Inquiries in Political Theory

From Moral Responsibility to Legal Responsibility in the Conduct of War*

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Abstract: Different societies came to consider certain behaviors as morally wrong, and, in time, due to a more or less general practice, those behaviors have also become legally prohibited. While, nowadays, the existence of legal responsibility of states and individuals for certain reprehensible acts committed during an armed conflict, international or non-international, is hard to be disputed, an inquiry into the manner in which the behavior of the belligerents has come to be considered reveals long discussions in the field of morals and theory of morality, and, especially, regarding the different manner of establishing the elements to whom obedience is rather owed (the divinity, the sovereign, the law) and the relations between these. Hence, the present paper aims at analyzing the connections between moral responsibility and legal responsibility for wrongful behaviur during war in a diachronic approach, along with the major shifts in paradigm (codification and individual liability). Understanding morality as practice, convention, custom, we are arguing that the nowadays requirement of liability for war crimes appeared due to an assumed intention and practice of the decision-making entities (the sovereign, the state) and, ultimately, to a decision-making process of the most influential states.

Keywords: moral responsibility, custom, ethics of war, individual liability, war crimes

Introduction

Although, starting with World War II, peace became a quite serious goal in international relations, as proven by the rather small number of armed conflicts and war victims (correlated, of course, with both the existing military technology and the formation and respect for the customs regarding the protection of individuals), the history of humanity experienced the coexistence of war and peace, which raised both the issue of the justness of war, and the issue of the just behaviors adopted by the belligerents during combat.

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Nowadays, the term 'war' itself seems rather obsolete, legally speaking, since war is outlawed, and declaring war is strictly prohibited according to international law. However, since, factually speaking, state of war still appears, the term used in the contemporary period is the one of 'armed conflict,' which can be both international and non-international (involving insurgent movements, rebels, paramilitary forces and so on), and even justified by democratic reasons.

As a matter of fact, theoretical justifications for waging war have been brought into discussion ever since Antiquity, and we are considering the just war theory, preoccupied, on one hand, with the morality of starting and waging war, and, on the other, with the moral behavior during war, as well as, more recently, with the issue of liability for the contrary behaviors. A distinction is made, accordingly, between *jus ad bellum*, *jus in bello* and the more recent *jus post bellum*, gradually emerged through customs. Customs, for their part, reveal the conventional character of morality, in the sense that morality, at base, is merely custom, convention, the practice in a given context or space (Harris 2009, 37). Different societies have come to consider certain behaviors as *morally wrong*, and, in time, with the support of a general practice, those behaviors have also become *legally prohibited*.

James Turner Johnson speaks rather of a 'just war tradition' than a 'just war theory,' emphasizing the fact that 'just war theory' is merely the general name for the tradition that has come to justify and limit war. The term 'just war theory' is imprecise, ambiguous, and this due to the variety of contexts in which the idea of just war appeared in time, due to the metamorphosis of the concept in time, due to the existence in the same (any) time of numerous theories, due to the imprecision of language (especially in what concerns the equivalence of terms between languages), and also due to the expectations that individuals have nowadays regarding war, expectations that are transferred to the idea of just war (Johnson 1981, XXI-XXII).

The just war tradition is rightfully seen as 'the coalescence of the major effort Western culture has made to regulate and restrain violence,' efforts that, nevertheless, can be found in any culture, although in different forms, different measures, more or less coherent. In what concerns the cultural attempts of regulating war and their sources, it is clear that, in Ancient cultures, a distinction between law and morality or religion is generally impossible, in Pre-modern cultures this distinction is also not easily accomplished (Johnson 1981, 41), while, with modern international law, the claims for some values that transcend cultures have become legal claims (Wright 1964, 155-156). Such claims beyond cultural borders made by Ancient civilizations were 'international' only in the sense that they were perceived by a certain civilization as adequate for the entire humanity, regardless of the distinct opinions that other civilizations might have had. Moreover, when conquest spread the hegemony of a certain culture, its moral or religious claims were spreading as well, becoming mandatory on the

subjected peoples due to the occupation accomplished by the new masters. Even in the Western doctrine of just war, a distinction between the religious, moral, philosophical or legal components doesn't lead to a fair assessment of the nature of this doctrine or the different value-forming sources that contributed to it (Johnson 1981, 41-42).

In the present discussion, just war tradition interests only insofar as it proposed the observance of a moral behavior during the course of a conflict and it is thought to have advanced the idea of liability for breaches of such a conduct. Whether war is moral or not, or what are the potential just causes for war are not relevant issues for the purpose of this discussion. We are considering the factual situation of the existence of an armed conflict (regardless of whether it is national or international) and the foundations of the idea of ethical behavior towards the enemy, as well as the manner in which this idea was transposed in the sphere of legal norms, customary or conventional.

A Diachronic Approach

'Normative attitudes' regarding what is and is not permitted during war are specific to each culture and time (Rengger 2008, 33). It seems that the Egyptians, the Babylonians, the Assyrians and the Hittites recognized certain restraints in waging war, and limits regarding combat are also mentioned in the Old Testament (Bederman 2001, 242-262), although, as is the case of all the rules grounded on religion in that time, the form of sanction seems to have been 'rather divine than earthly' (Cryer 2005, 11). In Ancient China, around the 5th Century B.C., certain thinkers who related to Confucianism seem to have spoken in terms of 'criminality' regarding unjust wars, although none of them seem to have had in mind the legal concept of 'crime' in the criminal law sense (Iriye 1967, 8-11). Also, while Sun Tzu, in 'The Art of War,' recommended the humane treatment of the sick, wounded, prisoners and civilians, and also respect for the religious institutions located in the occupied territories (Sun Tzu, transl. 1971), these recommendations were motivated rather by political realism than humanitarian considerations (Bassiouni 2013, 30). A century later, in India, The Book of Manu contained similar provisions (Singh 1984), and in Mahabharata it is said that those who breach the law of war will be considered outlaws and stripped of their privileges (Sastry 1966, 502).

The law of war in Ancient Greece was very harsh, since everything was allowed against the enemy. However, in time, certain rules for ameliorating the hardness of war, or at least for introducing some sort of discipline during it, like the necessity of a formal declaration regarding the state of war, the respect for enemy envoys or heralds, the neutral character of sanctuaries and properties belonging to gods, the protection of those who seek refuge (a right to asylum), have gradually led to a humanization of war. All of these seem applicable only among the Greek *polis*, due to a feeling of belonging to a well differentiated ethnic, linguistic, religious or cultural community, while the *barbarian,* the *non-*

Greek, with an unintelligible language, in relation to whom the Greeks considered themselves superior, could be subdued or held into slavery (Truyol y Serra 1995, 12). Therefore, the practice of war in Ancient Greece was bound to a series of conventions which were generally respected, and the breach of which brought real opprobrium, or even the head of the guilty. The release of prisoners, the possibility to bury the ones who fell on the battlefield, the respect for certain truces (for instance, during the Olympic Games), all these were conventions which had the effectiveness of law, and their breach was of utmost gravity, as Thucydides shows in his considerations on the Peloponnesian War (Thucydides, trans. 1989, referred to in Rengger 2008, 33). Xenophon, regarding the same conflict, speaks even of a possible trial in applying these ideas. The Athenian prisoners of war, captured by the Spartan commander Lysander, have been accused of planning and committing different breaches of the Greek laws of war, such as cutting the hands of the Spartan prisoners and throwing these prisoners in the sea. It appears that Lysander gathered his allies against the Athenians and they jointly decided that all Athenian prisoners are to be executed, with a single exception (McCormack 1997, 33). In *The Republic*, Plato even proposed a program of humanizing war among the Greek *polis* (Truyol y Serra 1995, 13).

The Greek Antiquity also represents the origin of the idea of natural law, along with Roman Antiquity. The Greek thinking was impregnated with the sacred character of laws, with roots in the oldest traditions and nimbed by different religious beliefs. Heraclites, Sophocles, Aristotle distinguished between natural law and written law, between a natural justice and a legal one (Craiovan 2010, 239), and equity was meant to "correct the law, where the law proves to be insufficient, due to its universality" (Aristotle, transl. 1998, V, 10, 6). In the same time, Aristotle clearly distinguished between a law that emerges from the nature of things and a law founded on human will, as well as between a common law of all humans and a law belonging to each state (Aristotle, transl. 1998, V, 11, 34). In the Hellenistic period, however, stoicism affirmed the unity of humankind, allowing for the enunciation of a set of ethical and legal principles that apply to all humans, without distinction of race, language or culture, a universal law (the *Logos*) regulating the life of cosmos, and all humans participating in it through their just reason (Truyol y Serra 1995, 14).

The Romans, on the other hand, while having complex conventions regarding war, the whole process of starting it being strongly formalized, had quite few restraints regarding conduct on the battlefield once war itself was declared legitimate - some medieval thinkers even invented a type of war, *bellum Romanum*, a war without limits or restraints (Rengger 2008, 33). However, the Romans introduced the concept of *jus gentium*, which brings about an interesting discussion regarding law and universality. The existence, in Rome, of a college of praetors with attributions in starting a war, concluding a peace or requesting compensations for injuries caused in Rome to a Roman citizen gave birth to *fecial law*, a sacred law, but which came to acquire a rather formal character. In order

to cover the legal vacuum in what concerned foreigners, when a treaty with their city would not ensure their explicit protection (in the absence of such a treaty, the foreigner had no rights, the Roman *jus civile* being inapplicable to him), *jus gentium* developed, to the detriment of *jus civile*. *Jus gentium* had a larger flexibility, due to the wider freedom of the peregrine praetor (as opposed to the formalism of *jus civile*) in developing its norms, taking into account the needs of the everyday practice. The very character of these needs, common to the members of the different peoples the commercial activities of which were in contact with Rome, as well as the role played, in the activity of the praetor, by the considerations of 'natural equity,' were tending towards a universality of its norms, aided by the influence of stoic philosophy, widely disseminated in Rome, and due to which *jus gentium* came to represent a sort of law common to the ensemble of peoples – which some of them were even confusing with the natural law of Greek origins (Truyol y Serra 1995, 15-16).

This gradual change of the original significance of *jus gentium*, under the influence of Aristotle, and of the stoics as well, is obvious at Gaius, who distinguishes between a law that is specific to humans (civil law) and a law that is common to all humans, established by the natural reason among all humans, and that all peoples apply. Called *jus gentium*, this law has a triple quality: it is common to mankind, it is unwritten and it is natural (Gaius, *Institutes*, I.1, referred to in Gaurier 2014, 16-17), continuing the tendency advanced by Cicero, of a law that extracts its validity from a superior necessity (Cicero, *De Officiis*, 3, 15, 69, in Gaurier 2014, 17) - certain eternal, immutable laws, 'equity,' considered above positive laws, were opposing injustice and tyranny (Craiovan 2010, 239). Ulpian, as well, states that *jus gentium* is the law practiced by human peoples.

The tradition of natural law is continued in the European Christian medieval thinking, in which divine punishment has a strong role. Augustine, for instance, distinguishes between eternal law, representing the very will of God, and natural law, a sort of imprinting of eternal law in our being; positive laws must derive from natural laws, and their destination is to protect the peace and social order established by God - if positive laws do not derive from natural law, their observance is not mandatory (Craiovan 2010, 185). Thomas Aquinas draws the same distinction between divine laws, which are to be found in God's wisdom, the laws of nature, which result from the divine ones, and positive laws, in which human arbitrary intervenes, and which are only right if they correspond to natural law (Villey 1957, 237). The Christian perspective highly influenced the manner in which the moral character of war (and, subsequently at the time, the moral behavior on the battlefield) was assessed - if war was just, limitations were to be taken into consideration in its conduct.

Thus, Augustine claims that war is only justified if it is the only manner of repairing a wrongdoing that its author doesn't itself repair, and necessity, the only one that makes war just, imposes, in the same time, limits in waging it

(Truyol y Serra 1995, 25). Of course, the justness of war is obvious when it represents the will of God, when God himself calls people to battle; but, in the lack of such a divine command, when wars are undertaken without express warrant from God, but with just causes, more caution must be taken as reason, aided by charity, attempts to discover whether the conditions are all met, and, also, to what degree. Although the Christian considers his participation in war to be just, he can never act as if his endeavor is absolutely right, and his own power of discerning regarding the fairness of his endeavor doesn't allow him to use unlimited violence towards the enemy (Johnson 1981, XXIX-XXXI). According to Thomas Aquinas, punishing wrongdoers in the name of God could also represent a just cause for war (Johnson 1981, XXIX-XXXI). In parallel, the doctrine of pacifism has developed, as opposed to the idea that Christians could participate in acts of violence such as war, some authors even claiming a tripartite characterization of the Christian attitudes regarding war: pacifism, just war and the holy war, the crusade (Bainton 1960, 148); the spectrum seems to go from those who reject any participation in violence to those who accept war without restraints in the case of true religion (Johnson 1981, XXV).

Starting from the justification of war in the Augustinian sense, two issues divided thinkers: what is the competent authority for resorting to a just war, and which of the conditions of just war are also applicable to the wars against non-Christians. In what concerns the first issue, the answer differs according to the approach of the principle of hierarchical power in the Christian world. The supporters of the Pope's plenitude of power considered war a monopoly of the papacy (Henri de Suse, the 'curialists'), while the theoreticians of the Empire were attributing it exclusively to the Emperor (Barthole, Balde); a third position was recognizing sufficient authority to the communities that didn't have, in fact, a superior, the 'princes' in general (Innocent IV, Thomas Aquinas). In what concerns the issue of non-Christians, those who were subordinating natural law to the positive divine law (the positive law of divine origin) were refusing legal personality to non-Christians, while those who were operating a clear distinction between the natural and the temporal field on one side, and the supernatural and the spiritual on the other, could not agree to such discrimination towards non-Christians, attributing them a legitimate power and jurisdiction, and including them, accordingly, in the 'human society' (Truyol y Serra 1995, 26-27). The relevance of this matter is that the war waged between sovereigns was to respect certain conditions (Truyol y Serra 1995, 21), and sovereigns could be, therefore, either the Pope, or the Emperor, or, according to the third position, any *princeps*. If the non-Christians were not granted legal personality, the conditions – the limitations available to war between sovereigns – did not have to be applied.

In parallel, the medieval Christian authors also contributed to the study or systematization of the law of war, as well as the conduct during hostilities, which had to fit the 'humanitarian spirit' that had inspired 'God's peace' (Truyol y Serra

1995, 26). The practice of the Church somehow ratified precaution regarding the participation of Christians in war, demanding that, after war was over, the soldiers were to make penitence for the sins they may have committed during hostilities (Johnson 1981, XXX); hence, the Christian world was accepting the religious connection with punishment for breaches of the limitations in the conduct of war, books and decrees of penitence being known, such as the Penitential of Theodore, Bishop of Canterbury (7th century B.C.) or the penitential decrees following the battles of Soissons, in 923 (Draper 1998 I, 20-23) or Hastings, in 1066 (Draper 1998 II, 26).

In fact, in most of the Christian space, the division of power between the Emperor and the Pope, the two supreme institutions, made the whole spiritual authority belong to the religious leader, and it manifested upon all Christians, regardless of the jurisdiction they belonged to. Canonic law became, thus, a 'supranational' law, along with Roman law, converted into *jus commune*, one of the essential elements of the Christian West. During the 12th to 15th century also developed a *jus gentium* of religious origin, in which the ideal of chivalry, through its code of honor, that was imposing certain forms and limits of battle, was channeling the military activity (Truyol y Serra 1995, 20-21). Thus, heraldic courts developed a code of chivalry that was regulating the conduct of a knight in battle, and the Christian princes were applying these norms in their courts (Maogoto 2009, 4). For instance, in 1474 an ad hoc tribunal was established, composed of 28 judges from different states allied to the Western Roman Empire, which subjected to trial and convicted Peter von Hagenbach for murder, rape, perjury and other crimes committed in breach of 'the laws of God and men,' during the occupation of the city of Breisach, in a time when there were no hostilities (Schwarzenberger 1968, 462-466).

The decline of the Western Roman Empire and the beginnings of modern state crystallization (along with the numerous and bloody conflicts associated) seem to have determined a certain change in the approach of the belligerents' behavior, the thinkers seeking to systematize more and more the laws of war, and suggesting, as well, forms of accountability that were exceeding the religious paradigm.

Thus, Franciscus de Vitoria used the idea of natural law in order to shape his vision on the norms applicable to the conduct of hostilities, especially in the context of the interactions between the Spanish and the Native Americans, in the hope for determining the former to not use without restraints their superior military power against the latter (Johnson 1981, 77). Moreover, in his opinion, "difference of religion does not represent cause for just war," but the only such justification is the harm suffered, and the only way to identify whether a war is just or not is through natural law, common to both Christians and non-Christians – assessing, in the same time, that the use of force by the Spanish Crown against the inhabitants of the newly-found realms is not justified (Rengger 2008, 37). Suarez, without departing from the just war theory, stated, for its part, that "the

method of waging war must be adequate" (Suarez, referred to in May 2008, 60). Ayala illustrated the implications that the just war theory and the concepts of state sovereignty have on the evolution of the norms regarding the non-international armed conflicts (Perna 2006, 15-16), stating that a war against rebels was as just as possible, as long as the rebels were committing an offence against God, from whom power was deriving, and that is why the laws of war shouldn't apply to the acts of rebels (Ayala 1582/1912, 16). Alberico Gentili suggests, for a change, that the right of belligerents to prisoners and war booty does not depend on the justness of war, and states that the law must be impartial towards both of them (the captured property becoming the property of each side), considering that war can be just on both sides (Gentili1598/1933, 33).

Grotius brings into discussion the idea of punishment beyond the regular punishments that commanders could impose on the members of their troops, recognized (and recommended) at least since Sun Tzu (Sun Tzu, transl. 1971). In Grotius' view, grounded on natural law, four fundamental precepts direct the entire law, and one of them is the equitable punishment of those who breach them (*poene inter homines meritum*). Analyzing the right of society to punish those who breach its laws, prejudicing the conditions of living in common, Grotius claims that this right should not be arbitrary, like revenge, but it should be a manifestation of reason, exercised within the limits of justice and humanity (Negulescu 1986, 530-531). This idea also manifested in what concerned a possible form of criminal justice for the conduct during war; in the statement "in order to justify a punishment of that kind (killing a war prisoner), the person put to death must have committed a crime, and such a crime too, as every equitable judge would deem worthy of death" (Grotius 1625/1901, 359-360), Grotius refers to punishment in the criminal law sense, and not to declaring war against the wrongdoers. The writings of Vitoria, Suarez, Ayala, Gentili, Grotius, Puffendorf, de Vattel produced historical syntheses between what the Romans called *jus ad bellum* and *jus in bello*, and they were combining the values of natural law in the line of Plato and Aristotle with the Christian equivalents from the writings of Augustine and Thomas Aquinas (Bassiouni 2013, 31-32). Grotius' ideas represented a bridge between the laws of war specific to medieval Europe and a new, pre-Enlightenment insistence on a more civilized approach regarding the highly destructive wars, reflecting, in the same time, the increasing preoccupation of the thinkers in early modern age for the nature of war, its justifications, and war crimes (Crowe 2014, 34).

This preoccupation started to be manifested, in the same time, in the area of the imposition by the state of some sanctions for the individuals that were committing breaches of the rules, for instance through the adoption of military codes or of ordinances establishing punishments. Mainly, these were targeting matters related to military discipline (desertion, for instance, has been punishable since immemorial times, but it was the commander who had the responsibility of imposing a possible sanction); however, certain norms of

conduct related to the behavior on the battlefield, punishable in a 'systematic' manner, by the state (such as theft or rape committed by the members of the military) also emerged.

It is difficult to speak of an universal idea of protecting the weak (wounded, sick and so on) in the field of conducting armed conflicts; at least until this time, the main reason for granting some form of protection was either the interest of a particular army (military discipline) or a form of revenge (when the winner, at the end of a conflict, would subject the captured prisoners of war to trials for breaching the laws of war). Even assuming that the enemy was recognized his *humanity* (in the European space, even Christian, if he *resembled* the European, if he had similar behaviors and values, if he wasn't 'barbarian,' if he knew the same *natural law*), and although, in general, the soldier *ought to behave civilized* (in the sense of the Christian-European chivalry, of honor, of nobility), the military reasons and necessities seemed and could scatter any moral norm in the treatment of the *enemy*.

The Major Shift in Intentions: Codification

Until the nineteenth century, the remains of chivalry, the theoretical treaties without legal force and the slow increase in restrictions provided by the customary law derived from the practice of states equaled to the legal framework governing conduct during war. However, the changing nature of warfare, driven by technological progress and the increased rivalries between the newly-consolidated nation-states, revealed the lack of force specific to these restraints and imposed their revision (Maogoto 2004, 21). Thus, the second half of the nineteenth century marks the beginning of a tendency towards codification, concentrated on the law governing certain limited matters, regarding, for instance, wounded soldiers, or the prohibition of certain weapons, and the transition to the twentieth century brings a more comprehensive shaping of the modern law of war and war crimes (Meron 2011, 79). As the modern international system developed in the nineteenth century, and multilateralism found its voice, efforts started to be made for increasing the level of voluntary compliance with certain international obligations (Maogoto 2004, 21).

In fact, the essential paradigm shift in thinking a system of protecting individuals during wars depended on the modifications in international relations and military technology that took place around mid-nineteenth century. The collapse of Metternich's system in the eve of the Crimean War caused almost two decades of conflict – the war of Piedmont and France against Austria (1859), the war for Schleswig-Holstein (1864), the Austro-Prussian war (1866) and the French-Prussian War (1870) (Kissinger 2003, 88). If the horrors of the Crimean War underlined the necessity of some norms that protect the wounded and those who care for them (Pugliese 2002, 316), the conflict between Piedmont and France on one side, and Austria on the other, directly led to the adoption of the

first humanitarian convention with general applicability, the 1864 Geneva Convention.

In 1859, the Swiss banker Henry Dunant travelled to Northern Italy, where he witnessed the human losses caused by the Battle of Solferino (Reinalda 2009, 52), carried between the French and the Austrian troops on June 24, in Southern lake Garda, a battle which ended a two-months campaign, marked by the first large-scale use of railways in war, as well as the first deployment on the battlefield of rifled field artillery. The battle involved over a quarter of a million individuals, 26000 persons being killed or wounded on June 24 (Brooks 2009, 4). Dunant noticed that there were barely any doctors or supplies at the disposal of the thousands of wounded, hence he joined the relief efforts, writing to his friends to ask for support and composing an appeal against the cruelties he assisted (Reinalda 2009, 52), in the style of the purest and so effective German Romanticism.

Therefore, in 1862 Dunant published (and distributed through his own financial effort) the book *Un souvenir de Solferino*, in which he described in detail the sufferings endured by the wounded and argued for the establishment of some relief societies that would protect the victims of war (Boissier 1985, 56). The paper drew considerable attention, both due to his proposals regarding the avoidance of such situations, and due to the general feeling that the time of peace Europe experienced was coming to an end, and technology would increase the damages caused by more and more effective weapons (faster firearms, more destructive bullets). Dunant's proposal was promoting the establishment of some national societies that would work for a better medical supply for the wounded and would take over responsibility in times of war, with the help of qualified volunteers. While Dunant was making every effort to convince the governments, using an appeal to reason, the Swiss philanthropist Gustav Moynier, who was familiar with the work carried out within international conferences, sought to obtain enough support in favor of an international convention that would establish the basic rules for the protection of the wounded (Reinalda 2009, 53); the efforts of the two led to the adoption of the first convention of a purely humanitarian character, the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the starting point in the codification of the rules of behavior on the battlefield, initially signed by 12 states, but to which, in time, almost all 'civilized' states adhered to (Oppenheim 1905/2008, 707), namely 45 more.

The Major Shift in Enforcement: Towards Individual Liability

When the ample process of codification of the laws and customs of war began, the intention of its proponents and participants was to convince states to apply certain norms in a uniform manner, relying on the pressure of 'public opinion' (Maogoto 2009, 5), which would have determined the leaders to adopt or to

impose on their troops a certain – moral – behavior on the battlefield. These norms did not have proper legal force, a specific enforcement mechanism, and they did not contain specific sanctions for the individuals breaching them; however, the signatories of the adopted conventions could resort either way to the 'classical' means of reacting to a wrongdoing caused by another state. But their primary goal was to convince states to apply them voluntarily - these norms were rather conceived in the 'should' manner, an ultimately moral sense. However, quite soon it seemed more appropriate that a system of sanctioning should be conceived, one that wouldn't function in a 'private' manner, but an 'international', 'systematic' one, and that would transfer to the discussed moral norms a well-defined legal character, of proper obligations. Hence, ever since the 1870s, the idea of establishing an international court that would subject individuals to trial for breaches of the laws and customs of war appeared, an idea continuously developed through the explicit agreement of states ever since the end of World War I and accomplished in various instances (regardless of whether we are considering the temporary international tribunals, or the recently-established International Criminal Court).

In time, this idea obtained the obliteration of any (legal) relevance of the justness or lack of justness of a certain conflict in what concerns punishing individuals that breach 'the assumed rules of the game' (including, or especially, customary norms, the norms established by state practice, reminding of *jus gentium*, *the law of nations*, yet this time universally binding). The legal norms (both in sense of customs and rules contained in the accomplished codifications) regarding armed conflicts are preoccupied, as Anthony Lamb rightfully appreciates, rather with "the wrongfulness of doing certain things to certain people" (Lamb 2013, 16), in a sense that is rather prohibitive and of abstention than in a positive sense, of 'action towards'.

The concepts of moral responsibility can and should undergird the legal concepts regarding criminal liability (Corlett 2013, 9). The theory of moral responsibility concentrates significantly and directly on the nature of the intentional and voluntary action of a moral agent and on the measure in which this determines the character of morally responsible agent. In general, a moral agent is seen as a morally responsible agent (who can be praised, rewarded, blamed, punished) to the extent that he is a voluntary agent (he can decide against acting in a certain manner). The concept of responsibility and the concept of punishment involve each other, the notion of punishment involving the character of responsible agent of the one that can be punished, therefore responsibility is at least a necessary condition for punishment (Corlett 2013, 9-10).

Transferring this matter in the field of criminal law (understood as the law that established which behaviors affect the entire society as a whole, as well as the applicable sanctions or measures), if the internal law of each state establishes the necessary conditions for criminal liability to be drawn, in what

concerns international criminal liability (in the sense of the present discussion, for war crimes), if a certain norm doesn't contain any reference to the subjective element, then the form of guilt provided in most legal systems for the underlying offence is required, and it seems that individual liability can be drawn even if the act was committed through culpable negligence (Cassese 2005, 438-439).

The morality of the existence of a form of accountability (regardless of what that form is) seems undeniable. In Michael Walzer's words, "attributing responsibility is the critical test of the argument for justice," since "there can be no justice in war if there aren't, ultimately, responsible men and women," and "law must provide some recourse when our deepest moral values are savagely attacked" (Walzer 2006, 287). Orend, distinguishing between just war theory and international law, claims that the former represents a set of morally mandated principles that guide our determinations on the ethics of conduct regarding war, while the latter refers to binding principles that derive from treaties, jurisprudence or customs, and which can be the subject, ideally speaking, to constraints imposed by law. Against Orend's assessment that just war theory represents the moral mark that offers convincing ethical principles that guide the construction of the legal principle (Orend 2007, 571-572), Kyriakakis fairly notices that, in what concerns war crimes trials, the relation is reversed, and the existing practice establishes the reference point for theory (Kyriakakis 2012, 128, n. 74).

Conclusions

As a matter of fact, the entire effort of codification regarding the rules of behavior during war represented a collective reaction (product of Western thought and with universalist claims actually 'accomplished') to the destructive methods and means of warfare that appeared along with the technologization and industrialization of war in the modern sense, and also a *humanitarian* effort. These rules represented (and still represent) the expression of the practice of participants in armed conflicts, or of their intentions, motivated, in time, by different reasons, different 'morals,' and to whom all recognized states of the word have acquiesced – if not for purely humanistic grounds, at least for the sake of reciprocity (the 1949 Geneva Conventions are ratified by all these states). In what concerns ensuring some forms of international criminal justice for war crimes, and for other grave crimes such as genocide, crimes against humanity or the crime of aggression, these fully depend on the explicit agreement of states, through their participation in the specialized international mechanisms. All these rules of behavior are subjected to a continuous process of practice, as well as, equally important, of a permanent evaluation accomplished by the international courts. Although these rules can be modified and completed at any point, even given up, they reveal the current 'international morality.'

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