

OCCUPATION COURTS, *JUS AD BELLUM* CONSIDERATIONS, AND NON-STATE ACTORS: REVISITING THE ETHICS OF MILITARY OCCUPATION

Alejandro Chehtman*

University College London/Universidad Torcuato Di Tella

ABSTRACT

This article provides a normative appraisal of the law of military occupation by looking into occupation courts and their legitimacy. It focuses on two cornerstones of the current regulation of war: the principle of equality of belligerents, that is, the potential relevance of *jus ad bellum* considerations on the *in bello* rights of occupants, and the normative force of the traditional distinction between states and non-state armed groups, specially in conflicts not of an international character. Against the currently predominant neoclassical position in just war theory, it argues in favor of the moral equality of just and unjust occupants. Against the orthodox position in international law, it advocates the symmetrical treatment of states and non-state actors fighting internal armed conflicts, at least in terms of the rights they may claim on the territories under their control. It concludes by appraising the way in which this moral landscape should be translated into legal norms.

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I. OCCUPATION, JUST WAR THEORY, AND THE LAWS OF ARMED CONFLICT

Military occupation, as a matter of both international law and normative political philosophy, combines immediate practical relevance with pressing theoretical challenges. Since the 1990s, the law of military occupation has been increasingly invoked or applied in diverse contexts from the occupied Palestinian territories to the Congo, Northern Cyprus, Iraq, East Timor, and Eritrea,—to mention a few. The technical aspects of military occupation and its contemporary practice have been widely explored in the relevant literature. By contrast, the theoretical issues that underpin it have remained largely neglected.¹ The rights and duties of occupying powers are part of the more general framework of the laws of war. This article focuses on the normative justification of two cornerstones of the laws of armed conflict: the principle of equality of belligerents, that is, the potential relevance of *jus ad bellum* considerations on the *in bello* rights of occupiers, and the normative force of the traditional distinction between states and non-state armed groups, specially in conflicts not of an international character. Against the currently predominant position of neoclassical authors in just war theory, it argues in favor of the moral equality of just and unjust occupiers.² Against the orthodox position in international law, it advocates the largely symmetrical treatment of states and non-state actors fighting internal armed conflicts, at least in terms of the powers and duties they have on the territories under their control.

Instead of looking at the different aspects relevant to the military occupation of foreign territories, I focus here on occupation courts (and criminal courts in particular) as a way of providing insights and specific arguments applicable to occupation more broadly. This way of circumscribing the issue is based on two main considerations. First, it may be argued that analytically what is peculiar to military occupation—and stands in need of normative justification—is the administration of the occupied territories or, as Fox puts it, “the appropriation of governmental functions.”³ International law regulates many other aspects of occupation, most notably the protection of civilians, the seizure of property, and so on. However, the rules that govern many of these other issues are, at least conceptually, somewhat

1. The small body of work that tackles this issue includes Jeff McMahan, *The Morality of Military Occupation*, 31 *LOY. L.A. INT'L & COMP. L. REV.* 101–123 (2009); J. Rocheleau, *From Aggression to Just Occupation? The Temporal Application of jus ad bellum Principles and the Case of Iraq*, 9 *J. MIL. ETHICS* 123–138 (2010); Cecile Fabre, *Living with the Enemy: The Ethics of Belligerent Occupation* (unpublished manuscript) (on file with the author); and most recently, Saba Bazargan, *Proportionality, Territorial Occupation and Enabled Terrorism*, 32 *LAW & PHIL.* 435–457 (2013).

2. See, e.g., JEFF McMAHAN, *KILLING IN WAR* (2009). For the opposite view, see, *inter alia*, Christopher Greenwood, *The Relationship between jus ad bellum and ius in bello*, 9 *REV. INT'L STUD.* 221–234 (1983); and Adam Roberts, *The Equal Application of the Laws of War: A Principle under Pressure*, 90 *INT'L REV. RED CROSS* 931–962 (2008).

3. GREGORY H. FOX, *HUMANITARIAN OCCUPATION* (2008), at 220.

independent of the situation of occupation per se—they also apply to “mere” invaders.

Second, given the intrinsic relationship between criminal punishment and the core functions of the state, the justification for the exercise of criminal jurisdiction over the occupied territory provides a *prima facie* case for conferring upon the occupier other sets of powers, including civil or administrative jurisdiction, the authority to adopt economic measures, and so on. In sum, the issue of occupation courts is used as a proxy to examine the general framework that should apply, as a matter of normative argument, to military occupation. As a result, I avoid discussing certain specific issues that often arise in this kind of situation and which require separate examination, such as the exploitation of natural resources or the democratization of illiberal peoples under the doctrine of so-called “transformative” occupation.

This article puts forward two main propositions. A weak thesis provides a *prima facie* normative argument for all three “cases” identified above having criminal jurisdiction over the occupied territory. The strong thesis, by contrast, is thinner than the weak one. At the core of this article lies the claim that provided one is prepared to accept the jurisdiction of the just state occupier, one is committed to conferring symmetric powers to *ad bellum* unjust occupiers and to non-state actors exercising effective *de facto* control over territory and providing fair proceedings. Put shortly, this article provides a limited defense of the principle of separation between *ad bellum* and *in bello* considerations—at least as applied to occupying powers—and advocates treating states and non-state groups symmetrically.

This may seem strange, given that the moral equality of combatants is often associated with an essentially statist view of war, and this view would seem incompatible with putting rights of states and non-state groups on a par. However, this article does not defend a statist view of war. In fact, its point of departure is entirely compatible with the core neoclassical claim that situations of war are simply interpersonal situations writ large. It contends only that applying this insight to situations of military occupation does not lead to the asymmetrical treatment standardly advocated by the revisionist approach.

The argument proceeds as follows. Section II briefly introduces the conceptual and normative framework that I use in this piece, namely, it presents a succinct account of military occupation and jurisdictional rights. Section III identifies a “standard case”—that of a just state occupier—and provides a normative argument as to why we should confer on it jurisdictional powers over the occupied territory. Section IV, in turn, examines the situation of unjust occupiers, and Section V addresses the position of non-state armed groups. A conclusion briefly considers the way in which this moral landscape could be translated into legal provisions.

II. BASIC CONCEPTS: MILITARY OCCUPATION AND CRIMINAL JURISDICTION

Before assessing the powers that we ought to confer on occupying powers as a matter of normative argument, it is necessary to provide a succinct idea of what it means to be an occupying force and what kind of powers occupying forces standardly hold. For these purposes, I use the conceptual framework provided by international law to help me briefly characterize the situation of military occupation and which I suggest is sufficiently sophisticated for our theoretical enterprise. Accordingly, the first thing we must note is that whether a given territory is considered occupied by any given power is primarily a question of fact.⁴ In the words of the International Criminal Tribunal for the former Yugoslavia in its famous *Tadic* decision, any given power X is an occupying power over a territory when it holds “effective control over the area.”⁵ This means that the occupier “must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly.”⁶ This kind of control requires more than military presence; the law on occupation does not apply to mere “non-consensual stationing of troops.”⁷ Occupation, finally, pertains only to the area in which the occupier is in fact capable of exercising its authority.⁸

A detailed analysis of what effective control means in this context is certainly beyond the scope of this article. However, it pays to elaborate this notion further. It has been suggested, for instance, that naval or air supremacy would not suffice.⁹ Similarly, it clearly does not suffice that there is a vacuum of authority in the relevant area.¹⁰ In the words of Leslie Green:

4. Art. 42, Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (Hague Rules). During Allied occupation of Italy, for example, all Allied “legislation became operative in each province as soon as any part of the province was in fact occupied, and it was therefore unnecessary to accompany each advance with new proclamations”; H.A. Smith, *The Government of Occupied Territory*, 21 BRIT. Y.B. INT’L L. 153 (1944).

5. Prosecutor v. Tadic, Case No. IT-94-1-AR, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶72 (Appeals Chamber, Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995). See also YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* (2009), at 35.

6. Prosecutor v. Naletilic et al., Case No. IT-98-34 (Int’l Crim. Trib. for the former Yugoslavia Mar. 31, 2003), at 217.

7. DINSTEIN, *supra* note 5, at 43. Hague Rules, *supra* note 4, art. 42 (1907) establishes that “[t]erritory is considered occupied when it is actually placed [de facto] under the authority of the hostile army” (my emphasis). Some may question whether by relinquishing some of the control over a given territory (e.g., Israel over Gaza) occupiers may seek to absolve themselves from the normative framework of occupation law. This is a crucial question, which is, however, beyond the scope of this article.

8. DINSTEIN, *supra* note 5, at 42. See also INSTITUTE OF INTERNATIONAL LAW, *THE LAWS OF WAR ON LAND* (1880), art. 41, available at <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument>.

9. H.P. Gasser, *Protection of the Civilian Population*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* (Dieter Fleck ed., 2008), at 272.

10. F. Mini, *Liberation and Occupation: A Commander’s Perspective*, 35 ISR. Y.B. ON HUM. RTS. 86 (2005).

It must be clear that in the affected territory there is no longer any semblance of authority other than that imposed or tolerated by the [Occupier], that the local forces are no longer effective in the area, . . . and that it is the occupying authority which is effectively maintaining law and order.¹¹

This kind of control admits, however, of “sporadic local resistance.”¹² In the rest of this article, it will not be disputed that the relevant occupier holds the necessary control over the relevant territories.

Furthermore, under current international law, occupying powers have jurisdiction over the occupied territories.¹³ This means they have the right to prosecute and punish those who perpetrate domestic offences. Yet the occupier must respect, “unless absolutely prevented, the laws in force in the country.”¹⁴ Such duty is generally understood as entailing the right to adopt certain legislative measures, including mainly security legislation aimed at protecting the occupation forces, the capacity to repeal legislation that is inconsistent with the laws of armed conflict, and legislation that serves the interests of the civilian population.¹⁵

I consider here only whether occupying powers should hold the right to enforce *existing* legislation, provided this legislation complies with basic human rights standards. Admittedly, occupied territories often have a two-tiered system of courts with concurrent criminal jurisdiction: the local judiciary and military courts of the occupying power. For present purposes I do not distinguish between the two. The reason for this is that the local judiciary ultimately depends, albeit temporarily, on the authority of the occupying power. Indeed, if the local criminal laws are modified by the occupying power, both courts have to apply the amended laws. Similarly, occupying forces have the authority to remove judges and public officials and would have the power to appoint new ones in cases of resignation, retirement, or removal.¹⁶ Finally, they can redraw the local courts’ organizational chart, set up new local courts, “sever any subordination of the local courts to appellate bodies operating in a non-occupied region retained by the displaced sovereign,”¹⁷ and even transfer cases from local to military courts under certain circumstances.¹⁸

11. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* (3d ed. 2008), at 286.

12. See *Naletilic et al.*, *supra* note 6, at 217.

13. It is standardly understood that this follows from the Hague Rules, *supra* note 4, art. 43, which imposes on occupiers the duty to “restore and ensure, as far as possible, public order and safety.”

14. *Id.* This text, however, is nonbinding. The binding version is in French and has significant discrepancies with the one quoted here. In particular, it speaks about “*l’ordre et la vie publics*” rather than “public safety and order.” This distinction, which is hardly trivial, will play no role in my account.

15. See Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (GCIV), art. 27, ¶¶ 3, 4, and art. 64.

16. GCIV, *supra* note 15, art. 54.

17. DINSTEIN, *supra* note 5, at 116.

18. H.A. Smith recalls that “[t]he task of the judicial section [of the Allied Occupation Government in Italy] was to organize and administer the Allied Military Courts, to prosecute offenders against the proclamations, . . . to review cases, and to supervise the work of the

Before proceeding with our inquiry into the normative position of different types of occupiers, it is necessary to introduce the basic analytical framework concerning courts' jurisdictional powers.¹⁹ First, I frame the normative arguments using the language and the conceptual apparatus of moral rights. This is broadly uncontroversial. Rights-based accounts not only enjoy significant appeal but are also attuned with normative assessment of legal practices given the conceptual affinity between moral and legal rights.²⁰ Second, I take it that rights are formed of different Hohfeldian incidents, namely, liberties, claims, powers, and immunities. We are concerned here mainly with whether different occupiers have criminal jurisdiction, that is, a second-order power to punish offenders for crimes perpetrated within the occupied territories—a power they may have a duty to exercise. And finally, I assume that conferring upon a certain body a given right requires identifying a particular interest or set of interests that are sufficiently weighty to warrant putting someone else under a no-right, a duty, a liability, or a disability.²¹

Nonetheless, with respect to certain rights it may be argued that identifying an important interest would not suffice, all things considered, to account fully for the conferral of that right upon a specific entity X. We may admit, for instance, that a given state punishing an offender may serve a particular interest of a given group of individuals, and at the same time we may refuse to assign that state the power to do so because it standardly decides cases on the basis of coerced confessions or blatantly unfair procedures.²² I provide below a more detailed explanation of the authority of criminal courts which is largely based on Joseph Raz's influential service conception. Raz's account has two central features worth mentioning here. First, it assumes that the theoretical question concerning someone's authority is essentially about how the existence of an authoritative decision affects the reasoning or decision-making of others.²³ In other words, conferring

Italian courts, when these were reopened." Allied military courts, moreover, could try any offence under the Italian Penal Code or under communal ordinances should the Military Governor so direct it. Smith, *supra* note 4, at 152–153. See also Philip Marshal Brown, *The Armed Occupation of Santo Domingo*, 11 AM. J. INT'L L. 396 (1917).

19. For a more detailed defense of this framework, see ALEJANDRO CHEHTMAN, *THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT* (2010), esp. ch. 2.

20. *Id.*, ch. 1. For criticism of this approach, see Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation*, 18 EUR. J. INT'L L. 7–9 (2007).

21. The interest theory of rights is opposed to the will theory of rights. I cannot address in any detail the debate between the two theories here. For standard versions of the interest-based theory of rights, see M. Kramer, *Rights without Trimmings*, in *A DEBATE OVER RIGHTS* (M.H. Kramer, N.E. Simmonds & H. Steiner eds., 1998); and JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1988).

22. The interest theory of rights adopted here has been criticized for not adequately explaining Hohfeldian powers. I cannot examine this issue here. For standard accounts, see Kramer, *supra* note 21, and PETER JONES, *RIGHTS* (1994).

23. RAZ, *supra* note 21, at 46. Authoritative directives, then, work as protected reasons, that is, valid reasons for action that also work as a first order (exclusionary) reason to disregard other reasons against them. On this, see JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979), at 3.

upon any given body the authority to punish a defendant means that its decision is to be considered binding by others, that is, that they are under a duty to comply with it. Second, it postulates that the legitimate authority of any given court is not to be equated to, yet at the same time it is neither completely independent from, the authority of the state or the organization on whose behalf it operates.

I do not provide a general account of the authority of states—that is clearly beyond the scope of this inquiry. For our purposes it may suffice to note that under certain circumstances, belonging to a particular state or organization may undermine the authority of a given tribunal even if it satisfies all of the relevant conditions that specifically account for the authority of courts. To put it boldly, the framework put forward here is sensitive to the fact that we may question the authority of Nazi courts even in cases where they provide a defendant with immaculate justice, or so I argue below.

III. STANDARD CASE: THE JUST STATE OCCUPIER

The first case we shall examine here is that of the just occupier. For present purposes, we may concentrate on the case of a given state that occupies part of the territory of a foreign state in accordance with the rules of *jus ad bellum*. For instance, we may agree that the occupying state has acted in self-defense against an illegitimate military attack launched precisely from the occupied region. The group of just occupiers is, admittedly, larger than this particular example; under most accounts, it would include United Nations–led forces occupying a country postconflict, and some people would suggest that even *ad bellum* unjust forces could acquire a justification for occupying a particular territory. Our concern, for now, is only whether our unambiguously just, self-defensive occupier should hold criminal jurisdiction to try domestic offences perpetrated within the occupied territories. More precisely, the relevant question is: On what grounds may it do so? As the standard take on this issue suggests, “even an entirely legitimate occupier must provide an independent *jus in bello* justification for governing acts in the territory.”²⁴

An influential strand in contemporary just war theory argues, reviving the position classically defended by Vitoria, Suarez, and Grotius, that whether X is fighting an *ad bellum* just or unjust war makes a difference in terms of X’s rights and duties *in bello*.²⁵ Advocates of this position claim, for instance, that those combatants fighting on the *ad bellum* unjust side act impermissibly toward those fighting on the just side. The core insight behind this position is that situations of war are interpersonal situations writ large—the difference between war and conflicts short of war is just a matter of numbers

24. FOX, *supra* note 3, at 221.

25. This view is powerfully defended, inter alia, by Tony Coady, Cecile Fabre, Jeff McMahan, and David Rodin.

and the degree to which their action is coordinated.²⁶ Accordingly, they are not fundamentally unlike interpersonal situations in which an individual unjustly poses a threat to the life or limb of another person. In such situation, it is standardly argued, the threatened individual has the right to use force in self-defense, while the attacker lacks the right to retaliate in his own defense. *Mutatis mutandis*, the same asymmetry obtains between just and unjust combatants during armed conflict. I do not argue here against this theoretical framework as a justificatory or heuristic device. Nor do I question the soundness of its core position denying the unjust belligerents most of their *in bello* rights. My main purpose is, rather, to assess whether such an asymmetry can be consistently extended to the particular *in bello* right at hand, that is, the right to exercise its criminal jurisdiction within the occupied territories.

According to this neoclassical position, we need a particularized argument to take into account the different normative positions of individuals in the context of military occupation. If we were to take the *ad bellum* justification for resorting to force to have an impact on the *in bello* rights of a belligerent party, we would have to distinguish between different individuals depending on their involvement and attitude toward the unjust war. In this respect, we may distinguish between at least three different groups, namely, government officials of the occupied state and certain civilians who support the (unjust) war, including soldiers who fight in it, other civilians in that state who may be neutral toward the war, and individuals who actively oppose the war (but who resent the military occupation). Jeff McMahan formalizes this insight by suggesting that justification of the *in bello* rights of the occupied power could be made on the basis of one (or more) of these three types of arguments: 1) that certain individuals are themselves liable to be treated in a certain way; 2) that people suffering certain treatment is the lesser evil in the situation; and 3) that people in the occupied territories benefit from a particular treatment.²⁷ The challenge to the “moral equality” principle is the result of 1) being the dominant (albeit not the exclusive) justificatory strategy.

Thus the standard approach in the neoclassical just war literature is based on the claim that individuals in the justly occupied territories (at least several if not most of them) are essentially *liable* to be held under the authority of the occupying power. It seems morally appealing to claim that those public officials who are responsible for conducting the aggressive war are *ipso facto* liable to be under the jurisdiction of the occupying force. Under most contemporary accounts, these soldiers and military leaders are liable to be killed, and this would be the result of their own contribution toward the unjust war.²⁸ If we accept that there is continuity between the morality of

26. I am grateful to Jeff McMahan for pressing me to clarify this proposition.

27. McMahan, *Morality*, *supra* note 1, at 104.

28. See Jeff McMahan, *The Ethics of Killing in War*, 114 *ETHICS* 693–733 (2004); McMahan, *KILLING*, *supra* note 2; and CECILE FABRE, *COSMOPOLITAN WAR* (2012), among others.

occupation and the morality of war, we can easily explain their liability to being punished by the occupier.

However, it does not necessarily follow from the fact that A may be liable to be targeted that she is liable to be put under the criminal jurisdiction of the occupier. That is precisely the situation a nonresponsible attacker would be in under several accounts of defensive rights outside the context of occupation: liable to be killed but not to be punished.²⁹ Admittedly, McMahan could respond that this proposition would be entirely compatible with his normative framework, since for him only morally responsible attackers would be liable to be killed in armed conflicts. Similarly, only individuals who responsibly contributed to the unjust war would be liable to be put under the authority of the just occupier.

But this move hardly does the trick. First, this approach would be unable to distinguish between occupiers and mere invaders: individuals who are liable to be killed remain so irrespective of whether the just belligerent has obtained effective control over the territory of the unjust belligerent. Thus liability to be killed and liability to be punished are hardly coextensive. Similarly, the liability argument would be incapable of making sense of the occupier having jurisdiction only within the de facto occupied territory and not the whole of the country.³⁰ Second, it seems somewhat odd to say that the just belligerent has ipso facto acquired the right to try individuals who are in some way responsible for the unjust war effort for domestic crimes that are entirely unrelated to the war itself. Arguably it seems prima facie none of its business whether a high military commander is involved in instances of corruption against her own state, or whether a local industrialist severely beats his wife. And finally, insofar as under McMahan's view the majority of the civilian population in any relevant country is not liable to be killed by the just occupier, he would need to provide a specific argument for their liability to be put under the authority of the occupier.³¹

I suggest, by contrast, that a more specific argument is needed to account for conferring criminal jurisdiction over domestic offences upon a just occupying power. In fact, we need an argument that accounts precisely for the normative implication at stake: the liability to be punished for domestic crimes (as opposed to other liabilities). I argue elsewhere that the reason this Hohfeldian power is generally conferred upon any given state has to do with the fact that having a system of criminal law in force constitutes a public good that benefits, as per strategy 3) above, the individuals that happen to be under it in a certain way.³²

This proposition stands on an analytical and a normative claim. Analytically, it implies a necessary link between a criminal law system being in

29. See, famously, Judith J. Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283–310 (1991).

30. See *supra* Section II. In fact, GCIV, *supra* note 15, art. 66, even requires that the occupiers' courts sit in the occupied territory.

31. McMAHAN, KILLING, *supra* note 2, ch. 5.

32. See CHEHTMAN, *supra* note 19, ch. 2.

force and some agent holding the normative power to punish those who violate those rules. This is plausible enough not to warrant further elaboration here.³³ From the normative point of view, this position maintains that *believing* that a set of legal rules prohibiting murder, rape, and other crimes is in force contributes to the sense of dignity and security of individuals in any particular society. These criminal laws being in force contribute to our sense of being the bearers of certain rights and to building our confidence in the fact that there are legal rules protecting these rights which bind the conduct of others around us. This proposition is, admittedly, an empirical claim whose plausibility will have to be taken at face value here. Ultimately, I assume that the collective interest that individuals have in these rules prohibiting murder, rape, and so on being in force, namely, binding on them and others around them, is sufficiently important to warrant putting those who violate them under a liability to being punished.

I do not defend this argument on its own terms here.³⁴ Rather, I concentrate on explaining how it allows us to account for the just occupier's power to punish individuals on the occupied territories. As indicated, I suggest that a state's power to punish offenders is justified by the collective interest of individuals in that state in having a system of criminal laws in force. This collective interest would allow us to justify to defendants the occupier's power to put them on trial. But we also, and crucially, need to account for this power to the population in the occupied territories. I suggest that individuals in Allied-occupied Italy during World War II (a plausible example of a just occupier) had an interest in the basic criminal laws of the land remaining in force during occupation. In effect, "[a] belligerent occupier, particularly because of the disruptions that he causes in the peaceful relations of the occupied territory, should be required to ensure the availability of" basic public services, such as education, health care, and so on.³⁵ Among these services, I suggest, is the enforcement of the local criminal laws. This proposition is fully compatible with the official text of Article 43 of the Hague Regulations (in French), which empowers occupiers to maintain "public life" (*la vie publique*).³⁶

33. For a classical defense of this claim, see RAZ, *MORALITY*, *supra* note 21.

34. For most purposes it can be replaced by standard deterrence or retributivist accounts, and these would lead to similar conclusions. I cannot pursue this issue here.

35. Davis P. Goodman, *The Need for Fundamental Change in The Law of Belligerent Occupation* 37 *STAN. L. REV.* (1985), at 1601. On the duty to ensure medical supply, see GCIV, *supra* note 15, art. 55 and 56; on education, see *id.*, art. 50. See also S.C. Res. 1472, U.N. SCOR, 58th Sess., 4732 mtg., U.N. Doc. S/RES/1472 (Mar. 28, 2003) (the situation between Iraq and Kuwait), reprinted in 42 *INT'L LEGAL MATERIALS* 767 (2003).

36. This clause was defined by the Belgian delegate at the negotiations for the Brussels Convention of 1874 (Project of an International Declaration concerning the Laws and Customs of War) as meaning "social functions and ordinary transactions of everyday life," which was in turn taken to suggest that its purpose was wider than basic human security and would include other essential services benefiting the local population. Cited in M.J. Kelly, *Iraq and the Law of Occupation: New Tests for an Old Law*, 6 *Y.B. INT'L HUMANITARIAN L.* 147 (2003).

Furthermore, we could argue that insofar as the just occupier provides for fair and reliable processes to local defendants, it would also hold the authority to issue binding decisions. As suggested above, the theoretical question of authority concerns the grounds on which we can justify subjecting one's own judgment to that of another person, in our case by allowing occupation courts to decide whether a particular defendant should be punished. Following Raz's influential service conception, we may accept that this would be the case when someone "is likely better to [conform] with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow reasons which apply to him directly."³⁷ This leaves us with an entirely familiar account of the authority of criminal courts, one in which this authority is linked to their capacity to "accurately . . . determine whether or not a person has committed a particular criminal offence and [doing] so fairly."³⁸ Authority, then, is essentially connected to overall accuracy, reliability, and fairness.³⁹

But there must be something else that explains why Norwegian courts usually have authority in Norway and Brazilian courts usually have authority in Brazil. Or more to the point, there must be something in the fact that *X* has become an occupying power in a given territory for the courts under *its* command to hold authority there. Under the service conception, for any given body to have a normative claim to issue authoritative decisions, it must not only provide fair and reliable trials to defendants but it must also hold sufficient *de facto* authority.⁴⁰ Without this kind of *de facto* recognition, authorities would not be able to provide the benefits that ultimately justify empowering a centralized authority in the first place, that is, having it provide individuals under it with greater coordination and cost reduction.⁴¹ But, *ex hypothesi*, occupiers characteristically fulfill this further requirement. On these grounds, we may safely conclude that provided it takes this responsibility seriously, a just occupier would not only act in the interest of the local population by fairly enforcing the local criminal laws, it would also be able to claim the authority to do so.

Before closing this section, let me consider the following objection: the position defended here is based on the ways in which at least part of the occupying power's faculties *benefits* the indigenous population in the occupied territories. This, the objection goes, is a deeply flawed understanding of the

37. RAZ, *MORALITY*, *supra* note 21, at 53.

38. ANDREW ASHWORTH & MIKE REDMAYNE, *THE CRIMINAL PROCESS* (2010), at 23. On this, *see also* IAN DENNIS, *THE LAW OF EVIDENCE* (3d ed. 2007), ch. 2. Antony Duff and his colleagues accept the account provided here, but they consider it incomplete; *see* ANTONY DUFF, LINDSAY FARMER, SANDRA MARSHALL & VICTOR TADROS, 3 *THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL* (2007).

39. Against this view, *see*, notably, STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT AND ACCOUNTABILITY* (2006).

40. RAZ, *MORALITY*, *supra* note 21, at 56.

41. *Id.* at 30–31.

situation of military occupation, for it entirely overlooks the enormous burden that occupation entails for those same individuals. Any historical survey of occupation situations would suggest that portraying them essentially in terms of benefits simply fails to understand the phenomenon at all. Fair enough. Yet I need not take issue with the basic premise of this objection in order to respond to it here. Most of the relevant features of any occupation constitute a heavy burden on the individuals in the occupied territories. All my argument need show is that some of them do not. Indeed, it seems plausible to claim that absent a centralized authority with effective control over the territory, an institution that provides basic public goods, such as health care, education, and the enforcement of local criminal laws would benefit the locals sufficiently to have conferred upon it the right to do so.

For those who remain skeptical of this further suggestion, we may note that insofar this objection is based on occupation *per se*, that is, unrelated to the justness of the occupation, their objection would not undermine the strong thesis advanced in this article, namely, that *ad bellum* just and unjust occupiers should hold the same *in bello* rights over occupied territories, but only the weak one, that is, that occupying powers should, as a matter of principle, hold the power to enforce the domestic criminal laws of the occupied population.

IV. FIRST EXTENSION: UNJUST STATE OCCUPIERS

A central task of this article is to assess the principle of equality between belligerents in the context of military occupation. This section focuses on unjust state occupiers. Unjust occupiers are hereby defined exclusively as those that have violated the rules of the *jus ad bellum*. Thus we may assume for present purposes that a state A has invaded and occupied the territory of its neighbor state B in the course of an aggressive war over oil reserves situated between the two countries. Again, this would not be the only type of unjust occupier, yet it provides a good point of departure to discuss the precise normative issue at stake. A critical feature of the law of belligerent occupation is that it does not distinguish between lawful and unlawful occupiers in terms of the rights and duties they hold on occupied territories.⁴² Occupation is regulated by the *jus in bello*, which, under both international law and orthodox just war theory, is always separate from *jus ad bellum* considerations.⁴³

Neoclassical authors have strongly argued against the principle of moral equality between belligerents. By contrast, they defend the interconnection

42. *Trial of Wilhelm List and Others: United States Military Tribunal, Nuremberg, 8th July, 1947, to 19th February, 1948 (The Hostages Trial)*, in 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 59 (1949). See also A. Gerson, *War, Conquered Territory, and Military Occupation in the Contemporary International Legal System*, 18 HARV. INT'L L.J. 525 (1977).

43. MICHAEL WALZER, *JUST AND UNJUST WARS* (1977), at 21. See also GEORGE F. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* (2008), at 20.

between *ad bellum* and *in bello* considerations.⁴⁴ That is, they claim that the rules that should govern what belligerents can do during fighting cannot be independent from the justification for fighting in the first place. This position also applies in contexts of military occupation. In McMahan's words, "[t]he morality of the conduct of an occupation cannot be independent of the morality of the occupation itself."⁴⁵ A standard response to this kind of argument by international law scholars has been that it tends "to exaggerate the role and influence of the laws of war," and that it fails to consider the law's historical origins as a means to moderate the sufferings it caused and spare non-combatants.⁴⁶ Under this line of rebuttal, it would not make sense for the laws of war to prescribe all types of behaviors to belligerents; they should impose only a very limited number of restrictions and requirements during conflict. The laws of armed conflict are, it is often suggested, intensely practical.

As it stands, this response does not really provide an answer to McMahan's normative challenge. It seems concerned only with the issue of institutionalization of certain normative principles. The legal principle of equal application need not rest on the premise "that there is 'moral equality on the battlefield.'"⁴⁷ This article, by contrast, advances a different kind of response to the neoclassical challenge. It argues that unjust occupiers hold the Hohfeldian power to punish domestic offences perpetrated on the occupied territories as a matter of what has been standardly termed the deep morality of war, a power they are under a duty to exercise. This proposition, it is submitted, is based, again, on the considerations that ground the allocation of criminal jurisdiction in ordinary circumstances.⁴⁸

In the previous section, I argue that the right to punish can be plausibly explained by the interest of individuals in a given territory in there being a system of criminal laws protecting their basic rights. I now suggest that even in a situation in which the occupying power may be considered unjust *ad bellum*, individuals in the occupied territories have an interest in their system of criminal laws remaining in force. This is roughly uncontroversial. The unjust occupier is *de facto* the only body in a position to enforce these rules. Thus it is submitted here that the interest that warrants conferring upon just occupiers the normative power to punish offenders in the occupied territories *perforce* leads to the same conclusion in the case of unjust occupiers. The position of the government of the Turkish Republic of Northern Cyprus (TRNC) or the U.S. government in Santo Domingo in 1907, that

44. See, e.g., McMAHAN, KILLING, *supra* note 2; DAVID RODIN, WAR AND SELF-DEFENSE (2002); and FABRE, COSMOPOLITAN, *supra* note 28.

45. McMahan, *Morality*, *supra* note 1, at 116. See also Fabre, *Living with the Enemy*, *supra* note 1.

46. Roberts, *supra* note 2, at 935.

47. *Id.* at 936. Similarly, see Jeff McMahan, *The Law of War*, in THE PHILOSOPHY OF INTERNATIONAL LAW 498–499 (S. Besson & J. Tasioulas eds., 2010).

48. Against this distinction, see Seth Lazar, *The Morality and Law of War*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW (Andrei Marmor ed., 2012).

is, established in violation of *ad bellum* considerations, may illustrate this point.⁴⁹

This position is further supported by the fact that usually one of the first difficulties under occupation is the explosion of local criminality, including looting, theft, and gangs, as we have seen in Iraq post-2003.⁵⁰ Law enforcement, property, and personal safety are therefore particularly sensitive and pressing issues in the wake of occupation. There is at least some evidence that the lack of a basic security policy in Iraq in the immediate aftermath of the war fueled the internal conflict. The lack of protection of arsenals gave the relevant factions access to weapons and explosives, while the destruction of basic services and industries undermined the legitimacy of the occupier.⁵¹

Incidentally, it was the weaker states that pushed stronger states to accept a special duty to ensure public order and civic life and advocated for the application of sanctions as a way of looking after their own civilian population should their territory be held under occupation.⁵² The “framers of the Hague Regulations were afraid that the Occupying Power might tolerate pervasive turmoil and turbulence, not lifting a finger to prevent rampant anarchy from paralyzing the whole life of the civilian population.”⁵³ In effect, “[i]t is easy to contemplate a scenario whereby unruly armed bands bring devastation upon the civilian population, while avoiding a clash with the armed forces of the Occupying Power.”⁵⁴ It may well be the case, then, that unjust occupiers have a special responsibility to ensure that the local population suffers as little as possible as a result of the occupation. Just as they would be responsible for ensuring public health and other basic services, they are also responsible for the functioning of a system of criminal courts.⁵⁵

McMahan and other defenders of the asymmetric-rights position would concede this point. They would be prepared to accept that certain unjust occupiers hold this kind of prerogative when occupation is, in McMahan’s

49. On Santo Domingo, see Brown, *supra* note 18, at 394–399. On the TRNC, the European Court of Human Rights refers to this situation as occupation; see *Loizidou v. Turkey*, Eur. Ct. H.R., reprinted in 36 INT’L LEGAL MATERIALS 440, 453–454 (1996) (merits). Of course, Turkey would claim that its 1974 intervention was just (*ad bellum*).

50. It has been argued that looting and not the armed insurgency was the greatest threat to the welfare of the local population in Iraq after the 2003 invasion. See M. Sassoli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT’L L. 667 (2005). See also JOHANNES ANDENAE, PUNISHMENT AND DETERRENCE (1974), at 51, 124, 128.

51. See Asli U. Bâli, *Justice under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT’L L. 452 (2005); and David Glazier, *Ignorance Is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 RUTGERS L. REV. 77, 78, 83 (2005).

52. Sassoli, *supra* note 50, at 680.

53. DINSTEN, *supra* note 5, at 92.

54. Yoram Dinstein, *The Israeli Supreme Court and the Law of Belligerent Occupation*, 25 ISR. Y.B. ON HUM. RTS. 15 (1995).

55. As a matter of International Humanitarian Law, occupiers have concrete duties regarding medical units, civil defense, and basic needs. See art. 14, 63, and 69 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Protocol I), respectively.

terms, unjust but justified. “Justified” in this context refers to the fact that the occupation has weakened the state’s infrastructure in a way that makes it incapable of working. Under these circumstances, the occupier acquires a special responsibility on the grounds of his prior (mis)conduct. By contrast, McMahan believes that occupiers that are both unjust *and* unjustified lack any type of authority over the occupied territories, including the normative power to enforce the local criminal laws. This kind of occupier, he concludes, should “leave immediately.”⁵⁶

Yet even if McMahan is right that such occupiers are under a duty to “leave immediately,” it does not follow that they would be under a disability to enforce the local criminal laws. Let me illustrate this by reference to an interpersonal example. Suppose that Amy has kidnapped Bob and Charles. Bob has a serious illness and while in captivity he suffers a serious crisis. Suppose further that both Amy and Charles happen to be medical doctors and they could both help Bob overcome the crisis. Under these circumstances one may say that Amy is under a duty to assist Bob even if she is also under a duty to release him (and Charles). These two duties are logically independent from each other. In terms of the interest theory of rights hereby adopted, the interest that grounds Bob’s claim-right against being deprived of his liberty is in this context largely independent from his interest in his health being looked after immediately. Not treating him in such a situation would constitute a further and separate wrong to his deprivation of liberty.⁵⁷ Furthermore, and what is critical for our purposes, the fact that there is a third party (Charles), who is unrelated to the kidnapping and who would himself be capable of aiding Bob had Amy not been in a position to prevent it, is irrelevant for the purposes of holding Amy under this duty.

In the case of the unjust and unjustified occupier, this lack of conflict between the two relevant Hohfeldian incidents is even clearer. The existence of a second-order normative power to punish offenders is logically independent of the lack of a first-order liberty to stay. One could be under a duty to leave and still hold the former power. In fact, a state may hold the former duty to leave and be under a duty to exercise the latter power. This is the case under international law. If this analytical distinction is correct, McMahan’s argument begs the relevant question. That is, he would need, but fails, to provide a separate argument stating why this unjust and unjustified occupier would be under a *disability* to enforce the local criminal laws. Put more straightforwardly, the key proposition defended in this section is not that just and unjust occupiers are morally equal, all things considered, for they are clearly not. Just and unjust occupiers stand in a morally different position with regard to the local population in that the latter wrongs that population by merely being there while the former does not. But this

56. McMahan, *Morality*, *supra* note 1, at 118.

57. By this I do not mean that hostage takers necessarily hold authority over those kidnapped by them; rather, I suggest only that from the fact that they are under a duty to liberate them it does not logically follow that they cannot have rights over them in certain respects.

wrong is precisely what it is captured by the claim that they are violating the *ad bellum* rules. My claim is that this important normative difference does not translate into the *in bello* rights and duties they hold vis-à-vis the administration of the occupied territory.

To go back to our kidnapping example: although Charles would be in a position to help Bob should Amy allow him to (e.g., she unties him), he is not currently in such position. Of course Amy would be under a duty to untie Charles, both for his own sake and for him to be able to assist Bob; but that is beside the point. As long as she does not do so and insofar as she is the one incapacitating Charles, Amy assumes a special duty of care vis-à-vis Bob. Similarly, the unjust *and* unjustified occupier assume a special responsibility toward the domestic population. Put differently, I submit here that the problem with McMahan's approach seems to stem from the fact that he is too concerned with whether the occupier should be there at all and not enough with the difference it makes, if at all, that it is already there and unwilling to leave.

McMahan may still argue that this response is too quick. In such situation, the only permissible option for Amy should be to free Bob so he can be treated by Charles. Treating Bob herself is only a lesser wrong than not treating him at all. But it would be mistaken to say that she has a right or even that she is under a duty to do so. She would only be under some form of conditional duty, but this conditional duty would be a duty that all things considered it would be impermissible to fulfill. The reason for this is simply that it would be impermissible to create the conditions under which the duty arises. The same reasoning would apply, *mutatis mutandis*, to the unjust and unjustified occupier. It would be under some kind of conditional duty to enforce the local criminal laws, but only if it acts wrongly by continuing the occupation. This, again, would be the lesser wrong, but it would be mistaken to suggest it has the right or even a duty to punish offenders for crimes perpetrated within the occupied territories.⁵⁸

I agree that the power (and duty) of the unjust and unjustified occupier is conditional. But I suggest that it is conditional on its holding *de facto* effective control over the occupied territories and that this conditionality is unrelated to the *ad bellum* wrongness of the occupation. In this particular sense, the power of the just occupier is also conditional. Furthermore, I suggest that conditionality has no direct bearing on either occupier holding the relevant power or it being at liberty and even under a duty to exercise that power. Consider the case of Amy once more. She is certainly under no duty not to assist Bob in his crisis—that is, she is clearly at liberty to do so. If we were to assess her moral behavior, the fact that she assisted Bob would have to be considered a mitigating element in the overall wrong she inflicted upon him. This seems to indicate that doing so was not merely the lesser wrong but actually a good deed in the midst of an awful wrong.

58. I am indebted to Jeff McMahan for pressing me on this issue.

This is compatible with my previous claim that an occupier's power to punish is based on the benefits it exercising this power provides to the local population and not just on lesser evil considerations.

Furthermore, were Charles to hold Amy back when she is trying to assist Bob (I assume here that Charles can prevent her from saving Bob but is not physically capable of assisting Bob himself, due to Amy's having him tied up), it would not only be permissible for her to free herself from Charles, but she would be justified in doing so. Put differently, her "*in bello*" behavior seems to me clearly permissible even if her "*ad bellum*" behavior clearly is not. Finally, the circumstance in which her behavior is "*ad bellum*" impermissible seems to entail, if anything, that her duty to assist Bob is more stringent than if she had not kidnapped him. These implications suffice, in my view, to justify my claim that provided one accepts that just occupiers have criminal jurisdiction over the occupied territories, one is also committed to conferring a similar power upon unjust (and unjustified) ones. We may even say that the duty to exercise this power is more stringent in the latter case.

A second, related objection would claim that my proposed solution would make the fulfillment of the first order duty to leave less likely. Conferring upon the unjust and unjustified occupier criminal jurisdiction over the occupied territory would allegedly create dangerous incentives by allowing unjust occupiers to bootstrap themselves into legitimacy while violating the rights of innocents. This, in short, may "prop up" the ultimate injustice: it would be like granting labor rights to slaves rather than dealing with the ultimate wrongfulness of slavery. This is a powerful objection. A first thing to note is that it is open to question whether the balance of incentives works in quite the way this objection assumes. On the one hand, it is doubtful that conferring criminal jurisdiction over an unjust and unjustified occupier would significantly enhance its legitimacy vis-à-vis the local population. Examples abound, but the situation of Israel in certain parts of the Palestinian territories seems to illustrate this well.

On the other hand, it is far from clear that the exercise of criminal jurisdiction over domestic offences has a direct impact on the willingness of an unjust and unjustified occupier to stay. The negotiating history of the Hague Regulations as well as much of the specialized literature in international law casts serious doubts on this proposition.⁵⁹ After all, administering the occupied territory entails allocating significant resources and personnel, thus it usually becomes a heavy burden. Yet even if we accept that incentives would work in the way the objector suggests, we can readily doubt that the incentives created by the standard neoclassical solution would fare any better under the circumstances. In short, conferring upon the unjust but justified occupier jurisdictional powers over the occupied territory while negating them to the unjust and unjustified would create in such scenario

59. See text corresponding to notes 53 and 54 above.

an incentive for the unjust occupier to destroy the local infrastructure so as to justify its presence in (and its powers over) the relevant territory.

Furthermore, unless one takes a purely consequentialist approach, this objection does not really affect the argument of principle hereby advocated. The reason for this is that it works only at the level of institutionalization. This objection seems ultimately to suggest that we should be wary of *institutionalizing* the moral rights that unjust and unjustified occupiers have in a way that confers upon them criminal jurisdiction over the occupied territories because of the pernicious incentives it would create. But it does not challenge the claim that the underlying normative reality works in exactly the way I describe here.

What seems to lie at the core of this objection from an intuitive perspective is the possibility of the unjust and unjustified occupier punishing locals fighting against the occupation. In effect, Article 64 of Geneva Convention IV provides that:

The Occupying Power may . . . subject the population of the occupied territory to provisions which are essential to enable [it] to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

However, I am afraid that the key intuition underlying this objection is misplaced. The behavior of soldiers or even civilians who are taking a direct part in hostilities against the unjust occupier is not regulated by the norms on belligerent occupation (this arguably holds as a matter of both law and morality). Rather it is governed by the relevant rules regulating armed conflicts that apply between belligerents, that is, the rules of engagement and the relevant rules concerning war crimes.⁶⁰ Accordingly, these combatants are neither under the regular jurisdiction of the occupier nor the object of my argument here, which concentrates exclusively on jurisdiction over domestic offences.

A final line of objection against the main proposition defended in this section is that it relies, perhaps fatally, on the unjust occupier being able, as a matter of fact, to provide individuals in the occupied territories with the specific public good at stake. This, the objection goes, can certainly be open to question. Whereas an unjust occupying power could easily provide medical care for individuals in the occupied territories or ensure that they have access to drinking water, it does not necessarily follow that it would be in a position to warrant the provision of a public good such as a working system of criminal laws. This public good is fundamentally disanalogous to a health care or a water supply system. If nothing else, punishment has a condemnatory function that the provision of other goods lacks. This aspect

60. DINSTEIN, INTERNATIONAL, *supra* note 5, at 100.

of the imposition of legal punishment may require, among other things, a certain standing. Furthermore, punishment has a unique potential for facilitating oppression. Nazi occupations during World War II constitute the archetypical case in point.⁶¹ They were brutal, murderous, and genocidal. Individuals living under their power could hardly have believed that their basic rights to life, freedom, and so on were meaningfully protected by the local system of criminal laws, even if Nazi authorities took responsibility for enforcing domestic criminal provisions.

I am happy to concede this point. However, it hardly undermines the central proposition advocated in this section, namely, that *ad bellum* considerations are separate from the *in bello* rules that govern occupation. The fact that Nazi Germany should not be granted the power to enforce the local criminal laws in, for example, occupied Belgium has nothing to do with it violating the prohibition on using force in the *ad bellum* sense. The reason it should lack such right is, in the words of the Nuremberg tribunal, that “Germany violated . . . every principle of the law of military occupation,”⁶² and possibly every basic human right of the local population under its control. A further problem is the way in which Germany enforced the local laws, namely, through blatantly unfair trials and persecution of minorities if not summary executions. In the spine-shivering words of Goebbels, “[t]he idea that the judge must be convinced of the defendant’s guilt must be discarded completely.”⁶³ McMahan himself hints at this when he suggests that it was the fact that the Nazis were “barbaric” that matters.⁶⁴

My contention is therefore that there is no meaningful difference in this respect between *ad bellum* just and unjust occupiers at the level of their powers and responsibilities vis-à-vis the occupied territories. An *ad bellum* just occupier that nonetheless is unable to meet minimum due process requirements or is itself associated with atrocities or mass human rights violations would be under a disability to enforce the local criminal laws, just as an *ad bellum* unjust occupier would be had it been liable to the same criticisms. To illustrate, I suggest that we should treat similarly the German occupation of, say, Denmark and the Soviet occupation of parts of Germany during World War II. Irrespective of the fact that the former violated *ad bellum* principles and the latter did not, the account I favor here is committed to the view that neither Nazi Germany nor the Stalinist USSR should be granted criminal jurisdiction over their respective occupied territories.

This may seem to leave us where we started, for even if we cannot distinguish between Germany and the USSR during World War II, we may still

61. See, e.g., RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* (2005), esp. chs. 3 and 4.

62. *The Justice Trial: Trial of Josef Altstötter and Others: United States Military Tribunal, Nuremberg, 17th February–4th December, 1947*, in 6 *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 1, 59 (1948).

63. *Id.* at 104.

64. McMahan, *Morality*, *supra* note 1, at 117.

suggest that *ad bellum* considerations would suffice to disqualify an aggressor's authority. The relevant question is whether an *ad bellum* unjust occupier should be put under a disability in exercising criminal jurisdiction on these precise grounds—that is, whether that would be a sufficient condition for such a normative implication. The argument advocated here is that this unjust occupier should not per se be so disqualified. Individuals in the occupied territories have an interest in their basic rights being protected by a binding system of criminal rules. And insofar as the occupier is a minimally decent state and subjects local defendants to minimally fair and reliable trials, convictions would be able to convey to the relevant stakeholders that the sanctions vindicate the violated criminal prohibitions.⁶⁵ According to some accounts, the Germans would have been in such a position in occupied Russian territory during World War I.⁶⁶ But a better example would perhaps be the American occupation of parts of Mexico by General Winfield Scott in the 1846–1848 war.⁶⁷ American forces strove to restore public order after the capture of each city and protected locals from bandits and looting. If only anecdotal, it is noteworthy that Mexicans tried by American courts enjoyed a higher acquittal rate than their U.S. counterparts.⁶⁸

V. SECOND EXTENSION: NON-STATE QUASI-OCCUPIERS

The second and final “extension” I wish to consider here is that of non-state armed groups. Again, the issue at stake is whether they should hold criminal jurisdiction at the bar of justice. The orthodox position under international law distinguishes between state and non-state actors and does so precisely in terms of the rights and duties each of them has during armed conflict. The rules applicable in noninternational armed conflicts are to some extent different from those that apply to international ones. There is currently a renewed tendency in some contemporary scholarship to bring these two bodies of law closer to one another, if not to override that distinction entirely.⁶⁹ The point at issue here is precisely the soundness

65. On decent states, see the characterization in JOHN RAWLS, *THE LAW OF PEOPLES* (1999), at 64–68.

66. S.W.D. Rowson (Shabtai Rosenne) reports that the Germans treated the Russian population in occupied territories fairly. See S.W.D. Rowson, *The Abolition of Nazi and Fascist Anti-Jewish Legislation by British Military Administrations of the Second World War*, JEWISH Y.B. INT'L L. 261–262 (1948).

67. Interestingly, Francis Lieber and General Scott of all people opposed, or at least were critical of this war from an *ad bellum* point of view. For a succinct account, see Glazier, *supra* note 51, at 36.

68. *Id.* at 23.

69. Dieter Fleck, *The Law of Non-International Armed Conflicts*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 615 (Dieter Fleck ed., 2008); James Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 850 (2003); and Emily Crawford, *Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflict*, 20 LEIDEN J. INT'L L. 441–465 (2007). For arguments going further and attacking, precisely,

of that distinction and (at least some of) its normative implications. Unlike in the previous section, we are not concerned here with the principle of separation between *ad bellum* and *in bello* considerations; our concern is with the asymmetric status of states and non-state parties to a military conflict.

The basic legal framework regulating military occupation described in Section II does not apply in internal conflicts.⁷⁰ Conceptually, there is no obvious reason that the framework of occupation would not be entirely adequate to examine situations involving effective control by insurgents of parts of the national territory.⁷¹ Yet to avoid any technical or terminological difficulties, let us speak of “quasi-occupation.” Again, let us resort to the law to establish the main conceptual framework applicable to this specific situation. The closest we get to regulation of the issue at hand is Common Article 3 of the four Geneva Conventions (CA3) and Article 6(2) of Additional Protocol II.⁷² The former prohibits “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁷³ Article 6(2) provides that “[n]o sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction

the moral asymmetry between state and non-state forces in the context of noninternational conflicts, see FABRE, COSMOPOLITAN, *supra* note 28; and François Bugnion, Jus ad bellum, jus in bello and Non-International Armed Conflicts, 6 Y.B. INT’L HUMANITARIAN L. 167–198 (2003). For important precedents advocating assimilation of internal conflicts to international ones, see the examples cited in David Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE W. RES. J. INT’L L. 42–43 (1979).

70. Adam Roberts recalls that the possibility of a piece of territory being occupied by a non-state actor was not discussed at either the 1949 or the 1974–1977 conventions in Geneva. However, he “hazards the opinion” that the law on military occupation should apply fully in those circumstances, with the caveat that such occupier may lack some of the resources that states normally enjoy. See Adam Roberts, *What Is Military Occupation?*, 55 BRIT. Y.B. INT’L L. 293 (1984).

71. See, notably, L. OPPENHEIM, INTERNATIONAL LAW (H. Lauterpacht ed., 1952), at 249; and Fleck, *supra* note 69, at 628; and the fact that the law of occupation was included in the Instructions for the Government of Armies of the United States in the Field, General Order No. 100 (Lieber Code), drafted for the purposes of the American Civil War. For doubts, see Sandesh Sivakumaran, *Courts of Armed Opposition Groups. Fair Trials or Summary Justice?* 7 J. INT’L CRIM. JUSTICE 489–513 (2009), at note 124.

72. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977). Admittedly, both Protocol II and CA3 are concerned more with the group’s jurisdiction over war crimes than with regular crimes.

73. At least one interpretation of the “regularly constituted courts” requirement in CA3 is intrinsically linked to fair and reliable verdicts. See, e.g., Hamdan v Rumsfeld, 548 U.S. 557 (2006) (Stevens, J.). Furthermore, the Pictet Commentary to the Geneva Conventions does not equate this requirement with a basis in municipal law but rather focuses on the prohibition of “summary justice”; JEAN PICTET, *Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949: Commentary—Art. 3, Part I: General Provisions*, in COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, available at <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCO-MART&articleUNID=A4E145A2A7A68875C12563CD0051B9AE>.

pronounced by a court offering the essential guarantees of independence and impartiality.”⁷⁴

Although these provisions regulate the functioning of courts in noninternational armed conflicts, they say nothing about whom they are directed to. Some authors believe that through them, international law accepts courts of non-state actors. This position is based on the claim that international humanitarian law provisions bind all parties to the conflict.⁷⁵ The precise answer to this legal issue is beside the point here. We are concerned only with the normative justification for the right of these actors to exercise criminal jurisdiction on territories under their control.

The orthodox view among international lawyers submits that the equivalence between belligerents that applies in international armed conflicts does not hold between states and armed opposition groups, at least in armed conflicts not of an international character.⁷⁶ And yet this position does not cover all non-state groups. First, some conflicts between a state and a non-state group may be considered internationalized for the purposes of international humanitarian law, such as wars fought by proxies or non-state groups under the control of a foreign state.⁷⁷ In such context, the position of the different parties would be largely symmetrical in terms of rights and duties. Second, at least part of the law on military occupation would normally apply to conflicts in which a “people” is “fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right to self determination.”⁷⁸ Third, recognition of belligerency by a non-state actor could put this group on a par with state authorities for many purposes even if the law on military occupation would not necessarily regulate its conduct.⁷⁹ Ultimately, classification of the relevant conflict and specification of the particular provisions that apply to it exceed our

74. In reference to this provision, the United Kingdom’s MANUAL OF THE LAW OF ARMED CONFLICT considers that “the use of the bare word ‘law’ . . . could also be wide enough to cover ‘laws’ passed by an insurgent authority”; U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004), at 404. On this, see also Statute of the International Criminal Tribunal for Rwanda, SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994), art. 4(g); Statute of the Special Court for Sierra Leone, 2178 UNTS 138, 145; UN Doc. S/2002/246, appendix II, art. 3(g); and Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998), art. 8(2) (c) (iv).

75. Sivakumaran, *supra* note 71, at 493. In favor of this possibility, see Marco Sassoli, *Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law*, 1 J. INT’L HUMANITARIAN LEGAL STUD. 34 (2010); and Jonathan Somer, *Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict*, 89 INT’L REV. RED CROSS 655–690 (2007).

76. Characteristically, non-state belligerents lack immunity from prosecution for participating in a conflict.

77. See, e.g., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits [1986] ICJ Rep 14; and *Tadic*, *supra* note 5; although each requires different levels of control by the foreign state.

78. Art. 1(4) Protocol I, *supra* note 55. This provision, however, is not binding per se on nonparties. Consideration of whether it has become part of customary international law is beyond the scope of this article.

79. Bugnion, *supra* note 69, at 181.

purposes here.⁸⁰ Our interest lies with the situation of a non-state armed group regardless of the type of conflict it is involved in, as our distinction is conceptual rather than legal.

The classical argument in favor of distinguishing state from non-state actors for our purposes submits that conferring upon the latter powers or immunities traditionally held exclusively by states encourages rebellion, or at least empowers it.⁸¹ Non-state rebels are thereby portrayed as mere bandits or criminals to which domestic criminal law rather than international humanitarian law should apply. Yet this is a bit too quick. For one, defenders of this position would probably have a hard time assessing an internal armed conflict in which the two warring parties are non-state groups fighting for control of a (failed) state's machinery. Furthermore, it is arguably not the case that every single one of these groups can be accurately portrayed simply as a band of criminals. Thus it simply does not follow that its non-state status would suffice to disqualify any such group from holding the rights characteristically enjoyed by states over an occupied territory.

The main problem with these groups, the advocate of the traditional view may retort, is that they lack the relevant authority (*auctoritas*).⁸² Yet it is open to question whether this consideration is what is doing the work in the first place. For instance, victory by the secessionist party automatically provides it with the powers that advocates of the orthodox view deny it up to that point.⁸³ Similarly, non-state belligerents fighting for national self-determination would hold these rights from the outset. Be that as it may, such a proposition suffers from a more fundamental flaw; namely, whether these non-state groups hold the relevant authority to try individuals is precisely the point at issue. Thus any argument taking this point for granted simply begs the relevant question.

We need to address the issue of whether such groups should be granted the power to punish by concentrating on normative argument rather than institutional description. Substance rather than form should lead the argument. As I argue above, individuals in an armed conflict have an interest in the local criminal laws remaining in force during its duration. Occupation situations not only create a threat to life, limb, and property; they often severely weaken the state structures, and their outbreak often leads to an explosion of "regular" criminality. This is also true with regard to internal conflicts. Thus, in terms of the justification for the right to punish these offences, it follows from the argument advocated in the previous sections that individuals in internal armed conflicts have an interest in legal punishment being meted out to offenders by a centralized authority. In Fabre's words, "in [civil] war[s], . . . thieves need arresting, 'ordinary' murders

80. For a succinct and clear exposition, see YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (2010), at 14–16.

81. See, e.g., Elder, *supra* note 69, at 50.

82. See, e.g., STEPHEN NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* (2005), at 250.

83. Bugnion, *supra* note 69, at 182.

need solving, laws (not all of which are unjust) need enforcing.”⁸⁴ Accordingly, in areas under the effective control of a non-state armed group, this interest would be sufficiently important to warrant conferring upon that organization jurisdiction over criminal offenders.

It is necessary to pause here to distinguish the argument hereby advocated from other similar claims available in the literature. Sivakumaran, for instance, argues that courts of non-state armed groups “offer a forum for prosecution when otherwise none would exist.” They function “as a counterweight to the disorder and chaos that would otherwise rein in the territory under armed group control”; “[w]ithout trials, summary executions . . . may become the norm.”⁸⁵ This argument relies, just as the argument defended here, on the fact that armed groups are the only de facto authority on the ground and that their exercising criminal jurisdiction would contribute to public order.

Yet, unlike the argument advocated here, Sivakumaran’s seems to regard these considerations as sufficient conditions for conferring upon non-state armed groups the power to punish offenders.⁸⁶ If one proceeds on the basis of the three considerations highlighted by Sivakumaran, one would have to admit that an armed group that conducts trials based on confessions obtained through torture should hold the normative power to exercise criminal jurisdiction on the territory under its control.⁸⁷ This would be, from a normative perspective, deeply problematic. And yet that kind of group could well be able to secure public order, avoid summary executions, and be the only one in a position to do so. Put differently, the point I am trying to stress is that not every kind of public order is morally equivalent. It is only the type of public order connected with the legal protection of the fundamental rights of individuals that is considered of value and sufficiently important to justify the right to punish.

The more controversial issue is connected with the second limb of the argument for the Hohfeldian power to punish identified above; that is, whether non-state armed groups can claim the legitimate authority to try to punish offenders. Authority in this context would require actual competence. To be able to conduct this type of trial, any organization would need at least a significant amount of control or de facto authority over its area of action. The armed group Fuerzas Armadas Revolucionarias de Colombia (FARC), for instance, at the height of its powers exercised de facto control of several areas of Colombia to the extent of being considered by individuals

84. FABRE, COSMOPOLITAN, *supra* note 28, at 127. See, similarly, Philip Alston, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Rep. of the Special Rapporteur, Philip Alston, United Nations Commission on Human Rights, E/CN.4/2006/53/Add.5* (March 27, 2006).

85. Sivakumaran, *supra* note 71, at 500.

86. *Id.*

87. This, of course, is not what he has in mind. Yet it seems to me that the consequentialist approach he adopts in order to resolve this issue commits him to this implausible view.

there the only law enforcement authority.⁸⁸ State judicial bodies handled as little as 20 percent of the existing conflicts and were largely absent in rural areas. And even when they intervened, they ultimately depended on FARC “authorization” to carry out their decisions.⁸⁹

Yet authority in this context not only requires the material capacity to perform this task but also their rendering decisions in a fair manner. I have endorsed a theory of authority that is to a significant extent based on courts issuing judgments after a minimally reliable investigation of the facts and an impartial consideration of the arguments of the relevant parties. Only then should their decision be considered binding by all the relevant stakeholders.⁹⁰ While courts in this kind of context, such as those established by the Frente Farabundo Martí para la Liberación Nacional (FMLN) of El Salvador and the Communist Party of Nepal-Maoist (CPN-M), may have failed to provide impartial proceedings and means of defense,⁹¹ there can be instances of armed groups satisfying these requirements. It has been submitted here that the authority of any decision regarding the criminal responsibility of individuals crucially depends on the relevant judicial body satisfying them. Given the interest of the armed group in stability in order to conduct its military struggle, and the interest of the local population in fundamental rights being protected by binding criminal laws, it can obtain that an organization performs jurisdictional tasks in the interest of the local population.⁹²

As a matter of fact, it was locals who resorted to FARC to settle their controversies in the territories under its control, including both the large landowner and the popular classes.⁹³ Taking over these functions involved a difficult challenge for FARC that required establishing a fairly complex legal architecture.⁹⁴ During the late 1990s, at what was probably the height of its territorial power, FARC prosecuted and tried politicians for acts of corruption while the Ejército de Liberación Nacional (ELN) supervised local elections with an aim to secure transparency; both of them were also

88. Nicolás Espinosa, *El despeje dos años después: en búsqueda de la experiencia del experimento*, 5 REVISTA COLOMBIANA DE SOCIOLOGÍA 118–119 (2000).

89. See JAIME GIRALDO ÁNGEL, LOS MECANISMOS ALTERNOS DE RESOLUCIÓN DE CONFLICTOS (1998), at 4; and MAURICIO GARCÍA VILLEGAS, JUECES SIN ESTADO: LA JUSTICIA COLOMBIANA EN ZONAS DE CONFLICTO ARMADO (2008).

90. Admittedly, one would have to make room for the fact that the procedural safeguards required in times of conflict may not be as stringent as those applicable in times of peace. The key issue in this regard is that no distinction should be made in terms of due process requirements between state and non-state courts.

91. *Third Report of the United Nations Observer Mission in El Salvador (ONUSAL)*, ¶ 11–14, U.N. Doc. A/46/876-S/23580 (February 19, 1992). The FMLN, of course, contested this finding.

92. On this, see, e.g., Alston, *supra* note 84, at 36.

93. See *id.* at 445–446; Alfredo Molano, *La justicia guerrillera*, in 2 EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA: ANÁLISIS SOCI-JURÍDICO 333 (Boaventura de Sousa Santos & Mauricio García Villegas eds., 2001); and Nicolás Espinosa, *Entre la justicia guerrillera y la justicia campesina. ¿Un nuevo modelo de justicia comunitaria? La Macarena, Meta, estudio de caso*, 20 REVISTA COLOMBIANA DE SOCIOLOGÍA 137 (2003).

94. Molano, *supra* note 93, at 334.

concerned with environmental protection issues.⁹⁵ Their actions, in short, arguably contributed to the maintenance of “public life” in the relevant region.⁹⁶

Admittedly, during their expansion and establishment many of these groups use the idea of criminal punishment as a means to consolidate their power. Often sanctions are either used as shorthand for summary executions or imposed through blatantly unfair procedures.⁹⁷ Criminal punishment is used to threaten or coerce the local population to comply and abide by the law of the guerrilla organization as well as to provide “security.” Yet these claims further support the argument hereby defended; first, because these are the kind of sanctions that would lack authoritative-ness according to the framework hereby defended. On these particular grounds we could well distinguish, for instance, between the Tuareg rebel group National Movement for the Liberation of Azawad (MNL) and the Salafist rebels in northern part of Mali after the 2012 coup.⁹⁸ Second, because the scenarios in which punishment was largely imposed with a view to coerce the local population and enhance the authority of these armed groups typically obtained in situations in which that armed group lacked or was struggling to secure effective control over the relevant area.⁹⁹ The proposition advocated here is precisely that non-state armed groups could be entitled to hold criminal jurisdiction only if they already hold effective control of an area in much the same way as a state occupying force.

Many would insist that armed opposition groups are almost always weaker than states.¹⁰⁰ Accordingly, it is only reasonable that we discriminate between them and states on grounds of their (comparative) lack of capacity. Yet the orthodox view in international law might have difficulty in consistently putting this argument forward. For, as indicated above, it confers upon certain non-state armed forces, that is, those that are fighting a war of national liberation, the powers recognized as states’ during armed conflict,

95. Mario Aguilera Peña, *Justicia guerrillera y población civil: 1964–1999*, 29 BULLETIN DE L’INSTITUTE FRANÇAIS DES ÉTUDES ANDINES 452, 453, 457 (2000).

96. *Id.* at 436–437.

97. *Id.*, sec. 2.2. In the 1990s, however, execution became a rare penalty for both FARC and ELN and had to be approved by the Central Committee of ELN or the Secretariat of FARC; Molano, *supra* note 93, at 335.

98. While the former have reputedly been generally decent, the latter have been engaged in ruthless imposition of a strict version of Sharia law, which has included amputations, beatings, and death by stoning; see, e.g., Adam Nossiter, *Jihadists’ Fierce Justice Drives Thousands to Flee Mali*, N.Y. TIMES, July 17, 2012, available at <http://www.nytimes.com/2012/07/18/world/africa/jihadists-fierce-justice-drives-thousands-to-flee-mali.html?pagewanted=all>.

99. Aguilera Peña, *supra* note 95, sec. 1. The different attitudes these groups hold when trying to secure control over an area and after this control has been secured are well illustrated by the contrasting actions of the Liberation Tigers of Tamil Eelam (LTTE) in different parts of Sri Lanka during 2006; while in the north it established “an interesting experiment in governance, with its own judiciary and police force,” in the east, “its modus operandi inflicts intimidation, coercion and violence on a population that is otherwise uninvolved in the conflict”; Alston, *supra* note 84.

100. *Id.* at 459.

including the right to exercise criminal jurisdiction over territory under their control. And there is no necessary difference, in terms of capacity and organization, between armed groups fighting against colonial domination in the exercise of the right to self-determination and those involved in other types of conflicts. Furthermore, the proposition advocated here is not that criminal jurisdiction should be conferred upon any non-state armed group but only upon those with de facto effective control over a territory. This in turn requires a significant degree of organization sufficient, at least, to provide serious and reliable investigation and public trial.¹⁰¹ Thus, only non-state actors that already have some capacity to function as a surrogate of the state would be entitled to exercise criminal jurisdiction under the framework hereby advocated.¹⁰²

On these grounds alone one could reject the Argentine group Montoneros's right to "convict" and execute General Aramburu in 1970.¹⁰³ Montoneros was simply not the kind of organization that could legitimately claim the right to exercise criminal jurisdiction as it lacked effective control over any area in Argentina. Yet this leads to an important point of clarification: one should not take the existence or lack of de facto control over a given territory as the key consideration doing all the justificatory work. Nor is authority in this context based on fair proceedings per se. These two are necessary albeit not sufficient conditions for holding the power to punish during quasi-occupation. Ultimately, as this example illustrates, the argument stands on the claim that Aramburu's conviction and punishment could have done nothing to convey to individuals in Argentina the sense of there being a system of criminal laws that was binding upon them. If anything, this kind of trial upsets that kind of belief. The same reasoning would apply to the retaliatory form of criminal justice exercised by the Tupamaros in Uruguay or its propagandistic use by the M-19 movement in Colombia.¹⁰⁴

And yet many would still question the authority of these armed groups on the grounds of lack of moral standing. Unlike states, most of these groups would be perceived as rights violators rather than as legitimate authorities.¹⁰⁵ This is a controversial stance, as it often takes into account an

101. As a matter of treaty law, Article 6(2) of Protocol II, *supra* note 72, applies only to non-state actors exercising sufficient de facto control of part of the national territory so "as to enable them to carry out sustained and concerted military operations and to implement" its obligations under Protocol II.

102. The point that increasing obligations as well as rights are conferred upon these groups based on their degree of organization (capacity) and the degree of control of the relevant area is not unpopular in the legal literature. *See, e.g.,* LISBETH ZEGVELD, *THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* (2002). This proposition should not be construed as advocating such a demanding threshold for the application of International Humanitarian Law to conflicts not of an international character.

103. General Pedro Eugenio Aramburu was kidnapped by Montoneros, tried for his role in the 1955 coup (including executions in 1956) in some sort of "popular trial," and executed in the basement of an *estancia* in the province of Buenos Aires.

104. OMAR COSTA, *LOS TUPAMAROS* (1972); Aguilar Peña, *supra* note 95, at 449, on the M-19 movement.

105. Sassoli, *Taking Armed Groups*, *supra* note 75, at 8.

external view rather than that of the local population. To give just one example, it is arguably the case that a significant proportion of the inhabitants of the eastern areas of Afghanistan do not consider the Taliban as *merely* a criminal organization; most of them, moreover, would not see it as a criminal organization at all. For them, the illegitimate authority may well be the U.S.-backed government in Kabul. The same could be argued about several other non-state armed groups with effective control over a piece of territory, such as the Kosovo authorities or the FNLM.

But even if we grant this proposition for the sake of argument, it still does not lead to the purported conclusion. Namely, it does not allow us to distinguish between states and non-state groups on the basis of this consideration alone. As argued in the previous section, states that are largely perceived by the locals as “criminal” states would *also* lack the power to enforce domestic criminal laws at the bar of justice. And this would be precisely for the same reason: being so closely linked to widespread or systematic atrocities as to make it unable for them to convey to the relevant individuals the sense of being right-holders and their rights being protected by binding legal rules. It is not their state or non-state character that has been making the normative work all along. Simply put, provided one is prepared to admit that the LTTE would lack the moral standing to try offenders for regular offences perpetrated in the territory under its control on grounds of its responsibility for extremely serious violations of human rights or the failure to conduct fair trials, one would most likely have to reach the same conclusion vis-à-vis the government authorities in Sri Lanka.¹⁰⁶ It is these features, and not the LTTE’s state or non-state status, which account for this normative implication.

VI. CONCLUSION: FROM NORMATIVE ARGUMENTS TO LEGAL INSTITUTIONS

This article provides a limited defense of the principle of separation between *ad bellum* and *in bello* considerations and advocates extending the principle of equality between belligerents to non-state armed groups, at least with regard to their powers during occupation. The main argument put forward is that provided one is prepared to accept the jurisdiction of the lawful state occupier, one would be committed to conferring parallel powers on unlawful state occupiers and non-state actors. Unlike other arguments in the literature, these conclusions have not been reached on the basis of institutional considerations, that is, by suggesting that law need not mirror morality in this particular domain. Rather, they were defended at the level of the deep morality of war. The article argues that the relevant normative distinction between occupiers should be drawn on different lines, namely

106. See Alston, *supra* note 84, at 10, 11.

on whether they can credibly and reliably meet out legal punishment for the right reasons. Among the considerations that would undermine that power are that they try defendants through unfair or unreliable proceedings, that they lack effective de facto control over the relevant territory, or that they are a criminal organization. Put differently, in order to hold such right, occupiers essentially need to try individuals through fair proceedings and be minimally decent.

Someone may plausibly object that this bar is set too high. On these grounds, we would end up rejecting the right of several powers to exercise criminal jurisdiction on the territories under their control: just and unjust occupying forces and states and non-state entities alike. This, however, need not be so. This objection seems to presuppose that law should always mirror morality, and this seems to me an implausible stance to take. I argue that these conditions work as a matter of moral principle. Now we may consider, albeit briefly, how this moral argument should be implemented in legal rules. International law relies only on procedural fairness to confer on occupiers, be they *ad bellum* lawful or unlawful, state and non-state jurisdiction over domestic offences perpetrated on the territory under their control.

This, admittedly, fails to capture one—arguably the most important—consideration undermining an occupier's moral power to enforce criminal rules, that is, the fact that it is perceived as a criminal organization. Yet this is not a tragic shortcoming of the law but rather a reasonable compromise between moral principles, political reality, and practical considerations. There are enough reasons to doubt that the international community could create a working tribunal or any other mechanism that would sort out lawful from unlawful or criminal from decent occupiers in the course of the war, and do so authoritatively.¹⁰⁷ Under these circumstances, procedural fairness may be a reasonable legal requirement to confer upon any occupier or quasi-occupier the power to exercise criminal jurisdiction over the territories under its control. Although criminal states or non-state groups could eventually exercise their jurisdiction respecting fundamental due process safeguards, this is extraordinarily unlikely, as history aptly shows. Thus international law on this particular point could be defended, if not by noting its perfect fit with the moral principles underpinning military occupation, then by suggesting it is the best possible way of capturing through law the relevant moral differences in the world we inhabit.

107. For the opposite view, see Jeff McMahan, *The Prevention of Unjust Wars*, in READING WALZER (Yitzhak Benbaji & Naomi Sussman eds., 2013).