ley Constitutiva del Ejército*. Arts. 118 to 120 clearly state that military jurisdiction was exceptional, not intended to pass sentence over civil cases or criminal cases on ordinary crimes. Military jurisdiction was reserved for military crimes only. Art. 121: “Se reduce por consiguiente el fuero militar a las causas criminales que versen sobre delitos militares.”

<sup>108</sup> *Ibid.*, Art. 126: “El código penal militar señalará solamente las penas correspondientes a los delitos militares.”

<sup>109</sup> *Código Penal del Ejército* (Imprenta y Litografía del Depósito de la Guerra, Madrid, 1884).

<sup>110</sup> *Código de Justicia Militar* (Gaceta de Madrid, 4, 5, 6, 8, 9, 10 & 11 October 1890; *errata* in Gaceta de Madrid, 22 October 1890).

<sup>111</sup> On the evolution from the regulations disciplinary approach to the 1884 Criminal Code one, based on modern criminology and criminal legal understanding, see Simón Alegre, *supra* n. 93, at 40–43. This code was completed with the Court Martial Organization Law (*Ley de Organización de los Tribunales de Guerra*) of 10 March 1884 and the Military Procedural Law (*Ley de Procedimiento Militar*) of 29 September 1886. A complementary code was approved and developed for the navy: the Navy CP (*Código Penal de la Marina de Guerra*) of 19 August 1888 and the Navy Courts Martial Organization Law (*Ley de Organización y Atribuciones de los Tribunales de Marina*) and Procedural Law (*Ley de Procedimiento*), both of 10 November 1894.

(not always strictly military conducts were included); and/or the premises where the crimes were committed. All these three reasons could give place to a military jurisdiction “appropriation” of the criminal case. This was clearly a differentiated regime for military justice set for the first time as justice to protect military goods, premises, and values; and, at the same time, as justice for the armed forces members, independently of the military nature or not of the offence. Basically, this characterization has been followed up to the most recent Military Criminal Code in 2015, where a different approach is trying to open a window towards a more restricted view of special jurisdiction.<sup>112</sup> This first codification effort in 1884 included a specific set of crimes against the law of nations in Articles 104 and 105 (*Delitos contra el Derecho de Gentes*).<sup>113</sup> No reference was made to any international convention, although the code included the following definition of conduct: truce, armistice, or capitulation; violation resulting in the opening of hostilities or retaliation; forcing a prisoner of war to fight against their nation; mistreating or depriving him of food; attack of protected and identified premises like hospitals, or unnecessary and wanton destruction of churches, libraries, museums, archives, or art heritage; and attack on messengers. The rest of the code includes traditional military offences, not referred to in any war crime concept, such as treason, espionage, rebellion, falsification of military documents, disobedience, insubordination, desertion, neglect on post, and so on. As previously explained, the code also described ordinary crimes but specifically prosecuted them under this special jurisdiction when perpetrated by members of the armed forces, such as in cases of misappropriation, robbery, slaughter, and injuries.

The Military Code of Justice (*Código de Justicia Militar*) of 1890 followed the same pattern while including a wider variety of types of conduct against the law of nations.<sup>114</sup> The specific chapter on Crimes Against the Law of Nations was taken almost word by word from the previous code (numbered Articles 231 and 232), but with the inclusion of destruction of roads and railways and telegraphic lines. Some new articles (Articles 233 to 236) were added to condemn wanton destruction of buildings and property, robbery, pillage or sacking, or violence against persons not commanded by an authorized officer; destruction of public archives and communications; deprivation of clothes or valuables from the wounded or prisoners of war; and deprivation of valuables of death comrades. Ordinary crimes, when committed by members of the armed forces, were no longer under the special prosecution under military jurisdiction.

The Military Code of Justice of 1945 was a product of the post-Civil War era. It was a complex law that included not only general aspects of military criminal justice (principles, definition of crimes and penalties) but also a definition of the structure of the courts martial system and procedural

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<sup>112</sup> Thus, specialized scholars consider of high importance the difference between military criminal law and military jurisdiction. The first is a special and complementary branch of criminal law, whereas the second is an option, and not necessarily the only one or the best. See J. F. Higuera Guimerá, *Curso de Derecho Penal Militar Español* (Bosch, Barcelona, 1990), at 82. The military jurisdiction questions and their evolution in the Spanish legal system are noteworthy; see, for instance, Y. Doig Díaz, *Jurisdicción Militar y Estado de Derecho: Garantías constitucionales y organización judicial* (Publicaciones Universidad de Alicante, Valencia, 2003).

<sup>113</sup> *Código Penal del Ejército* (1884), Second Book, Chapter III, Arts. 104–105.

<sup>114</sup> *Código de Justicia Militar*, *Gaceta de Madrid*, 6 October 1980, Second Book, Chapter III, Arts. 231–236.

matters. This was a code that was to be applied to an extensive array of events, and not always to strictly military matters. But, regarding war crimes, this code reproduced the 1890 description of crimes against the law of nations,<sup>115</sup> and included the offences of devastation, plundering, and unduly seizure of buildings and valuables in time of war (Articles 284 and 285). All these crimes were considered under the heading of “Crimes Against the Security of the Nation” (*Delitos contra la Seguridad de la Patria*), along with treason and spying.<sup>116</sup>

Some minor amendments to the Military Code of Justice of 1945 were introduced as years went by, since there was a lack of coherence with the regular criminal code; none of the articles previously mentioned, however, were modified. A commission was set up to develop a new code in 1969, but the resulting project was never adopted.

After the constitutional period became established, however, some years were to pass before the military criminal law was reformed. The overwhelming military jurisdiction inherited from the dictatorship period needed to come to terms with constitutional guarantees. This was clear even before the adoption of the new 1978 Constitution. A specific topic on military jurisdiction reformation was included in the notorious Moncloa Pacts (*Pactos de la Moncloa*) between all constitutional political forces in 1977.<sup>117</sup> An initial reformation law modifying the 1945 code was passed in 1980,<sup>118</sup> although in the interim period other rules were also passed that affected the exercise of military jurisdiction (penitentiary regulations, National Defence Law, and so on). A brand new Military Criminal Code (*Código Penal Militar*) was prepared by a special commission and approved in 1985<sup>119</sup> as part of a military renovation package on criminal, disciplinary,<sup>120</sup> jurisdictional,<sup>121</sup> and institutional matters.

As J. L. Rodríguez-Villasante y Prieto points out, the Military Criminal Code (which already possessed constitutional status) was a turning point. The 1985 Military Criminal Code was for the first time conceived in terms of complementary and specialized criminal regime, as it was generally

<sup>115</sup> J. J. Fernández Flores, in R. Blecua Fraga and J. L. Rodríguez-Villasante y Prieto, *Comentarios al Código Penal Militar* (Civitas, Madrid, 1988), at 815; and J. L. Rodríguez-Villasante y Prieto, “El derecho militar del siglo XXI: un proyecto de Código penal militar complementario”, *Revista Española de Derecho Militar* (2001), no. 77, at 91.

<sup>116</sup> *Código de Justicia Militar, actualizado con las Leyes Orgánicas 9/1980, de 6 de noviembre y 2/1981, de 4 de mayo notas, concordancias, jurisprudencia y disposiciones concordantes y complementarias* (Academia Editorial Lamruja, Madrid), at 130–132.

<sup>117</sup> Some of the objectives were to eliminate the dual description of crimes in the military and ordinary CPs, to limit the military jurisdiction prosecution of crimes based on the place of commission, and to resolve conflicts of jurisdiction when non-military individuals were involved in the same events as the military, limiting the cases in which military jurisdiction should prevail, as well as ordinary criminal jurisdiction for police, non-military activities and guarantees, and procedural rights and guarantees. See Higuera Guimerá, *supra* n. 112, at 120–121.

<sup>118</sup> BOE 1 November 1980, Organic Law amending the Military Code of Justice.

<sup>119</sup> BOE 11 December 1985, Organic Law 13/1985, containing the Military CP.

<sup>120</sup> Unfortunately, as J. L. Rodríguez-Villasante y Prieto points out in “Los principios generales del código penal militar”, *Boletín de Información del CESEDEN* (1986), no. 196, at 21, the Act for the Disciplinary Regime for the Military Forces (Organic Law 8/98) was not fully coordinated with the code, as they were not discussed in parallel.

<sup>121</sup> Some critiques have been made regarding the fact that jurisdictional questions were addressed in a separate legal instrument. See J.L. Rodríguez-Villasante y Prieto, “El Código Penal Militar”, *Revista General de Derecho* (1986), no. 499, at 1279.

the state of the art among western countries.<sup>122</sup> In regard to the question we are addressing, the 1985 code overcame the old concept of “crimes against the law of nations, devastation and sacking” described in the Military Code of Justice of 1945, including a specific section on war crimes as a separate concern from national security and defence.<sup>123</sup> Title II of the Second Book of 1985, Articles 69 to 78, under the heading of “Crimes Against the Law and Usages of War” (*Delitos contra las Leyes y Usos de la Guerra*). The following set of conduct, considered representative of Geneva Conventions grave breaches, was included in Articles 69 to 77:<sup>124</sup> mistreatment of surrendered or out of combat enemies; use of prohibited means of warfare or means and methods that cause superfluous injury or unnecessary suffering; destruction of neutral or non-military ships in violation of international treaties duly signed by Spain, without permitting the crew or people on board to safely evacuate; truce, capitulation, or armistice violation; destruction of non-combatant enemy property; protection of goods, values, and buildings from seizure in occupied territories; violation of price rights; violation of truce, messenger flags, or protected emblem according to Geneva Conventions; inhuman treatment causing death or injuries; rape to any sick or wounded combatant, any prisoner of war, or the civil population; practicing scientific or medical experiments without consent, or causing severe injuries or suffering; violation of the wounded and sick, prisoners of wars, hospitals, and other sanitary or religious personnel and facilities; forcing prisoners of war to fight against their country; forced movement and deportation of civil population; artistic, cultural, and historic heritage destruction. The title ends with an open clause in Article 78 to outlaw any other violation of international treaties duly ratified by Spain concerning means and methods of warfare, protection of wounded and sick both in land and naval warfare, prisoners of war, civil population, and protection of heritage in time of war.<sup>125</sup> This clause would eventually cover specific types of misconduct against the laws of war, taken from the strict “grave breaches” mandatory description, and would accommodate violations of

<sup>122</sup> J.L. Rodríguez-Villasante y Prieto, “El anteproyecto (2013) de Ley Orgánica de Código Penal Militar”, *Revista Española de Derecho Militar* (2013), no. 100, at 88–91.

<sup>123</sup> A preliminary analysis of the draft of the code, as approved by the Council of Ministers and passed to Congress in September 1984, can be found in J. L. Rodríguez-Villasante y Prieto, “La reforma penal militar”, *Boletín de Información del CESEDEN* (1985), no.186. A comment on the final text passed by Congress, in September 1984 can be found in Rodríguez-Villasante y Prieto, *supra* n. 120.

<sup>124</sup> For a detailed exegesis of these articles, see Fernández Flores, *supra* n. 115, at 807–845. Rodríguez-Villasante y Prieto, *supra* n. 121, at 1283, underlines the influence of the Military Criminal Code of Belgium of 27 May 1870 and the draft Military Criminal Code of 1978 of this same country on the new Title II of the Spanish Military Criminal Code.

<sup>125</sup> From a criminal law perspective, this has not been without criticism, given that no systematic approach is defined considering the protected values, the gravity of the offence, or the duration of penalties. Specifically, the open clause is severely criticized, as it supposes a loose reference that may encroach fundamental criminal principles, such as the principle of *nulla poena sine lege*. See C. Lamarca Pérez, “La competencia de la jurisdicción militar en tiempos de guerra y los delitos contra las leyes y usos de la guerra en el código penal militar”, *Revista General de Derecho Penal* (2004), no. 1, at 7. In this same essay, the author comments on specific potential contradictions among crimes and penalties for different violations, at 10–12.

the Additional Protocols of 1977, which were ratified by Spain in 1989 after the code was already in force.<sup>126</sup>

The code was amended several times, and the death penalty, which was only constitutionally allowed in time of war, was banished as of Organic Law 11/1995.<sup>127</sup> It affected specifically those penalties that could be imposed after conviction on the basis of Articles 69, 70, 71, and 76 cited *supra*. Some criticism has been levelled at the way crimes were described in the Military Criminal Code of 1985, for prosecution is limited to types of conduct “in time of war”. International obligations arising out of the Geneva Conventions also demand prosecution of grave breaches under occupation regimes; these, however, are not necessarily coetaneous or a consequence of “time of war”.<sup>128</sup>

Although conceived as a complementary regime to the ordinary Criminal Code, it was an unusually detailed and long code, since the new and constitutional ordinary Criminal Code took a long time to be passed in 1995 (see *infra*).<sup>129</sup> This produced a duplication in the war crimes description, included during decades in both military and ordinary codes.

This, along with other reasons, led to the discussion and further adoption of a recent and brand new code in 2015.<sup>130</sup> The need to adapt to the new international conventions ratified by Spain affecting prosecution of war crimes and the obligations arising out of the complementary regime with the International Criminal Court appear as important reasons, as can be evidenced in the Preamble of the new code.

Descriptions of crimes against the law of nations and violations of international conventions regulating war conduct have disappeared from this new version. The subsidiary and special principle regarding the ordinary Criminal Code should clarify the situation. The definition of conduct is now exclusively included in the ordinary Criminal Code, although in some cases the crimes are subject to military jurisdiction and aggravated penalties. The prosecution of these crimes (war crimes), independently of the (non-)military statute of the perpetrator, should be carried out through ordinary criminal jurisdiction in accordance with the ordinary Criminal Code description of crimes (as will be explained later). Nevertheless, the Military Criminal Code of 2015 states that all crimes against any protected persons and goods in case of armed conflict will be considered military crimes when

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<sup>126</sup> A proposal to amend both the Military Criminal Code of 1985 and the ordinary Criminal Code to encompass the Additional Protocols violations was drafted by the Spanish Red Cross in “Propuesta...”, *supra* n. 5. For the Military Criminal code specifically, see pages 760–762 (reasoning) and 768–772 (draft reformed articles).

<sup>127</sup> BOE 28 November 1995, abolishing death penalty in time of war.

<sup>128</sup> Fernández Flores, *supra* n. 115, at 817; Lamarca Pérez, *supra* n. 125, at 8.

<sup>129</sup> The Military Criminal Code of 1985 was supposed to be passed after a new ordinary Criminal Code was approved. A draft Criminal Code of 1980 was not accepted by Parliament, and time passed before a new draft was submitted to consideration. In consequence, a special and complementary — military — regime was passed in 1985 before the ordinary one was enforced in 1995, with this being object of several critiques, as can be read in Rodríguez-Villasante y Prieto, *supra* n. 121, at 1274–1275 and again at 1282–1281, and Rodríguez-Villasante y Prieto, “El derecho...”, *supra* n. 115, at 92–94 & 99–102.

<sup>130</sup> Organic Law 14/2015 of 14 October, Military Penal Code, BOE 15 October 2015. A proposal for the new code can be found in Rodríguez-Villasante y Prieto, “El derecho...”, *supra* n. 115, at 105–133. In another essay short of comments on the approved text of the law, the author explores the draft of 2013, which has been largely retained in the final text; see Rodríguez-Villasante y Prieto, *supra* n. 122, at 92–93.

abusing the authority conferred or infringing upon duties.<sup>131</sup> This may be considered the basis for the prosecution of crimes against the law of war by courts martial when perpetrated by members of the armed forces. But there is still a shortage of authoritative comment and exegesis upon this point and the conditions it establishes for declaring the military character of a crime (misconduct upon protected persons or goods with abuse of authority and/or infringement of duties of the Organic Law 9/2011<sup>132</sup> and Organic Law 11/2007,<sup>133</sup> which can never be presumed but will often be so when crimes against the law of war are committed).<sup>134</sup>

Even though the description of crimes is transferred to the ordinary Criminal Code, the new Military Code undertakes a more than terminological update; for instance, the substitution, among others, of “in time of conflict” for “wartime”, thus broadening the scope of the jurisdiction to encompass international humanitarian law instruments in more complex situations, such as occupation. The code does not include any description of the term “in time of conflict” or “conflict”. Rodríguez-Villasante y Prieto underlines that this is common practice in other military codes in western states. The concept should be interpreted according to international instruments such as the Geneva Conventions and the Additional Protocols or the Rome Statute of the International Criminal Court.<sup>135</sup> Moreover, the new code’s definition of “enemy” includes, among more traditional categories, “the forces, formations, or gangs that compose non-state armed groups, acting where Spain undertakes or participates in international peace enforcement or peacekeeping operations, according to international rules”<sup>136</sup> and “the organized armed groups referred to in Article 1.4 of Protocol I of 8 June 1977 (...) taking part in an armed conflict with Spain”.<sup>137</sup>

If we look at ordinary criminal law in Spain to broaden the domestic understanding on the epic question, it is worth mentioning that ordinary criminal law was for the first time unified and codified in Spain in 1822, long before military criminal law did. From then on, new criminal codes (not only reforming legislation) were enacted once and again when a change of constitution took place (and that was quite often, in fact): in 1848, 1850, 1870, 1928, 1932, 1944, and finally in 1995 (this one amended several times afterwards).<sup>138</sup>

<sup>131</sup> Military CP, 2015, Art. 9.2.a). Rodríguez-Villasante y Prieto, *supra* n. 122, at 97–98.

<sup>132</sup> BOE 28 July 2011, on the rights and duties of the members of the Armed Forces.

<sup>133</sup> BOE 23 October 2011, regulating the rights and duties of the members of the Civil Guard.

<sup>134</sup> Reviews are slowly appearing, although they still retain a very descriptive approach. See, for instance, J. L. Rodríguez-Villasante y Prieto, “El Código Penal Militar de 2015”, *Revista Ejército de Tierra Español* (2016), no. 900, at 48–55.

<sup>135</sup> Rodríguez-Villasante y Prieto, *supra* n. 122, at 96–97.

<sup>136</sup> Organic Law 14/2015, Art. 7.1.3: “Las fuerzas, formaciones o bandas, integrantes de grupos armados no estatales, que operen en un espacio donde España desarrolle o participe en una operación internacional coercitiva o de paz, de conformidad con el ordenamiento internacional.”

<sup>137</sup> Organic Law 14/2015, Art. 7.1.3: “Los grupos armados organizados a que se refiere el apartado 4 del artículo 1 del Protocolo I de 8 de junio de 1977, Adicional a los Convenios de Ginebra de 12 de agosto de 1949, que se encuentren en situación de conflicto armado con España.”

<sup>138</sup> Another criminal code was enacted with a limited territorial (Basque Country and Navarra only) and temporal scope (1875–1876) during the so-called Third Carlist War (third in a series of civil wars in the nineteenth century contending for the succession to the Spanish throne). Inspired by the Criminal Code of 1850, it has not been taken into consideration for this study. An analysis can be found in J. Gómez de Maya, “El Código Penal de Don Carlos VII”, *Anales de derecho* (2008), no. 26, at 85–140.

The nineteenth century has been characterized as having had a routine treatment for war crimes, as is evidenced in the Criminal Codes of 1848 and 1870 and in its twentieth-century version of 1932. All these criminal codes have been considered progressive for their time. *Delicta iuris gentium*, or crimes against the law of nations, are included in every one of the criminal codes mentioned<sup>139</sup> as part of the title devoted to Crimes Against the External Security of the State. The Criminal Code of 1928 would constitute the first landmark for a definition of war crimes as such.

Historically, a single set of crimes has been firmly established under the heading of “Crimes Against the Law of Nations”. They are not precisely what we consider war crimes, since they are neither related to the limitations of the means and methods of war nor to the conduct towards protected persons or goods. The crimes included as crimes against the law of nations were usually those committed against alien monarchs.<sup>140</sup> In 1822, other crimes were included in the criminal code, such as crimes against alien diplomats and representatives of alien states<sup>141</sup> or against the political constitution of alien states,<sup>142</sup> territorial sovereignty violation by military or public forces,<sup>143</sup> unauthorized extradition,<sup>144</sup> and slave trade.<sup>145</sup> Also, the Criminal Code of 1928 introduced crimes against alien state symbols<sup>146</sup> and internal or external security.<sup>147</sup>

Piracy has been a special case. It was initially included among *delicta iuris gentium* (Criminal Codes of 1822, 1848, and 1850),<sup>148</sup> but it was later considered alone as a specific crime in a separate chapter, among Crimes Against the External Security of the State (Criminal Codes of 1870, 1928, 1932, and 1944).<sup>149</sup> In 1995, it was left out of the code for a future special act to be adopted, but it was finally reintroduced among Crimes Against the International Community in the 1995 reformed code presently in force.<sup>150</sup>

<sup>139</sup> 1822 CP, Arts. 259–273; 1848 CP, Arts. 154–159; 1850 CP, Arts. 154–159; 1870 CP, Arts. 153 & 154; 1928 CP, Arts. 238–244; 1932 CP, Arts. 140 & 141; 1944 CP, Arts. 136 & 137.

<sup>140</sup> 1822 CP, Art. 260; 1848 CP, Art. 154 & 155; 1850 CP, Art. 154 & 155; 1870 CP, Arts. 153 & 154; 1928 CP, Arts. 238–240; 1932 CP, Arts. 140 & 141; 1944 CP, Arts. 136 & 137.

<sup>141</sup> 1822 CP, Arts. 262 & 265; 1928 CP, Art. 242.

<sup>142</sup> 1822 CP, Art. 259.

<sup>143</sup> 1822 CP, Art. 269.

<sup>144</sup> 1822 CP, Art. 271.

<sup>145</sup> 1822 CP, Art. 273.

<sup>146</sup> 1928 CP, Art. 241.

<sup>147</sup> 1928 CP, Art. 243.

<sup>148</sup> 1822 CP, Art. 268; 1848 CP, Arts. 156–159; 1850 CP, Arts. 156–159.

<sup>149</sup> 1870 CP, Chapter IV, Arts. 155 & 156; 1928 CP, Chapter IV, Arts. 245–252; 1932 CP, Chapter IV, Arts. 142 & 143; 1944 CP, Chapter IV, Arts. 138 & 139.

<sup>150</sup> 1995 CP, only after addition by Organic Law 5/2010, in force since 23 December 2010, Arts. 616 ter & t quater. The history and problems of piracy in the Criminal Code of 1945 and special laws (maritime and aerial piracy special regimes) and the original absence of this category in the Criminal Code of 1995 have been underlined in the first comments on the 1945 code. See M. Pérez González and M. Abad Castelos, “Offences Against the International Community According to the Spanish Penal Code”, *Spanish Yearbook of International Law* (1995–1996), no. 4, at 12–14; M. Pérez González and M. Abad Castelos, “Los delitos contra la comunidad internacional en el código penal español”, *Anuario da Facultade de Dereito da Universidade da Coruña* (1999), no. 3, at 440–441.

In relation to war crime conduct, the Criminal Code of 1822 specifically included as *delicta iuris gentium* the letter of safe conduct violation;<sup>151</sup> truce or armistice violations;<sup>152</sup> and crimes against the property and/or physical integrity of resident aliens at large, even in war times and concerning prisoners of war or under wartime reprisals allegations.<sup>153</sup>

The Criminal Code of 1928 defined for the first time and among the *delicta iuris gentium* the criminal responsibility for violation of humanitarian rules concerning the inviolability of ambulances, hospitals, and sick and wounded in combat, either in land or sea war; the obligation to assist the sick and wounded; and the protection of humanitarian associations, national or aliens, consecrated to the protection and assistance of sick, wounded, and prisoners of war.<sup>154</sup> We may consider this the first time that the epic question was truly addressed and that Spanish domestic law declared the unlawfulness of different types of conduct concerning warfare. This was not reproduced in the Criminal Code of 1932, nor was it considered in the Criminal Code of 1944.

The process to adapt the ordinary Criminal Code of 1944 to the 1978 Constitution took its time. A first draft in 1980 failed to garner support and was not approved in Parliament, whereas the Military Criminal Code — special and complementary criminal legislation — was swiftly adopted in 1985.<sup>155</sup> In the meantime, Spanish ratification of the Additional Protocols made the vacuum concerning the domestic ordinary definition of crimes all the more pressing, since their violations were not even included in the Military Criminal Code.<sup>156</sup> Eventually, the still-in-force Criminal Code was enacted in 1995 and several times reformed since.<sup>157</sup> The 1995 code included a full Title XXIV devoted to “Crimes Against the International Community” as a novelty. As M. Pérez González and M. Abad Castelos have pointed out, it must be stressed the use of a new terminology encompassing a conceptual change in the values protected, since protection is granted for international common values (the international community protection) and not merely in violation of international law or as a means of national interest or self-defence, as was previously argued.<sup>158</sup>

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<sup>151</sup> 1822 CP, Art. 266.

<sup>152</sup> 1822 CP, Art. 267.

<sup>153</sup> 1822 CP, Arts. 270 & 272.

<sup>154</sup> 1928 CP, Art. 244, states: “Incurrirán en la pena de cuatro meses a cuatro años de reclusión y multa de 1.000 a 5.000 pesetas, siempre que el hecho no constituyere un delito más grave: 1.º Los que en tiempo de guerra no respeten la neutralidad de las ambulancias y los hospitales para enfermos o heridos. 2.º Los que en las mismas circunstancias no presten auxilio a los heridos o enfermos o los hostilicen en alguna forma. 3.º Los que falten a la neutralidad de los bosques o aeronaves hospitalarios fletados por las Sociedades de socorro con autorización del Gobierno para auxilio de los náufragos, enfermos y heridos. 4.º Los que de cualquier modo impidan a las Asociaciones de caridad autorizadas, nacionales o internacionales, recoger o socorrer a los heridos, enfermos y prisioneros, prestando los servicios de su Instituto.”

<sup>155</sup> *Supra* n. 129.

<sup>156</sup> Pérez González and Abad Castelos, “Offences...”, *supra* n. 150, at 3–51, and especially at 30.

<sup>157</sup> The main reforms affecting this Title XXIV devoted to “Crimes Against the International Community” are Organic Law 15/2003 of 25 November (BOE of 26 November 2003), Organic Law 5/2010 of 22 June (BOE of 23 June 2010), and Organic Law 1/2015 of 30 March (BOE of 31 March 2015), modifying the description of pre-existing crimes or including the description of new prohibited types of conduct.

<sup>158</sup> They authored two specific essays regarding the Criminal Code of 1995’s new title on “Crimes Against the International Community”. See Pérez González and Abad Castelos, “Offences...”, *supra* n. 150, at 3–51, and especially at 4–8; Pérez González and Abad Castelos, “Los delitos...”, *supra* n. 150, at 433–467. See also M. Pérez González, “Un caso test en las relaciones entre el orden internacional y el interno: la adaptación de la legislación penal española a las exigencias del Derecho

The first chapter is a classic: under the heading of “Crimes Against the Law of Nations”, it only includes crimes against the “chief of an alien state” or “internationally protected individuals” as defined by international treaties.<sup>159</sup> Chapter II regulates the crime of genocide.<sup>160</sup> Crimes against humanity were originally a missed domain, heavily criticized among scholars of the epoch. It was incorporated through a reform in 2003 when a Chapter II bis was introduced (modified twice afterwards) addressing “Crimes Against Humanity”.<sup>161</sup>

Chapter III specifically deals with crimes against protected persons and goods in time of conflict.<sup>162</sup> Chapter IV covers command responsibility by way of omission to prevent the commission of crimes described in Chapter II, II bis, and III, and the responsibility of authorities or civil servants who, being in charge of the prosecution of those crimes, do not comply with their inherent responsibilities.<sup>163</sup> Finally, a specific chapter devoted to piracy has been added according to Organic Law 5/2010, as the Criminal Code of 1995 initially left this crime out of the code for special legislation to be passed. After some inconvenient experiences in relation to the capture of pirates in international waters off the coast of Somalia, the crime was again incorporated into the Criminal Code.<sup>164</sup>

Concentrating on Chapter III, the text was closely drafted following the proposal of the Centre of Studies of International Humanitarian Law of the Spanish Society of the Red Cross and constituted a

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internacional humanitario”, in F. Mariño Menéndez (ed.), *El derecho internacional en los albores del siglo XXI: homenaje al profesor Juan Manuel Castro-Rial Canosa* (Trotta, Madrid, 2002), at 533–544.

<sup>159</sup> 1995 CP, Ch. I (“Delitos contra el Derecho de Gentes”), Art. 605 and 606. The Organic Law 1/2015 (in force since 1 July 2015) modified Art. 605 to include the maximum imprisonment term (“prisión permanente revisable” or “reviewable permanent imprisonment”).

<sup>160</sup> 1995 CP as amended by Organic Law 1/2015 (in force since 1 July 2015), Art. 607, modifying penalties. This crime has been modified several times: Constitutional Court Decision 235/2007 declared the crime of denial of genocide as unconstitutional; Organic Law 5/2010 amended the text, in force since 23 December 2010, to include acts directed against handicapped or disabled persons as members of a group.

<sup>161</sup> Organic Law 15/2003, in force since 1 October 2004; modified by Organic Law 5/2010, to include acts directed against handicapped or disabled persons as members of a group; and amended by Organic Law 1/2015, modifying penalties. The original absence of this category has been missed and criticized by those scholars commenting upon the code: Pérez González and Abad Castelos, “Offences...”, *supra* n. 150, at 9–12; Pérez González and Abad Castelos, “Los delitos...”, *supra* n. 150, at 437–440. On the reform, see M. Capellá i Roig, “El proyecto de reforma del Código Penal propone la incorporación por primera vez de los crímenes de lesa humanidad en el ordenamiento jurídico español”, *Revista española de derecho internacional* (2003), at 540–543; J. M. Landa Gorostiza, “‘Nuevos’ crímenes contra la humanidad: el nuevo delito de lesa humanidad (artículo 607 bis CP 1995) desde una perspectiva intrasistémica”, *Eguzkilore: Cuaderno del Instituto Vasco de Criminología* (2003), no. 17, at 105–119; J. L. Rodríguez Villasanté y Prieto, “La lucha contra la impunidad de los crímenes de lesa humanidad y de los crímenes de guerra en el Código Penal español”, 10 *Cursos de derechos humanos de Donostia-San Sebastián* (2009), at 147–184; F. Bueno Arús, “Los delitos de lesa humanidad: su regulación en el Derecho Internacional y en el Código penal español”, in M. S. de Tomás Morales, *Las operaciones de mantenimiento de la paz y el derecho internacional humanitario* (Dykinson, Madrid, 2009), at 183–206.

<sup>162</sup> 1995 CP, Arts. 608–614, as modified by Organic Law 15/2003, in force since 1 October 2004, and Organic Law 5/2010, in force since 23 December 2010. The most comprehensive study on the 1995 initial version of the code concerning the crimes against protected persons and goods in time of conflict can be found in F. Pignatelli y Meca, *La sanción de los crímenes de Guerra en el derecho español: Consideraciones sobre el Capítulo III del Título XXIV del Libro II del Código Penal* (Ministerio de Defensa, Madrid, 2003).

<sup>163</sup> 1995 CP, as modified by Organic Law 15/2003, in force since 1 October 2004, and Organic Law 5/2010, in force since 23 December 2010, Arts. 615 & 616 bis.

<sup>164</sup> 1995 CP, only after addition by Organic Law 5/2010, in force since 23 December 2010, Arts. 616 ter & quater. See n. 150.

true novelty concerning the protection of persons and goods in time of conflict in Spanish ordinary criminal codes,<sup>165</sup> apart from the cited Article 244 in the Criminal Code of 1928. Until now, extensive protection had merely been granted by the military codes in the sense already explained. As it has been underlined, this text was a very positive step, since it moved from “war time” misconduct to crimes “at the occasion of an armed conflict”, although a definition is not included in the code but must be interpreted according to international instruments. This allows easily the prosecution of those crimes when committed in time of occupation.<sup>166</sup> On the other hand, the “protected person” is defined in Article 608 by reference to international humanitarian conventions binding Spain.<sup>167</sup>

The description of conduct has followed a mixed system in which some descriptions are referenced directly to international rules, whereas others are defined by the national legislator. The purpose was to adopt a broad compliance with the obligation to “ensure respect”, so all “grave breaches” as regulated by the Geneva Conventions and both Additional Protocols are included, yet other forms of violations of international humanitarian rules not amounting to “grave breaches” are defined as well.<sup>168</sup> Significant reforms have been introduced since 1995 to achieve today a well-developed state of descriptions of conduct with respect to Spain’s international obligations and beyond. Chapter III and related norms have been modified at least in three different occasions.<sup>169</sup> Again, following the proposal submitted to the Spanish Government by the Spanish Red Cross Society,<sup>170</sup> the Criminal Code was adapted in 2003 mainly to include the non-applicability of prescription to war crimes<sup>171</sup> according to

<sup>165</sup> “Propuesta ...”, *supra* n. 5, at 693–845; see also Pérez González and Abad Castelos, “Offences...”, *supra* n. 150, at 31, indicating that no amendment was introduced, but formal wording modifications were the only changes in Parliament.

<sup>166</sup> “Propuesta ...”, *supra* n. 5, at 713–716 and again at 726, Pérez González and Abad Castelos, “Offences...”, *supra* n. 150, at 35; Pérez González and Abad Castelos, “Los delitos...”, *supra* n. 150, at 459–460.

<sup>167</sup> Reformed by Organic Law 15/2003, Art.161, to include among the “protected persons” a reference to the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994, ratified by Spain on 11 December 1997 (BOE n° 124, 25th May 1999).

<sup>168</sup> “Propuesta...”, *supra* n. 5, at 722–725.

<sup>169</sup> Art. 608 was reformed by Organic Law 15/2003 to include among the “protected persons”, a reference to the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994, ratified by Spain on 11 December 1997 (BOE n° 124, 25th May 1999). Art. 610 was modified by Organic Law 15/2003 to include proscription of “no quarter” orders. Art. 611 was amended by Organic Law 15/2003 to include deportation, forced transfer or shield “use” of protected persons, and the permanent placement of population of the occupying power into occupied zones, and modified again by Organic Law 5/2010 to include deprivation of judicial rights and attacks on sexual freedom. Art. 612 has been rewritten partially by Organic Law 15/2003 for an accurate description of terms and later amended by Organic Law 5/2010 to forbid recruitment of minors, to include new protective signs, and to forbid hunger being used as tactic of war, including not permitting access of humanitarian societies to starving populations, violation of armistice, truce, or other agreements between conflicting parties, and attacks on personnel on UN missions that could claim civilian protection status. Art. 614 was modified by Organic Law 15/2003 to specifically protect cultural heritage and religious sites and was amended by Organic Law 5/2010 to include new forms of destruction, requisition, and confiscation of non-military goods and premises. Art. 615 has been modified by Organic Law 5/2010 to include a specific reference to the proscription of other acts not previously detailed in violation of international treaties regarding means and methods of warfare.

<sup>170</sup> Centro de Estudios Derecho Internacional Humanitario de la Cruz Roja Española, “Propuesta de modificación del Código Penal español en materia de delitos contra las personas y bienes protegidos en caso de conflicto armado”, *Revista española de derecho militar* (2001), no. 78, at 87–128.

<sup>171</sup> Organic Law 15/2003, modifying Arts. 131 and 133. Only those conducts described in Art. 614 (protection of sites and goods) may prescribe. A detailed analysis is found in J. L. Rodríguez-Villasante y Prieto, “La reforma del Código Penal

the Rome Statute of the International Criminal Court and to fill gaps in several types of conduct described concerning UN personnel protection in peace operations, the ban of certain weapons (such as biological and chemical weapons), reinforced protection for cultural heritage and sites, and childhood protection against recruitment in wartime.

In 2010, and under the advice of the Centre of Studies of International Humanitarian Law of the Spanish Society of the Red Cross, the protection in time of conflict was reinforced. In this case, it affected the protection of cultural heritage.<sup>172</sup> Because it was included in a broader amendment of the Criminal Code, it took longer to be approved than previous reforms. Along with a stronger protection of cultural heritage, a reference to the protective Red Crystal emblem<sup>173</sup> and new prohibitions of means of warfare are now expressly described in the code after Spain ratified the UN Convention on Cluster Munitions in 2009.<sup>174</sup> And, in 2015, the amendment served to strengthen the penalties to be imposed in cases of death, including the new “reviewable permanent imprisonment” penalty (“pena de prisión permanente revisable”).

The double description of war crimes in the Military Criminal Code of 1985 and the ordinary Criminal Code of 1995 (in force until 2015) has been an extraordinary situation in Spanish legislation. Up to 1995, and with the exception of Art. 244 of the Criminal Code of 1928 (protecting humanitarian and medical assistance in conflict), Military Criminal Law was the only law covering war crimes violations, first in a limited manner (some humanitarian law violations and a few means and methods of warfare violations), and after 1985 with a wide array of conduct concerning Geneva grave breaches violations and even other types of violations not considered as grave breaches. The incredible piece of work done to update war crimes descriptions in order to encompass the latest international conventional obligations binding Spain (the Additional Protocols of 1977, the Anti-Personnel Mine

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Español por la Ley Orgánica 15/2003: un paso al frente en la ‘criminalización de la barbarie’”, *Revista española de derecho militar* (2003), no. 82, at 197–234.

<sup>172</sup> Cultural heritage has long since been protected through military ordinances and military criminal codes in Spain (already in 1884). But according to J. L. Rodríguez-Villasante y Prieto and other specialized scholars, the protection in the Criminal Code of 1995 was not a comprehensive and specific one, as it was partly achieved under the “open clause” concerning other treaty violations. The reform of 2003 reinforced the protection but it was still considered insufficient, justifying a new legislative intervention in 2010 through Organic Law 15/2003, in force since 1 October 2004. See J. L. Rodríguez-Villasante y Prieto, “Protección penal de los bienes culturales en los conflictos armados”, *Patrimonio cultural y derecho* (2011), no. 15, at 165–192; F. Pignatelli y Meca, “La protección penal de los bienes culturales y lugares de culto en caso de conflicto armado”, en M. J. Aznar Gómez et al (eds.), *1 Estudios de derecho internacional y de derecho europeo en homenaje al profesor Manuel Pérez González* (2012), t. I, at 897–938; and M. San Martín Calvo, *Bienes Culturales y conflictos armados* (Aranzadi, Cizur Menor, 2014).

<sup>173</sup> Protocol additional to the Geneva Conventions of 12 August 1949, relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005. The United States signed Protocol III on 8 December 2005 and ratified it on 8 March 2007. Spain signed it on 23 December 2005 and ratified it on 10 December 2010. In June 2006, an International Conference of the Red Cross and Red Crescent met in Geneva to amend the statutes of the International Red Cross and Red Crescent Movement to take into account the creation of the new emblem. See F. Bugnion, *Red Cross, Red Crescent, Red Crystal* (e-book, International Committee of the Red Cross, Geneva, 2007).

<sup>174</sup> For a more general comment on the 2010 reform, see J. L. Rodríguez-Villasante y Prieto, “La modificación del Código Penal español por Ley orgánica 5/2010, en materia de crímenes de guerra”, *Revista Española de Derecho Militar* (2010), no. 95/96, at 149–174, and “La modificación del Código penal español por Ley Orgánica 5/2010, en materia de crímenes de guerra: un paradigma en la protección penal de las víctimas de la guerra”, *Revista General de Derecho Penal* (2012), no. 17, at 1–25.

Ban Convention of 1997, the International Criminal Court Statute and amendments of 1998–2010, the Second Hague Protocol for Protection of Cultural Property of 1999, or Convention on Cluster Munitions of 2008) and the leading and supporting role played by the Spanish Society of the Red Cross to define national legislation through its Centre of Studies of International Humanitarian Law are characteristics that individualize Spanish contemporary evolution on the domestic criminal law compliance clause. This evolution has permitted to achieve a true change towards a military specialized and reduced jurisdiction, where the Military Criminal Code passes on the definition of crimes to the ordinary Criminal Code, reserving for itself jurisdiction in restricted cases.

#### (D) *DEUS EX MACHINA*? THE EPIC QUESTION BECOMES COMMON KNOWLEDGE

Throughout the previous pages, we have collected some data on international law treaties and the American and Spanish legislation regarding the description of crimes related to warfare and the prosecution thereof. The original purpose was set in the Introduction, when we defined the epic question. Is international criminal responsibility an original *Jus Gentium* conquest? Or is it a common concern built at an international level on previous domestic foundations? What came first, the international or the domestic description of illegal conducts? Does the domestic prosecution clause seen in several international treaties add anything to the pre-existing domestic criminal legal order?

We will analyse two levels in our conclusion: the one concerning the definition of crimes and the one related to the prosecution of those crimes. Historically, international customary law has restricted the way in which war was to be fought (means and methods of warfare) and the persons who should be spared of it (protected persons). But codification is quite recent, and it doesn't begin before the nineteenth century. Treaties concerning both aspects (means and methods and protected persons) have been cited in Section B ("As International Rules Go By"). The international obligations to not use certain means of warfare and to protect certain groups of people were formally established in treaties after 1856 and 1864, respectively. Both Spain and the United States were parties to most of these treaties, at least up to the Geneva Conventions. Consequently, they were formally bound to observe those obligations and to not perform those conducts in contradiction with them. This conclusion, by itself, does not amount to the recognition or acceptance of an international obligation to prosecute individuals for such violations. It merely indicates that a state whose armies did not comply with the conventional standards would be internationally held responsible for the violation of such treaties (international state responsibility).

We have further verified the inclusion of a domestic criminal law compliance clause in certain treaties, through which the international convention requested the state party to legislate and/or prosecute the violation of the norms (or a part of them) included in the convention as regulated conduct. The number of treaties containing such a clause was reduced. We found it in seven cases (1906, 1909, 1922, 1929, 1948, and 1949 conventions, along with Additional Protocol I in the period observed, although there may be other applicable cases after 1977) but only some of them were ever in

force: the 1906 and 1929 Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the four 1949 Geneva Conventions in conjunction with Additional Protocol I. All those treaties were binding on the United States, with the exception of Additional Protocol I of 1977 (as of 1907, 1932, 1988, and 1955, respectively), and on Spain with no exception (as of 1907, 1932, 1988, 1955 and 1989, respectively).

The extent and the way in which the clause was drafted varied along the decades. What is interesting to note is that an important restriction has taken place regarding the types of conduct under which a national obligation to criminalize is established. If, in the first of the conventions (1906), the number of crimes for which repression was required was limited, and the only jurisdiction concerned was military, the obligation was later extended to the violation of “any of these rules” (1922) and to the “repression in time of war of any act contrary to the provisions” to both criminal and ordinary jurisdictions, as no distinction was drawn (1929). But when the 1949 conventions were drafted, only the “grave breaches” as defined in the conventions were included in the domestic criminal law compliance clause, thus restricting the scope of international criminal responsibility of the individual compared with the international responsibility of the state. No reference was made to the competent special (i.e. military) or ordinary criminal jurisdiction.

As deduced from the way in which the former international conventions cited regarded the domestic criminal law compliance clause, international law at the time assumed that domestic legal orders were already describing prohibited types of conduct as crimes and prosecuting the supposed perpetrators. The clause was seen as a reinforcing tool. But was that a real assessment?

To shed some light on this matter, we have looked at domestic legislation. Some common traces have appeared clearly, however. We have found that a double prosecution system has been in place since earlier times and that violations have been historically included under military and ordinary criminal jurisdiction both in Spain and the United States, although with a different intensity.

If we narrow our findings on military jurisdiction, we may see that war crimes as crimes against the law of nations appear to be first described under army regulations than under statutes. It originally occurred in the United States (1863) and later in Spain (1882). In the case of the United States, the description of crimes was incorporated before any international treaty was passed on the matter; as for Spain, the 1864 treaty concerning protected persons (Convention for the Amelioration of the Condition of the Wounded in Armies in the Field), of which Spain was a party, was already in force, and no other treaty concerning means and methods of warfare binding on the country was ever adopted.

Although we could be tempted to conclude that domestic law was the first to describe and consider a war crime definition (hence, solving the epic question in favour of domestic law rather than international law), the reality is that domestic crimes were defined as a law of war (international law of war) violation in the Lieber Code and as crimes against the law of nations in Spanish regulations. When domestic legal orders evolved and substituted military codes (statutory norms) for army regulations, the situation was more or less the same. Although, somehow surprisingly, the US

Uniform Code of Military Justice of 1950 never included a war crime concept, it has been considered in practice as covering the “international” definition of conduct through crimes already described in the code and, therefore, assuming its international obligations. For Spain, however, specific crimes have always been described under the heading of “Crimes Against the Law of Nations”. There was no specific mention of any international treaty until the appearance of the 1985 code. The types of conduct described sometimes made reference to violations of the means and methods of warfare — whose codification treaties never included a domestic criminal compliance clause — and to other humanitarian protection violations. Yet we consider that the previous Spanish Military Codes of Justice (1890 and 1945), when defining the illegal and criminal character of both types of conduct, referred to customary international rules on the means and methods of warfare and the protection of civilian persons. The more recent Spanish Military Codes (1985 and 2015, the latter referring to definitions in the ordinary Criminal Code) have taken a different approach, with a more precise definition of crimes directly based on both the letter and the spirit of international conventions in force for the country. A crucial role has been played by the Spanish Society of the Red Cross through its Centre of Studies of International Humanitarian Law, a true driving force during the last 30 years, helping to develop Spanish legislation in the field.

The peculiarity of the American system lies in the double military path through which US armed forces are prosecuted by courts martial (in army judicial proceedings subject to review by the judicial branch) and alien combatants are prosecuted by military commissions (ad hoc commissions, part of the military administration). Although the description of conduct for US Army members is subject to statutory development —which, as we have seen, took place in 1950 with the Uniform Code of Military Justice and includes no specific war crime definition— in practice, US jurisdiction is, in very limited cases, exerted over the US military for war crimes. On the other hand, military commissions have exerted jurisdiction over alien combatants for war crimes, as a(n) (international) law of war application system, historically based directly on the international law description of conduct, despite having recently been altered by a controversial set of Acts (2006 and 2009). It is truly a special jurisdiction, based on a universal jurisdiction principle. Only after the 11 September 2001 attacks and the subsequent War on Terror were these commissions procedurally developed both by a statutory regime and US Supreme Court rulings.

Army regulations of both the United States and Spain, as well as the Spanish military codes, considered the necessity of prosecution for war crimes and war-related types of conduct before any domestic compliance clause was introduced by international treaties, even though the basis for such prosecution rested on violations of the customary international law of war.

If we now turn to “ordinary” criminal jurisdiction, silence has also been the rule in the United States for a long time, as is the case of the Uniform Code of Military Justice. The United States introduced war crimes prosecution as such in 1996, with an elaborated history of reformations, so that, at present, the description is reduced to the grave breaches concept and a specific and closed definition of crimes in case of non-international armed conflicts. Until then, the legislative and executive branches considered that the international obligation to prosecute those types of conduct

was already covered by other crimes descriptions. Spain, with a series of criminal codes in its history (1822, 1848, 1850, 1870, 1928, 1932, 1944, and 1995), did not include a definition of war crimes-related conduct until the introduction of the Criminal Code of 1928, where attack on protected persons and medical transport was described with a reference to international conventions. No further broadening of the concept was included before the appearance of the current criminal code in 1995. It is at this very moment that a comprehensive coverage of war crimes is defined, going above and beyond of what is claimed by the international treaties to which Spain is bound — specifically, the grave breaches concept of the Geneva Conventions of 1949. This code, thrice modified and updated to encompass the new international obligations assumed by the country in the meantime, offers at present a very comprehensive and respectful definition of war crimes. The definition in the ordinary Criminal Code is the only one and serves both ordinary and military jurisdictions —encompassing the now truly subsidiary Military Code of 2015.

As we have seen, in terms of the description of conduct concerning war crimes, international law clearly takes the lead, as the domestic definition was established on the basis of customary international law concerning war limitations, even before international treaties codified the laws of war.

In regard to the second tier of the individual criminal responsibility for international crimes and the obligation to prosecute, the analysed states asserted their right to prosecute before there was no such an obligation. If William Blackstone wrote that retaliation, and not criminal punishment, was the legal mechanism for responding to violations of the laws of war in the early nineteenth century, the states subject to our study decided otherwise throughout the same century. It was an original power —an inherent power, according to the theories on national sovereignty— that included the exercise of a not-yet-named universal jurisdiction principle in the US military commissions system already in place after the Lieber Code. This was a natural consequence of the sovereignty of states, as the Permanent Court of International Justice would confirm in the *Lotus Case* (1927).

A different issue is the fulfilment of the obligation to describe and prosecute the violations of the 1906 and 1929 treaties regarding the wounded and sick, as well as the violations of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the four Geneva Conventions of 1949 (as far as the grave breaches concept is concerned). Turning a right into an obligation is a delicate matter when referring to states. The definition of the obligation in the in-force treaties is not homogeneous. It does not limit jurisdiction to the most traditional territorial connection; rather, it allows for a jurisdiction based on a personality (active or passive) principle or even on a universal jurisdiction principle. Whether this obliges states to extend jurisdiction to such cases in a specific way through a specific definition of conduct is not clear, although it is indeed quite relevant. What is truly pertinent to the epic question, though, is a threefold final conclusion:

First, types of conduct described as war crimes (crimes consisting of violations of protected persons and places, and violations of warfare means and methods) were introduced quite prematurely in domestic legal orders, even before international treaties were passed. States have incorporated —initially through military jurisdictions— the prosecution of such conduct, including means and

methods of warfare violations, in the absence of specific treaty provisions in the realm of the domestic criminal compliance clause. Moreover, after international treaties were passed on the matter, domestic descriptions did not always accommodate specifically to in-force treaty prosecution obligations. The crimes considered have always been described as types of conduct prohibited by international law, so it is customary international law that first classified these types of conduct as illegal in order to generate international criminal responsibility. As time passed, states assumed that this responsibility fell not only under military jurisdiction but also under an ordinary criminal one. An initial implicit reference to the definition of a crime in an international treaty can be found in the Spanish domestic legal order, in Article 244 of the Criminal Code of 1928.

Second, treaty obligations concerning prosecution were generally applied by states every time the inclusion of such crimes allowed for the exercise of jurisdiction. Yet no specific reference to these treaties establishing the obligation to prosecute has been incorporated until very recently. During the nineteenth century and the first half of the twentieth century, the analysed states mostly relied on their sovereign rights to establish jurisdiction over the selected crimes at a national level. It is mainly after the Geneva Conventions of 1949 that, both in Spain (Criminal Code of 1995) and the United States (War Crimes Act of 2006), a reference to the conventions is included when describing the crimes and the prosecution rights thereof, although not in a systematic way.

And third, the United States anticipated the idea of universal prosecution in the creation of the military commission jurisdiction in the Lieber Code. At present, this jurisdiction has been questioned on a procedural basis after the Guantánamo affair. Consequently, it has recently been updated (through the 2006 and 2009 Military Commissions Acts) to come closer to international standards of protection of fair trial rights in accordance with Common Article 3 of the Geneva Conventions. At the same time, these acts were not without controversy, given that they moved away from what was already established under international law, in particular in their description of conduct and their alleged attempt at tracing down its content based on international law. This is especially evident in regard to the concepts of conspiracy and the prohibition of the indicted to invoke those rights protected by the Geneva Conventions.

These pages do not exhaust the materials and conclusions to be drawn. A careful comparison between the different criminal descriptions (international and domestic) or a comparison with third countries' regimes could shed some light on new approaches. The domestic norms complying with the treaty provisions studied could serve as practice material for an analysis of international and domestic law relations on this specific topic. For example —and despite the prevalence of a monist approach as far as international treaties are concerned (the so-called supremacy clause)— the United States employs a double-standard approach to the criminal description of conduct under military jurisdiction, not by applying international law directly before courts martial, but rather by doing so to non-nationals only through military commissions.

Finally, and although our conclusions must be carefully limited to the selected legal order of the states included in this study, the analysis we have undertaken is a fruitful example of how a common

concern develops when it comes to the protection of human beings from the excesses of the use of force.

Customary international law limitations were established as restraints to the conduct of states in war before the nineteenth century, and the violation thereof entailed international state responsibility. Being the definition of prohibited types of conduct during war an international law conquest, the decision to attach individual criminal responsibility for their violation during the second half of the nineteenth century can be considered a sovereign decision. It was not until the twentieth century that international law clearly set up an obligation to include these types of conduct in domestic law as the criminal base for individual prosecution. It is the interaction between international and domestic law what really answers the epic question as clear evidence of the ongoing state-based structure of international law when defining a common interest and a common concern; yet it is already individual-oriented when it comes to choosing a specific interest and a common concern to rule. Without international law's initial steps on the matter based on customary law—where the individual will of a precise state is dimmer—there would not have been a common concept of war crimes. And without specific sovereign states' will, the introduction of the concept of individual responsibility for international crimes at a domestic level would have been postponed for several decades.

As Professor Carrillo Salcedo explained when introducing his General Course of International Law at The Hague Academy of International Law in 1996, what forms the basis of all constructive efforts to understand the relationship between law and power is a functional conception of power and a social conception of law.<sup>175</sup> Sharing this view, we consider that war conduct limitations through individual criminal responsibility are probably the field *par excellence* where power and law coexist for the survival of humankind as a common concern of international law.

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<sup>175</sup> “Convaincu qu'à la base de tout effort constructif en droit international se trouve une compréhension des rapports du droit et du pouvoir, c'est une conception fonctionnelle du pouvoir, ainsi qu'une conception sociale du droit qui inspireront mon enseignement”, J. A. Carrillo Salcedo, “Droit international et souveraineté des états”, 257 *Recueil des cours de l'Académie de droit international de La Haye* (1996), at 43.