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# Occupation Courts, *Jus ad Bellum*, and Non-State Actors: Revisiting the Ethics of Military Occupation

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# Presentations from the Inaugural Annual Junior Faculty Forum for International Law—New York City, May 2012

*Dino Kritsiotis, Anne Orford and J.H.H. Weiler*

The papers that are presented here for the Jean Monnet Working Paper Series are the result of the inaugural Annual Junior Faculty Forum for International Law held at the New York University School of Law on May 29 and 30, 2012. The Forum is convened by the three of us, and will be held annually in the spring; it will rotate from one year to the next from each of our institutions: from New York, the Forum will head to Nottingham on May 29 and 30, 2013, and, in May 2014, we shall all converge on the University of Melbourne for the third Forum.

We believe that the Forum is an important addition to the international law calendar. It is designed to provide junior faculty from all over the world with a valuable opportunity to receive careful and rigorous feedback on their work in progress from eminent senior scholars in international law and related fields. Each junior faculty member is paired with a senior scholar, who leads a discussion of the work that the junior faculty member presents at the Forum.

The Forum was launched on our website—www.annualjuniorfacultyforumIL.org—attracting a large number of impressive applications from young scholars across five continents. Nine of these applications were selected.

Our meeting in New York—held over two beautiful spring days in Washington Square—was a triumph of intellectual exchange and sustained engagement, and, without exception, the presentations seemed to us to be of such a high standard that they were deserving of a much broader audience. We therefore asked each of those who presented their work in New York—**Christopher Warren** (Carnegie Mellon University), **Michael Fakhri** (University of Oregon), **Sergio Puig** (Stanford University): **Martins Paparinskis** (University of Oxford), **Rose Sydney Parfitt** (American University of Cairo), **Umut Özsu** (University of Manitoba), **René Urueña** (Universidad de Los Andes), **Evan J. Criddle** (Syracuse University; now of William & Mary College of Law), **Alejandro Chehtman** (University Torcuato di Tella)—to consider submitting their presentations to the Jean Monnet Working Paper Series, and it is this impressive collection that you now have before you.

In introducing these presentations for the Jean Monnet Working Paper Series, we would also like to take the opportunity to extend our warmest appreciation to every one of these junior faculty for being part of this experiment—we could have hoped for no finer or more enthusiastic laureates than they to help inaugurate our first Forum. And their work—recorded here—will hopefully inspire other junior faculty to the same cause, and make the Forum a permanent a fixture of the international law calendar.

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

By Alejandro Chehtman*

## *1. Occupation, Just War Theory, and the Laws of Armed Conflict*

Military occupation both as a matter of 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 that go from the occupied Palestinian territories, to 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] This paper provides a normative appraisal of the laws regulating military occupation. In so doing it seeks to develop a fruitful dialogue between international law scholarship and contemporary just war theory.

The rights and duties of occupying powers are part of the more general framework of the laws of war. This same relationship is mirrored at a normative level. Put simply, this paper assumes that there is continuity between the morality of military occupation and the morality of war.[2] It focuses on the normative justification of two cornerstones of the laws of armed conflict: the principle of equality of belligerents, i.e.,

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[1] The small body of work which tackles this issue includes Jeff McMahan, "The Morality of Military Occupation" *Loyola at Los Angeles International and Comparative Law Review* 31 (2009), 101-123, J. Rocheleau, "From Aggression to Just Occupation? The Temporal application of Jus Ad Bellum Principles and the Case of Iraq", *Journal of Military Ethics* 9 (2010): 123-38, and most recently, Cecile Fabre, "Living with the enemy: the ethics of belligerent occupation" (unpublished manuscript on file with the author).

[2] McMahan, ibid, 101; Fabre, ibid.

the potential relevance of *jus ad bellum* considerations on the *in bello* rights of occupants; and it examines 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 neo-classical position in just war theory, it shall argue in favour of the equality of just and unjust occupants.[3] This position is largely compatible with the legal framework regulating this area currently in force.[4] Against the traditional position in international humanitarian law, it shall advocate 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.

Instead of looking at the different aspects regulated by the law of military occupation, I shall focus 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 three 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".[5] Admittedly, international humanitarian 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 independent from the situation of occupation *per se* –they also apply to a "mere" invader. 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 occupant other sets of powers, including civil or administrative jurisdiction, the authority to adopt economic measures, etc. And finally, this choice of focus is favoured by the fact that arguments in support of legal punishment and the authority of courts provide us with a sophisticated theoretical

[3] See, eg, Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009). For the opposite view, see, inter alia, Christopher Greenwood, 'The Relationship between jus ad bellum and ius in bello' *Review of International Studies* 9(4) (1983), 221-234, and Adam Roberts, 'The equal application of the laws of war: a principle under pressure' IRRC 90(872) (2008), 931-962.

[4] See, respectively, Eyal Benveniste, *The International law of Occupation* (Princeton, NJ: Princeton University Press, 1993), ch. 2; and Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009), 137-140.

[5] Gregory H. Fox, *Humanitarian Occupation* (Cambridge: Cambridge University Press, 2008), 220.

framework against which to assess several of the difficulties that arise under military occupation.

The paper proceeds as follows. Sections 2 and 3 clarify, respectively, the way in which military occupation is regulated under international law, and the conceptual framework that we shall use to make a case for criminal jurisdiction. Section 4 identifies a "standard case" –that of a just state occupant– and provides a normative argument as to why international law should confer jurisdictional powers on this occupying force. The paper then goes on, in Section 5, to examine whether the fact that the occupying force is unjust should have any bearing on it holding criminal jurisdiction on the relevant territory. Section 6, in turn, assesses whether the fact that it is a non-state actor should have any significance on it holding the right to punish. This paper puts forward two main propositions. A weak thesis provides a *prima facie* normative argument for all three "cases" holding criminal jurisdiction. The strong thesis I advocate, by contrast, is thinner than the one just mentioned. At the core of this paper lies the claim that provided one is prepared to accept the jurisdiction of the just, state occupant, one is committed to conferring symmetric powers to *ad bellum* unjust occupants and to non-state actors exercising effective de facto control over territory. Put shortly, it provides a limited defence of the principle of separation between *ad bellum* and *in bello* considerations and advocates treating state and non-state groups symmetrically. Section 6 concludes by considering the way in which this normative landscape should be translated into law.

## *2. What is military occupation?*

Before assessing the basic framework that ought, as a matter of normative argument, to regulate the conduct of occupying powers, it is necessary to provide a succinct idea of what it means to be an occupying force and what kind of powers occupying forces hold as a matter of international law. In that context, 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.[6] In the words of the International Criminal Tribunal for the former

[6] Art. 42 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

Yugoslavia (ICTY) in the celebre *Tadic* decision, and the International Court of Justice (ICJ) in *Armed Activities*, any given power X is an occupying power over a territory when it holds "effective control over the area."[7] This means that the occupant "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."[8] This kind of control requires more than military presence; the law on occupation does not apply to mere "non-consensual stationing of troops".[9] Hague Regulation 42 establishes that "[t]erritory is considered occupied when it is actually placed *under the [de facto] the authority* of the hostile army."[10] As that provision stipulates, occupation pertains only to the area in which the occupant is in fact capable of exercising its authority.[11]

In order to have a clearer picture of what we mean by occupation we need to elaborate further how much effective is for these purposes. Unsurprisingly, perhaps, this issue has been aptly described as "an imponderable problem."[12] The analysis of what it must mean effective control in this context is certainly beyond the scope of this paper. However, it has been suggested that naval or air supremacy would not suffice.[13] It clearly does not suffice that there is a vacuum of authority in the relevant area.[14] The ICTY, for instance, has accepted "a sufficient force present, or having the capacity to send troops within a reasonable time to make the authority of the occupying power felt"; this kind of

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unnecessary to accompany each advance with new proclamations" (H.A. Smith, "The Government of Occupied Territory", BYIL 21 (1944), 153).

[7] *Prosecutor v Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995); ICJ, Armed Activities Case (*Congo v Uganda*) (2005), at 310.

[8] *Prosecutor v. Naletilic et al*, (Case No. IT-98-34, T.CH. I 31.3.2003), at 217.

[9] Dinstein, *The International Law of Belligerent Occupation*, 43. Some may question whether by relinquishing some of the control over a given territory (eg, Israel over Gaza) occupants 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 paper.

[10] My emphasis. Hague Regulations 42 through 56 continue to form the cornerstone of the law of belligerent occupation. GC IV has made certain concrete stipulations to try to prevent reoccurrence of the events of WW2. This Convention is supplementary to the Hague Regulations. AP I and II are also relevant to our enquiry, although they lack universal approval. So is customary international law.

[11] Dinstein, *The International Law of Belligerent Occupation*, 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, last accessed on 7 May 2012).

[12] Dinstein, ibid, 43.

[13] H.P. Gasser, "Protection of the Civilian Population", in Dieter Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 2008), 272.

[14] F. Mini, "Liberation and Occupation: A Commander's Perspective", IYHR 35 (2005), 86.

control admits of "sporadic local resistance."[15] In the words of Leslie Green, "[i]t must be clear that in the affected territory there is no longer any semblance of authority other than that imposed or tolerated by the Occupant, 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."[16] For the purposes of this paper, it will not be disputed that the relevant occupant holds the necessary control over the relevant territories.

Occupying powers hold, as a matter of law, prescriptive, adjudicative and enforcement jurisdiction over the occupied territories. It is standardly understood that this follows from Hague Regulation 43, which imposes on occupants the duty to "restore and ensure, as far as possible, public order and safety". Admittedly, this provision requires the Occupier to respect "the laws in force in the country ... unless absolutely prevented".[17] 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 which serves the interests of the civilian population.[18] This capacity becomes particularly relevant in prolonged occupations for quite obvious reasons. This right enables the occupying power to enact criminal legislation, as explicitly recognized in Article 64 of Geneva Convention (IV). Nonetheless, for present purposes I shall consider only whether occupying powers should hold the right to *enforce* existing legislation, provided this legislation complies with basic human rights standards.

More relevantly for our purposes, the duty to restore and ensure public order and safety has been generally understood to imply also a right to impose criminal sanctions. In fact, it was framed as a duty because, as Dinstein suggests, "[t]he 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

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[15] *Prosecutor v. Naletilic et al*, at 217.
[16] Leslie C. Green, *The contemporary law of armed conflict* (Manchester: Manchester University Press, third ed, 2008), 286.
[17] This text is non-binding. 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 of "public safety and order". This distinction, which is hardly trivial, will play no role in my account.
[18] See, article 27, third and fourth paragraphs, and article 64 of the Geneva Convention IV.

the whole life of the civilian population."[19] 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 will 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. For instance, if the local criminal laws are modified by the occupying power, they both have to apply the amended laws. Moreover, occupying forces have the legal right to remove judges and public officials, and would have the power to appoint new ones in cases of resignation, retirement or removal.[20] They can even appoint their own officers to serve as judges in the local courts. 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",[21] and even transfer cases from local to military courts under certain circumstances.[22]

Admittedly, this is a somewhat controversial assumption. During the German occupation of Belgium during WW1, for example, Belgian courts continued to pronounce their judgements in the name of their King.[23] Yet as Oppenheim himself recognized, this does not mean that any Belgian government held authority over them. Rather it was the martial law of Germany which legally bound them.[24] Similarly, in post-2003 occupied Iraq, local authorities acted under the global control of the occupying forces.[25] In Tripolitania, again, local Italian courts helped maintain good order and

[19] Dinstein, *The International Law of Belligerent Occupation*, 92.
[20] Article 54 of the GC IV.
[21] Dinstein, *The International Law of Belligerent Occupation*, 116.
[22] A.H. 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 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 directed it (Smith, "The Government of Occupied Territory", 152-3). See also Philip Marshal Brown, "The Armed Occupation of Santo Domingo" AJIL 11(2) (1917), 396.
[23] Oppenheim, "The Legal Relations Between and Occupying Power and the Inhabitants", 367. The same obtained in Jersey, see C.W. Duret Aubin, "Enemy legislation and Judgements in Jersey" *Journal of Comparative Legislation and International Law* 31 (1949), 10
[24] Oppenheim, ibid, 368.
[25] Sassoli, "Legislation and Maintenance of Public Order and Civil Life", 682-3.

worked side by side with military ones.[26] This is even true of most "puppet" regimes that follow similar arrangements.

A critical feature of the law of belligerent occupation is, for present purposes, that it does not distinguish between lawful and unlawful occupants in terms of the rights and duties they hold on occupied territories.[27] Occupation is regulated by the *jus in bello* which under international law is always separate and independent from *jus ad bellum* considerations. There are multiple manifestations of this claim. For example, "[t]he fact that the Occupying Power pretends to 'liberate' the inhabitants of an occupied territory does not alter the legal taxonomy, as long as the occupation does not take place consensually"; "[t]he jurisdictional rights of the military government in an occupied territory stem from effective control alone."[28] A further relevant aspect is that the legal framework just described does not apply to non-state armed groups fighting in conflicts not of an international character.

### *3. Occupation courts: the basic analytical framework*

As indicated, this paper uses occupation courts as a proxy to assess the broader ethics of military occupation. Our enquiry takes place mainly at a philosophical level. Before proceeding, though, it is necessary to introduce the basic analytical framework.[29] First, I frame the normative arguments using the language and the conceptual apparatus of moral rights. This is hardly controversial. Rights-based accounts not only enjoy greater appeal than consequentialist or duty-based accounts, but they are also attuned with normative assessment of legal practices on grounds of the conceptual affinity between moral and legal rights.[30] Second, I take it that rights are formed of different Hohfeldian incidents, namely, liberties, claims, powers and immunities. We shall be concerned here mainly with whether different occupants have criminal jurisdiction, ie the second-order

[26] Benveniste, *The International Law of Occupation*, 80.
[27] *Hostages trial* (US Military Tribunal, Nuremberg, 1948), 8 LRTWC 34, 59. See also, A. Gerson, "War, Conquered Territory, and Military Occupation in the Contemporary International legal system" *Harvard International Law Journal* 18 (1977), 525.
[28] Dinstein, *The International Law of Belligerent Occupation*, 35.
[29] For a more detailed defence of this framework see Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford: Oxford University Press, 2010).
[30] ibid, Chapter 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" EJIL 18(1) (2007), 7-9.

power to punish offenders for domestic crimes perpetrated on the occupied territories. And finally, I assume that conferring upon a certain body a given right requires identifying a particular interest, or sets of interests, which are sufficiently weighty to warrant putting someone else under a no-right, a duty, a liability or a disability.[31] Thus, for instance, an argument for a particular State's power to punish a given individual requires identifying a sufficiently weighty interest, of potentially identifiable individuals, which warrants putting a particular offender under a liability to being punished by *that* State.[32] Similarly, that interest can be so weighty so as to require putting that State under a duty to exercise its normative power.

Now, with respect to certain rights it may be argued that identifying such an important interest would not suffice, all things considered, to actually confer said right upon 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 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.[33] I shall provide a more detailed explanation of the authority of courts below. For now, let me point out two central features of the general account of legitimate authority I shall hereby advocate. First, I assume that the theoretical question concerning someone's authority is essentially about how does the existence of an authoritative decision affects the reasoning or decision-making of others. Following Raz we may argue that "the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place

[31] The interest theory of rights is opposed to the will theory of rights. I cannot address with 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 M.H. Kramer, N.E. Simmonds, & H. Steiner (eds.) *A Debate over Rights* (Oxford: Clarendon Press, 1998); and Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1988).

[32] This interest-based framework on which rights and duties will be hereby allocated is not entirely foreign in legal contexts, particularly in debates on belligerent occupation. See, eg, Davis Goodman, "The need for Fundamental Change in the Law of Belligerent Occupation" *Stanford Law Review* 37 (1985), 1598 and Benveniste, *The International law of Occupation*, 189.

[33] 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, "Rights without Trimmings", and Peter Jones, *Rights* (Basingstoke: Macmillan, 1994).

of some of them."[34] In other words, to confer upon any given body the authority to punish a defendant *means* that its decision is to be considered binding by others; they are under a duty to comply with it. This conceptual point in turn clarifies the kind of normative question underlying legitimate authority of courts in the context of military occupation. Any such account needs to explain the grounds on which we can justify subjecting one's own judgment (that of the population of the occupied state, its officials, and arguably that of the international community), to that of another person, in our case by conferring this kind of power upon the occupants' courts.

Secondly, the legitimate authority of a 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 will not provide a general account of the authority of states; that is clearly beyond the scope of this enquiry. 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 shall argue in more detail below.

### *4. Standard case: the just military 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 which occupies part of the territory of a foreign state acting in accordance with the rules of *jus ad bellum*. For instance, we may agree that it has acted in self-defence against an illegitimate military attack launched precisely from the occupied region. The group of just occupants is, admittedly, larger than this particular example. It would include, under most accounts, UN-led forces occupying a country post-conflict, 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 occupant

[34] Raz, *The Morality of Freedom*, 46. Authoritative directives, then, work as protected reasons, that is, valid reasons for action which works also as a first order (exclusionary) reason to disregard other reasons against them. On this, see Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), 3.

should hold criminal jurisdiction to try domestic offences perpetrated on the occupied territories. More precisely, the relevant question is on what grounds it may do so. As the standard take on this suggests, "even an entirely legitimate occupier must provide an independent *jus in bello* justification for governing acts in the territory."[35]

Criminal jurisdiction can be portrayed as a Hohfeldian power to inflict legal punishment on offenders.[36] But herein lays our first difficulty. Under Hohfeld's conception, rights are relational concepts in the sense that they capture a normative relation between the right-holder and a certain (potentially identifiable) agent who is bound to respect or to abide by that right. Conferring upon a particular state the power to punish a particular individual entails both explaining why this power is warranted specifically to *that* state and why it creates a liability specifically upon a given (specifiable) individual. Thus, our first task must be to identify against whom we need to justify the existence of this particular power.

This power needs to be justified, first and foremost, before the individual who is being put to trial. However, in a situation of occupation, it must also be justified before an altogether different stakeholder. Traditionally, it has been argued that the law of military occupation regulates the interrelationship between the occupying power, the displaced sovereign and the local population. From this proposition one would suppose that this particular power would need to be justified before the latter two. This, however, would be too hasty a judgement. The traditional approach to military occupation predates the development of human rights and of contemporary conceptions of the right to self-determination.[37] "[T]he substance of the rules ... speak the language of nineteenth-century political institutions and of nineteenth century war."[38] Today it seems unwarranted to consider the interest of the ousted sovereign as something different from the interests of individuals living in that state or, at a minimum, its nationals.[39] This paper, by contrast, assumes that the prerogatives of occupying powers

[35] Fox, *Humanitarian Occupations*, 221.
[36] This power entails the normative capacity to alter an offender's first and second order rights, usually including its claim-right to personal liberty.
[37] Benveniste, *The International Law of Occupation*, x.
[38] Smith, "The Government of Occupied Territory", 151.
[39] See, eg, Allen Buchanan, *Justice, legitimacy, and self-determination: moral foundations for international law* (Oxford: Oxford University Press, 2003).

need to be justified, essentially, against individuals who are nationals or at least residents of the occupied state, particularly those in the occupied territories.

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*.[40] Advocates of this position claim, for instance, that those combatants fighting on the *ad bellum* unjust side act impermissibly towards those fighting on the just side. The core insight behind this position is that situations of war are relevantly analogous to interpersonal situations in which an individual unjustly poses a threat to the life or limb of another person. In this situation, it is standarldy argued, the threatened individual has the right to use force in self-defence, while the attacker lacks the right to retaliate in his own defence. Mutatis mutandi the same asymmetry obtains between just and unjust combatants during armed conflict. I will not argue here against this theoretical framework or the soundness of the analogy with interpersonal situations as a justificatory or explanatory device. My main purpose is, rather, to assess whether such an asymmetry can be consistently defended for the purposes of the particular *in bello* right at hand.

According to this neo-classical position, then, we need a particularized argument to take into account the different normative positions of individuals in the context of military occupation. If we 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 towards 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 towards the war, and individuals who actively opposed the war (but who resent the military occupation). McMahan has formalized this insight by suggesting that the 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: a) that certain individuals are

[40] This view has been powerfully defended, inter alia, by Tony Coady, Cecile Fabre, Jeff McMahan, and David Rodin among others.

themselves liable to being treated in a certain way; b) that people suffering certain treatment is the lesser evil in the situation (in that case, proportionality would be of the essence); and c) that people in the occupied territories benefit by a particular treatment.[41] The challenge to the moral equality principle is the result of a) being the dominant (albeit not the exclusive) justificatory strategy.

Thus, the standard approach in the 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 being held under the authority of the occupying power. It would seem morally appealing to claim that those public officials who are responsible for conducting the aggressive war are *ipso facto* liable of being under the jurisdiction of the occupying force. Under most contemporary accounts, these soldiers and military leaders are *liable* to being killed, and this would be the result of their own contribution towards the unjust war.[42] If we accept that there is continuity between the morality of occupation and the morality of war we can easily explain their liability to being punished by the occupant. However, it does not necessarily follow from the fact that A may be liable to being targeted that she is liable to being put under the criminal jurisdiction of the occupant. That is precisely the situation an unculpable attacker would be in, under several accounts of defensive rights, outside the context of occupation: liable to being killed but not to being punished.

Admittedly, McMahan may respond that this proposition would be entirely compatible with his normative framework, since for him only *culpable* attackers would be liable to being killed in armed conflicts. Similarly, only individuals who culpably contributed to the unjust war would be liable to being put under the authority of the just occupant. But this move hardly does the trick. First, because this approach would be unable to distinguish between occupants and mere invaders. Individuals who are liable to being killed remain so irrespective of whether just belligerent has obtained effective control over the territory of the unjust belligerent. On these same grounds, it would be incapable of making sense of international law conferring jurisdiction to the occupant

[41] McMahan, "The Morality of Military Occupation", 104.
[42] See McMahan, *Ethics of Killing in War*; and Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, forthcoming 2012), among several others.

only within the occupied territory.[43] Furthermore, 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 which are entirely unrelated to the war itself. And this is arguably because prima facie it seems none of its business whether a high military commander is involved in instances of corruption against its own state, or whether a local industrialist severely beats his wife.

I suggest, by contrast, that a specific argument is needed to account for conferring criminal jurisdiction over domestic offences to a just occupying power. In fact, we need an argument that accounts precisely for the normative implication at stake: the liability to being punished (as opposed to other liabilities). I have argued elsewhere that the reason why 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 c) above, the individuals that happen to be under it in a certain way.[44] This proposition stands on an analytical and a normative claim. Analytically, it implies a necessary link between a criminal law system being in 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. If in a given territory criminal offenders were not liable to being punished for their crimes, individuals would quickly lose confidence in there being a legal system prohibiting this kind of behavior which is binding at all.[45]

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. Put differently, 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 individuals have in these rules prohibiting murder, rape and so on being in force, that is binding on them and others around them, is

[43] See Section 2 above. In fact, GC IV even requires that the occupants' courts *sit* in the occupied territory (Art. 66).
[44] See Chehtman, *The Philosophical Foundations of Extraterritorial Punishment*, chapter 2.
[45] On a classical defence of this claim see, Raz, *The Morality of Freedom*.

sufficiently important to warrant putting those who violate them under a liability to being punished.

I will not defend this argument on its own terms here. Rather I will concentrate on explaining how it allows us to account for the just occupier's power to punish individuals on the occupied territories. As suggested, 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 allows us to justify before defendants, the occupant's power to put them on trial. But we also, and crucially, need to account for this power before the population in the occupied territories. I suggest that individuals in Allied-occupied Italy during WW2 (a plausible example of a just occupant) had an interest in the basic criminal laws of the land remaining in force during occupation. To put it more broadly, "[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.[46] Among them, I suggest, is the enforcement of the local criminal laws. This proposition is fully compatible with the official French text of Article 43 of the Hague Regulations, which empowers occupants to maintain "public life" (*la vie publique*).[47]

Furthermore, we could argue that insofar as the just occupant provides for fair and reliable processes to local defendants, it would also hold the authority to issue binding decisions. As I have argued in Section 3, 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. I cannot provide a complete account of courts' authority to punish offenders here.[48] Yet we may accept, following Raz's influential service conception, that this would be the case when someone "is likely better to [conform] with

[46] Goodman, "The need for Fundamental Change", 1601. On the duty to ensure medical supply see art. 55 and 56 GC IV; on education, see art. 50. See also UNSC Res 1472 (Mar 28 2003, on Iraq), available in 42 ILM 767 (2003).

[47] This clause was defined by the Belgian delegate at the 1874 for the Brussels Code as meaning "social functions and ordinary transactions of everyday life", 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," *Yearbook of International Humanitarian Law* 6 (2003), 147.

[48] See Chehtman, *The Philosophical Foundations of Extraterritorial Punishment*, chapter 6.

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."[49] This leaves us with an entirely familiar account of the authority of criminal courts. As Ashworth and Redmayne have argued, the authority of any criminal court is linked to it seeking "accurately to determine whether or not a person has committed a particular criminal offence and [doing] so fairly."[50] Indeed, the normal reason why individuals should recognize the authority of any given court to decide criminal cases is essentially that such court would have a greater knowledge of the facts and the relevant law, and it would have carefully and impartially considered the conflicting views on the matter. Authority, then, is essentially connected to overall accuracy, reliability and fairness.

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 occupant in a given territory for the courts under *its* command to hold authority there. Under the service conception endorsed here, 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.[51] Without this kind of *de facto* recognition, this authority would not be able to provide the benefits that ultimately justify empowering a centralized authority in the first place, i.e., it providing individuals under it with greater coordination and cost reduction. But ex hypothesis occupants characteristically fulfill this further requirement. On these grounds, we may safely conclude that, provided they take this responsibility seriously, a just occupant will not only act in the interest of the local population by fairly enforcing the local criminal laws, it would also be able to claim legitimate authority to do so.

Someone may object that such an arrangement fails to take into consideration the full range of interests of individuals in the occupied territories. Chiefly among them

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[49] Raz, *The Morality of Freedom*, 53.
[50] Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford: Oxford University Press, 2010), 23. On this, see also Ian Dennis, *The Law of Evidence* (London: Thomson, 3rd ed, 2007), chapter 2. Antony Duff et al accept the account provided here, but they consider it incomplete (see Duff et al, *The Trial on Trial , vol 3, Towards a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007)).
[51] Raz, *The Morality of Freedom*, 56.

would be their interest in remaining a self-governed political entity. In terms of standard international law, this arrangement would fail to adequately take into consideration their right to self-determination.[52] Yet this objection would be unfounded in our current scenario. The claim advocated here is that the occupying force holds the normative power to enforce the *local* criminal legislation which is already in force, not its own. The fact that its courts would be enforcing the local criminal provisions is hardly controversial. As it has been aptly illustrated, "[t]here was 'French law' in Louisiana after the Louisiana Purchase, 'Mexican law' in Texas and California, and for that matter 'English law' in the original States after 1776: but it is American courts that have applied it whether familiar or strange."[53]

Admittedly, occupying powers should refuse to enforce local criminal laws which are incompatible with the laws of war (and, arguably, against fundamental human rights) and they may be entitled to enact certain criminal legislation providing, mainly, for crimes against its own forces.[54] Neither of these two peculiarities is problematic for the account defended here. It may well be argued that the first limitation is precisely grounded on the fundamental interests of individuals indigenous to the occupied territory. The latter, by contrast, may be explained on the basis of the fundamental interests of the just occupant's servicemen. That is, *their* interest against suffering domestic offences also counts. This implication, I suspect, is plausible enough. In fact, under a liability-based approach, such as McMahan's, they would not have forfeited their right to be protected by their own state's martial law.

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 *benefit* the indigenous population in the occupied territories. This, the objection goes, is a deeply flawed understanding of the situation of 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

[52] Sassoli, "Legislation and Maintenance of Public Order and Civil Life", 671.
[53] Charles Fairman, "Asserted Jurisdiction of the Italian Court of Cassation over the Court of Appeal of the Free Territory of Trieste", AJIL 45(3) (1951), 547.
[54] As stated above, this paper does not examine the thorny issue of law creation in the context of occupation in any detail. This would be more profitably discussed in the contexts of debates concerning "transformative" or even "prolonged" military occupation.

them essentially in terms of benefits is simply not 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 it here. Most of the relevant features of any occupation constitute a heavy burden on the individuals in the occupied territories. All I would need to show is that some of them do not. And I suspect that absent a centralized authority with effective control over the territory, any institution that provides basic public goods, such as healthcare, education, and the enforcement of local criminal laws would benefit the locals sufficiently to be conferred upon the right to do so. Nevertheless, the critical point here is that even if one is still skeptical of this further suggestion, in so far it is based on occupation per se, ie unrelated to the justness of the occupation, this objection would still not undermine the key tenet advanced in this paper, namely, that *ad bellum* just and unjust occupants should hold the same *in bello* rights over occupied territories.

### *5. First extension: unjust occupiers*

A main task of this paper is to assess the principle of equality between belligerents in the context of military occupation. This section shall examine whether there are any relevant asymmetries between just and unjust belligerents that would warrant conferring upon them asymmetric rights in the context of occupation. I have proposed to examine this question by considering occupiers' right to punish local individuals for domestic offences. In the previous section, I argued that just occupants should hold criminal jurisdiction over the occupied territories as a matter of right. This section focuses on unjust occupiers. As in the previous section, I shall concentrate here on occupants which 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 neighbour state B in the course of an aggressive war over oil reserves situated between the two countries. Again, this may not be the only type of unjust occupant, yet it provides a good point of departure to discuss the precise normative implication at stake.

Contemporary just war theory has strongly argued against the principle of moral equality between belligerents. By contrast, they defend the interconnection between *ad*

*bellum* and *in bello* considerations.[55] That is, the rules that should govern what belligerents can do during fighting cannot be, or so these authors argue, 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."[56] 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.[57] Under this line of rebuttal, it would not make sense for the laws of war to prescribe all types of behaviours to belligerents; they should only impose a very limited number of restrictions and requirements during conflict. The laws of war are, it is often suggested, intensely practical.

As it stands, this response seems only concerned with the issue of institutionalization of certain normative principles during wartime. It does not really provide an answer to McMahan's normative challenge. Adam Roberts himself recognizes that the legal principle of the equal application need not rest on the premise "that there is 'moral equality on the battlefield'".[58] McMahan similarly acknowledges that law and morality can work on the basis of different considerations.[59] This paper, by contrast, advances a different kind of response to the neo-classical challenge. It argues that unjust occupiers should hold the Hohfeldian power to punish offences perpetrated on the occupied territories as a matter of *normative* argument, that is, unconstrained by practicalities and issues of institutionalization. This proposition, it is submitted, is based, again, on the considerations that ground the allocation of this particular normative power in ordinary circumstances.[60]

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[55] See, eg, McMahan, *Killing in War*; Rodin, *War & Self-Defence*, (New York: OUP, 2003); and Fabre, *Cosmopolitan Wars*.
[56] McMahan, "The Morality of Military Occupation", 116. See also, Fabre, "Ethics of Belligerent Occupation".
[57] Adam Roberts, "The equal application of the law of war: a principle under pressure", IRRC 90 (2008), 935.
[58] ibid, 936.
[59] McMahan, "The Law of War" in S. Besson and J. Tasioulas, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 498-499.
[60] Against this distinction, see Seth Lazar, "The Morality and Law of War", in *The Routledge Companion to the Philosophy of Law* (forthcoming).

In the previous section, I argued 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. For this to obtain, offenders in that territory should be punished, they should be punished for violating the criminal laws of the land, and this determination should be made by a body explicitly authorized by the relevant legal system. 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 occupying power 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 occupants the normative power to punish offenders in the occupied territories per force leads to the same conclusion in the case of unjust occupants. The position of the government of the Turkish Republic of Northern Cyprus or the US government in Santo Domingo in 1907, ie, established in violation of *ad bellum* considerations, illustrate this point.[61]

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, we have seen in Iraq post-2003.[62] Law enforcement, property and personal safety are therefore particularly sensitive and pressing issues in the wake of occupation. In fact, there is at least some evidence that the lack of a basic security policy in Iraq in the immediate aftermath of the war fuelled 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 occupant.[63] Quite tellingly, it was precisely the weaker states that pushed for stronger states (i.e., likely occupiers in situations of armed conflict) for the special duty to ensure

[61] On Santo Domingo, see Brown, "The Armed Occupation of Santo Domingo", 394-399. On the TRNC, see the European Court of Human Rights referring to this situation as occupation (*Loizidou v. Turkey* (merits) (ECtHR, 1996), 36 ILM 440, 453-454). Of course, Turkey would claim that their 1974 intervention was just (*ad bellum*).

[62] It has been argued that looting and not the armed insurgency was the greatest threat to the welfare of the local population in Iraq post the 2003 invasion. See, M. Sassoli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", EJIL, 16(4) (2005), 667. See also Johannes Andenaes, *Punishment and Deterrence* (Ann Arbor: University of Michigan Press, 1974), 51, 124, and 128.

[63] See Asli U. Bâli, "Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq" *Yale Journal of International Law* 30 (2005), 452; and David Glazier, "Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq," Rutgers Law Review 58(1) (2005), 77, 78 and 83.

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.[64] As argued by Dinstein, "[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."[65]

It may even be the case that unjust occupiers have a special responsibility to ensure that the local population suffers as little as possible as a result of the occupation. Take this further example at the interpersonal level. Suppose Alan and Betty go fishing together. While they are far away from the coast Alan pushes Betty to the water, jealous as he is of an affair she had with a common friend. The resulting situation is such that unless Alan rescues Betty, she will probably die or end up seriously injured. Alan has acted unjustly against Betty in a way that is analogous to an *ad bellum* prohibition. Yet this is entirely irrelevant for the purposes of his duty to rescue her. The same obtains vis-à-vis an unjust occupier. Just as it would be responsible for ensuring public health and other basic services, it is also responsible for the functioning of a system of criminal courts.[66]

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 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 to work. Much as in the fishing example above, the occupier acquires a special responsibility on grounds of his prior conduct. Now the relevant point is that McMahan believes that occupiers which 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".[67]

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[64] Sassoli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", 680.
[65] Dinstein, "The Israeli Supreme Court and the Law of Belligerent Occupation", 15.
[66] As a matter of IHL occupants have concrete duties regarding medical units, civil defence and basic needs. See Articles 14, 63 and 69 AP I, respectively.
[67] McMahan, "The Morality of Military Occupation", 118.

I suggest, by contrast, that even if McMahan is right in 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 explain. 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 in the cabin where they are being held there is only one telephone, over which Amy has full control. Under these circumstances one may say that Amy is under a duty to get medical assistance even if she is also under a duty to release Bob (and Charles). These two duties Amy is under are independent from each other. In terms of the interest theory of rights adopted in this paper, the interest that would ground 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 calling a doctor in such situation would constitute a further and separate wrong to his deprivation of liberty.[68] Furthermore, and what is crucial 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 rescuing 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 occupant, this lack of conflict between the two relevant Hohfeldian incidents is even clearer. The second-order normative power to punish offenders is not logically dependent on a first-order liberty to stay. One could be under a duty to leave and still hold the former power. This is the case under international law. If this analytical distinction is correct, then McMahan begs the relevant question. That is, he would need to provide an argument stating why this unjust and unjustified occupant would be under a disability to enforce the local criminal laws but he does not. Part of the problem seems to stem from the fact that he is too concerned with whether the occupier should be there at all, and not enough with what difference it makes, if at all, that he already is exercising effective *de facto* control. This consideration, I suggest, is crucial for any sensible appraisal of the morality of military occupation. Thus, just like in the case of Amy, Bob, and Charles, the relevant question is whether in *that* situation the occupant is entitled to enforce the local criminal rules. I

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

suggest it is; and I suggest it would be even if its occupation were both unjust and unjustified, that is, if were that aggressive power to leave, the sovereign state could handle the situation on the ground by itself.

A first objection we should consider at this point is that my argument in this section depends, 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 be certainly 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 potable 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 healthcare or a water supply system. Nazi occupations during WW2 constitute the archetypical case in point.[69] 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.

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 rules that govern occupation as a matter *in bello*. The fact that Nazi Germany should not be granted the power to enforce the local criminal laws in, eg, occupied Belgium, has nothing to do with it violating the prohibition to use force in the *ad bellum* sense. The reason they would lack such right is, in the words of the Nuremberg tribunal, that "Germany violated ... every principle of the law of military occupation",[70] and possibly every basic human right of the local population. The problem was not so much in them enforcing local laws, but rather the way in which they did so, namely, through blatantly unfair trials and persecution of minorities, if not through summary executions. McMahan himself hints at this when he suggests that it was the fact that the Nazi were "barbaric" that matters.[71]

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[69] See, eg, Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Clark, NJ: The Lawbooks Exchange, 2005), specially Chapters 3 and 4.
[70] *Justice trial* (US Military Tribunal, 1947), 6 LRTWC 1, 59.
[71] McMahan, "The Morality of Military Occupation", 117.

We therefore need to look more closely at what is actually doing the argument in this example. As suggested above, one may distinguish between two different considerations that lie at the basis of the power to punish. Namely, for any given body to hold that right it must be justified in inflicting this kind of treatment on the offender, ie, it must have sufficient *reasons* to punish her; and it should be able to claim the *authority* to do so. This division of normative labour is plausible enough, so I will not elaborate on this here.[72] It is quite standard that a state would not be able to convict guilty offenders if, despite having reasons to do it (ie, she actually killed her neighbour), it reached the verdict by bribing or coercing the jury. If this is a standard practice, we could argue that the courts of the system lack precisely legitimate authority to punish wrongdoers. Similarly, one would be reluctant to confer Norway criminal jurisdiction over a robbery perpetrated in Bolivia (in which neither the offender nor the victim is a Norwegian national) simply on the grounds that Norwegian courts provide "modelic" fair trials.

Accordingly, the first limb of the argument for the right to punish is connected with the justification for legal punishment. This paper proposes a version of the norm projection argument which connects the right to punish with the communication of the existence of a legal norm prohibiting certain kinds of public wrongs.[73] I have argued that individuals living under occupation have an interest in there being a system of criminal laws binding on their fellow nationals (as well as on the occupant). The second limb has to do with whether a particular occupant can claim the authority to convict individuals in the occupied territory. This further condition is what the Nazi-type of occupant fails to satisfy.

There is little doubt that Nazi courts in occupied territories hardly provided the local population with the sense of having rights, and that those rights were protected by the local criminal laws. Examples abound as to the manifest and atrocious due process

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[72] On authority as a necessary condition to hold certain rights, see, for instance, Cecile Fabre, "Cosmopolitanism, Just War Theory and Legitimate Authority," *International Affairs* 84(5) (2008) 963-76; and David Rodin, *War & Self-Defense*, 174-188.

[73] See, eg, Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007); David Luban 'War Crimes: *The Law of Hell*' in Larry May (ed), *War: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2008), 287; and Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', *Stanford Journal of International Law* 43 (2007), 85.

violations in rendering judicial decisions by its occupation courts. As Brand recalls, "[p]ersons suspected of resistance in the occupied portions of France, Belgium and Holland were seized under the 'night and fog' decree, secretly transported into the Reich, and there secretly tried without witnesses in their behalf, sometimes without counsel, in a language which they did not understand, and frequently without knowledge of the charges against them .... Thousands of these victims were tried and convicted and executed."[74] In fact, during occupation "a member of the infamous S.D. was assigned to each judge to spy upon him and report on his conduct. Contemporaneous with the consolidation of control over the judiciary was the enactment by decree of draconic laws empowering the Nazi judges to carry out the will of Hitler through the forms of the judicial process."[75] 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."[76]

Furthermore, the theory of authority hereby advocated accounts for the precise implications of Nazi Germany's lack of authority to try and convict offenders in occupied territories. These decisions were to be considered neither wrong nor right, but simply not binding. Hence in post WW2 Norway, "...judgements in criminal cases [were] null and void both when made pursuant to provisions of criminal law enacted directly by the Germans and when made pursuant to specified enactments of criminal law issued by the Quisling authorities during the occupation."[77] Norway also provided for the re-opening of cases connected with some form of influence or interference of the occupied powers, and individuals convicted by German authorities were simply released at the end of the occupation.[78]

Someone may object that even if we accept this line of reasoning, it would not take us far enough. For even if the Nazis had used a crystalline system of criminal justice in occupied territories, one would still be inclined to reject the proposition that they

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[74] James T. Brand, "Crimes Against Humanity and the Nuremberg Trials" *Oregon Law Review* Vol XXVII No. 2 (1949), 106.
[75] ibid, 105.
[76] ibid, 104.
[77] Peter P. Stabell, "Enemy Legislation and Judgments in Norway", *Journal of Comparative Legislation and International Law* 31 (1949), 5.
[78] ibid, 10.

should, as a matter of right, hold the power to punish regular offenders. If this is right, the objection goes, then the reason why they should be under a disability to punish is not ultimately connected to the quality of the justice they provide. This point seems compelling, but it does not really undermine the argument advocated here. One could well argue that lack of accuracy and procedural fairness is a sufficient but not a necessary reason to deny a system of courts legitimate authority to try defendants.

Nevertheless, this objection leads to a deeper point, ie, the existence of a connection between the conception of authority and the justification for legal punishment. I have argued, following Raz, that the legitimate authority of courts is grounded in their ability to improve our conformity with reasons that apply to us if we accept their decisions as binding, rather than trying to follow reasons which apply to us directly. I have also argued that the reason that justifies a given body holding the power to punish an offender is that it conveys to those living under that legal system the message that its rules are in force. For sanctions to convey such message, an individual who has violated a rule must be punished, for violating that rule, and she must be punished by a body which is effectively authorized by that legal system. Or better, she should be perceived as being punished for this reason. This is because, ultimately a legal system being in force depends on those living under it (and external observers) believing so. Thus, credibility is crucial for its existence, and the fact that a criminal occupant such as the Nazi state convicts an individual for murder does not really convey the sense among individuals in the occupied territory that, inter alia, the right to life is protected by a system of criminal rules. Such occupant simply lacks the moral standing to convey the message that the law confers rights on individuals and takes their protection seriously.[79] Furthermore, this lack of credibility is also why a system of courts based on unfair or arbitrary processes or on unreliable evidence lacks the authority to try defendants.

My contention is therefore that there is no meaningful difference in this respect between *ad bellum* just and unjust occupants. An *ad bellum* just occupant which nonetheless is unable to meet minimum due process requirements, or is associated itself

[79] For an argument that a body can lose its authority to try an offender on grounds of previous misconduct see, eg, Roberto Gargarella, "Penal Coercion in Contexts of Social Injustice" *Criminal Law and Philosophy* 5(1) (2011), 21-38.

with atrocities or mass human rights violations would also be under a disability to enforce the local criminal laws, just like and *ad bellum* unjust occupant would be had it been liable to the same criticisms. To illustrate, this means that we should treat similarly the German occupation of, say, Denmark, and the Soviet occupation of parts of Germany during WW2. Irrespective of the fact that the former violated *ad bellum* principles and the latter did not, neither Nazi Germany nor Stalinist USSR should be granted criminal jurisdiction on their respective occupied territories. Now this conclusion is not based on the claim that individuals in, eg, either Denmark or Eastern Germany lacked an interest in some of the fundamental criminal prohibitions remaining in force there. The reason is that an occupying power which cannot guarantee minimum standards of fair trial, accuracy, and ultimately, credibility, lacks the relevant authority to exercise criminal jurisdiction. Its sentences would be unable to effectively convey both to the person convicted and to other individuals in the relevant territory the message that the criminal rules of the land are effectively in force.

This may seem to leave us where we started, for even if we cannot distinguish between Germany and the USSR we may still suggest that *ad bellum* considerations could suffice to disqualify an aggressor's authority. The relevant question is whether an *ad bellum* unjust occupant should be put under a disability to exercise criminal jurisdiction on these precise grounds. That is, whether that would be a sufficient condition for such normative implication. I suggest that this unjust occupant should not be *per se* so disqualified. Individuals there have an interest in their basic rights being protected by a binding system of criminal rules. And insofar the occupant is a minimally decent state and it subjects local defendants to fair and reliable trials through its own courts or through the local ones, convictions would be able to convey to the relevant stakeholders that the sanction vindicates the violated criminal prohibition.[80] According to some accounts, the Germans would have been in such a position in occupied Russian territory during WW1.[81] But a better example would perhaps be the American

[80] On decent states, see the characterization of John Rawls in his *The Law of Peoples* (Cambridge, Ma.: Harvard University Press, 1999), 64-68.

[81] S.W.D. Rowson (Shabtai Rosenne) reports that the Germans treated the Russian population in occupied territories fairly. See his "The Abolition of Nazi and Fascist Anti-Jewish Legislation by British Military Administrations of the Second World War" *Jewish Yearbook of International Law* (1948), 261-2.

occupation of parts of Mexico by General Winfield Scott in the 1846-8 war. This war was arguably *ad bellum* unjust (if not illegal at the time) and yet the American forces behaved decently and provided with reasonably fair trials over offences perpetrated in the territories under their control.[82] They strove to restore public order after the capture of each city, and protected locals from bandits and looting, and if only anecdotally, Mexicans tried by American courts enjoyed a higher acquittal rate than their US counterparts.[83]

### *6. Second extension: Non-state quasi-occupants*

The second and final "extension" I wish to consider 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 traditional position in IHL would distinguish between state and non-state actors, and would do so precisely in terms of the rights and duties they have during conflict. The rules applicable in non-international armed conflicts are 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.[84] The point at issue here is precisely the soundness of that distinction and of (at least some of) its normative implications. Unlike the previous section, we shall not be 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.

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[82] Of all people Francis Lieber and General Scott opposed, or at least were critical of the war from an *ad bellum* point of view. For a succinct account, see Glazier, "Ignorance is Not Bliss", 36.
[83] ibid, 23.
[84] Fleck, "The Law of Non-International Armed Conflicts" in Fleck (ed), *The Handbook of International Humanitarian Law*, 615; Antonio Cassese, "The Statute of the International Criminal Court: some preliminary reflections" EJIL 10 (1999), 150; James Stewart, "Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict" IRRC 85 (850) (2003), and Emily Crawford, "Unequal before the law: The case for he elimination of the distinction between international and non-international armed conflict" *Leiden Journal of International Law* 20(2) (2007). For arguments going further and attacking, precisely, the moral asymmetry between state and non-state forces in the context of non-international conflicts, see Fabre, *Cosmopolitan War*; and Bugnion, "Jus ad bellum, jus in bello *and non-international armed conflicts*". 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", *Case Western Reserve Journal of International Law* 11(1) (1979), 42-3.

A first important thing to note is that the law of military occupation as described in Section 2 does not apply in internal conflicts.[85] Conceptually, I see no reason why the framework of occupation would not be entirely adequate to examine situations of effective control by insurgents of parts of the national territory.[86] Yet to avoid any technical or terminological difficulties let us speak of "quasi-occupation".[87] The closer we get to the regulation of the issue at hand is Common Article 3 to the four Geneva Conventions (CA3) and Article 6(2) of Additional Protocol II (AP II).[88] 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."[89] Article 6(2), on its part, 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 pronounced by a court offering the essential guarantees of independence and impartiality."[90] Although these provisions regulate the functioning of courts in non-international 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 IHL provisions bind all parties to the conflict. Sivakumaran argues, for instance, that while "[i]nternational humanitarian law may not explicitly create a right for armed opposition groups to set up courts; neither does it prohibit their establishment"; all it does is regulate their modes of creation and operation.[91] Be that as it may, the precise answer to this legal issue is besides the point here. We are concerned

[85] Adam Roberts recalls that the possibility of a piece of territory being occupied by a non-state actor was not discussed either at the 1949 or the 1974-7 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 occupant may lack some of the resources which states normally enjoy. See, Roberts, "What is military occupation?", 293.

[86] See, notably, L. Oppenheim, *International Law* (H. Lauterpacht ed. 1952), 249; and Fleck, "The Law of Non-international Armed Conflicts", 628, and the fact that the law of occupation was included in the Lieber Code, drafted for the purposes of the American Civil War. For doubts, see Sivakumaran, "Courts of Armed Opposition Groups", note 124.

[87] I am grateful to Charles Garraway for this suggestion.

[88] Admittedly, they are more concerned with the group's jurisdiction over war crimes than regular crimes.

[89] At least one interpretation of the "regularly constituted courts" requirement in CA3 is intrinsically linked to fair and reliable verdicts. See, eg, Justice Stevens in *Hamdan v Rumsfeld* 548 U.S. 557 (206).

[90] See also. Art. 4(g) ICTR, Art 3(g) SCSL Statute, and Art 8(2)(c)(iv) of the Rome Statute.

[91] Sivakumaran, "Courts of Armed Opposition Groups", 493. In favour of this possibility see Sassoli, "Taking Armed Groups Seriously", 34; and Somer, "Jungle Justice".

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 which applies in international armed conflicts does not hold between states and armed opposition groups, at least in armed conflicts not of an international character. Characteristically, non-state belligerents lack immunity from prosecution for participating in the conflict. 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 internationalised for the purposes of international humanitarian law, such as wars fought by proxies or non-state groups under the control of a foreign state.[92] 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".[93] Third, recognition of belligerency of 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.[94] Ultimately, the classification of the relevant conflict and the specification of the particular provisions which apply to it exceeds our purposes here.[95] My interest lies, by contrast, 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 favour of distinguishing state from non-state actors in this context submits that conferring upon the latter powers or immunities traditionally held exclusively by states encourages rebellion or at least empowers it.[96] Non-state rebels are thereby portrayed as mere bandits or criminals to which domestic criminal law, rather than international humanitarian law should apply. Defenders of this position

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[92] See, eg, *Nicaragua* and *Tadic*, although each requiring different levels of control by the foreign state.
[93] Art. 1(4) AP I. This provision, however, is not binding *per se* to non-parties. Considering whether it has become part of customary international law is beyond the scope of this paper.
[94] Bugnion, "Jus ad bellum, jus in bello *and non-international armed conflicts*", 181.
[95] For a succinct and clear exposition, see Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 14-16.
[96] See, eg, Elder, "The Historical Background of Common Article 3", 50.

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. Ultimately, the point is that it is not the case that every single one of these groups can be accurately portrayed simply as a band of criminals. The main problem with their position, the advocate of the traditional view may retort, would be that these non-state groups lack authority (*auctorictas*).[97] Yet it is open to question that this consideration is what is doing the argument 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.[98] Furthermore, non-state belligerents fighting for national self-determination would hold these rights from the outset. Be that as it may, such 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 we saw above, individuals in armed conflicts 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 regards to internal conflicts. Thus, in terms of the justification for the right to punish these offences, it follows from the argument advocated in this article 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 need solving, laws (not all of which are unjust) need enforcing."[99] Of a similar opinion is Philip Alston, who has indicated that "lack of cooperation in policing [between the government forces and the Liberation Tigers of Tamil Eelan (LTTE) in Sri Lanka] appears to be a persistent problem that adversely affects the protection accorded the

[97] See, eg, Neff, *War and the Law of Nations*, 250.
[98] Bugnion, "Jus ad bellum, jus in bello *and non-international armed conflicts*", 182.
[99] Fabre, *Cosmopolitan War*, 127. See, eg, the stories in post-Gaddafi's Libya in "Is Libya Craking Up", New York Review of Books, June 21, 2012.

population from crime."[100] Furthermore, 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, has argued 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."[101] 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 they exercising criminal jurisdiction would contribute to public order. Yet, unlike the argument I advocate, his seems to regard these considerations as sufficient conditions for conferring upon non-state armed groups the power to punish offenders.[102] If one proceeds on the basis of the three considerations highlighted by Sivakumaran one would have to admit that an armed group which conducts trials based on confessions obtained through torture should hold the normative power to exercise criminal jurisdiction on the territory under its control. 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. Thus, the point here 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. That is, whether non-state armed groups can claim the legitimate authority to try and 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

[100] Civil and Political Rights, Including the Question of Disappearances and Summary Executions, Report of the Special Rapporteur, Philip Alston, E/CN.4/2006/53/Add.5, 27 March 2006.
[101] Sivakumaran, "Courts of Armed Opposition Groups", 500.
[102] ibid.

action. Armed groups such as FARC at the height of their powers, for instance, exercised *de facto* control of several areas of Colombia to the extent of being considered there the only law enforcement authority.[103] State judicial bodies handled as little as 20 per cent of the existing conflicts and were largely absent in rural areas. But even when they intervened, they ultimately depended on FARC "authorization" to carry out their decisions.[104]

Yet authority in this context not only requires the material capacity to perform their task, but also their rendering decisions in a fair manner. I have advocated a theory of authority which 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 their decision should be considered binding by all the relevant stakeholders.[105] While courts in this kind of context, such as those established by the Frente Farabundo Martí para la Liberación Nacional de El Salvador (FMLN) or the Communist Party of Nepal-Maoist (CPN-M) in Nepal, may have failed to provide impartial proceedings and means of defence,[106] 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,[107] and the interest of the local population in their fundamental rights being protected by binding criminal laws, it can obtain that an organization performed jurisdictional tasks in the interest of the local population. 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

[103] Nicolás Espinosa, "El Despeje dos años después: en búsqueda de la experiencia del experimento", *Revista Colombiana de Sociología* Vol. V(II) (2000), 118-9.
[104] See Jaime Giraldo Ángel, *Los mecanismos alternos de resolución de conflictos* (Bogotá: Tercer Mundo, 1998), 4; and Mauricio García Villegas (Dir), *Jueces sin Estado. La justicia colombiana en zonas de conflicto armado* (Bogotá: Siglo del Hombre Editores, 2008).
[105] 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.
[106] Third Report of the United Nations Observer Mission in El Salvador (ONUSAL), UN Doc A/46/876-S/23580, 19 February 1992, paras. 11-4. The FMLN, of course, contested this finding.
[107] On this see, eg, Report of the Special Rapporteur, Philip Alston, E/CN.4/2006/53/Add.5, at 36.

classes.[108] Taking over these functions involved a difficult challenge for FARC which required establishing a fairly complex legal architecture.[109] During the late 1990s, at what was probably the height of their territorial power, FARC prosecuted and tried politicians for acts of corruption, while the ELN supervised local elections with an aim to secure transparency; both of them were also concerned with environmental protection issues.[110] Their action, in short, contributed to the maintenance of public life in the relevant region.[111]

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 used either shorthand for summary executions or imposed through blatantly unfair procedures.[112] 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 this consideration further supports the argument hereby defended. First, because these are the kind of sanctions that would lack authoritativeness according to the framework hereby defended. On these grounds, we could well distinguish between the Tuareg rebel group National Movement for the Liberation of Azawad (MNLA) and the Salafist rebels in northern part of Mali after the 2012 coup.[113] But also, because the scenarios in which punishment was harsh, unfair, imposed with a view to coerce the local population and enhance the authority of these armed groups, obtained characteristically in situations in which that armed group lacked or was struggling to

[108] See ibid, 445-446; Alfredo Molano, "La Justicia Guerrillera", in Boaventura de Sousa Santos and Mauricio García Villegas, *El Caleidoscopio de las justicias en Colombia. Análisis soci-jurídico* (Bogotá, Col: Siglo del Hombre, 2001, 2nd Vol.), 333; and Espinosa, "Entre la justicia guerrillera y la justicia campesina", 137.

[109] Molano, ibid, 334.

[110] Mario Aguilera Peña, "Justicia Guerrillera y Población Civil: 1964-1999," *Bulletin de l'Institute Francais des ètudes andines* 29(3) (2000), 452, 453, and 457, respectively.

[111] ibid, 436-437.

[112] ibid, Section 2.2. In the 1990s, however, execution became a rare penalty both for FARC and ELN, which had to be approved by the Central Committee of the ELN or the Secretariat of the FARC (Molano, "Justicia Guerrillera", 335).

[113] While the former have reputedly been generally decent, the latter have been engaged in a ruthless imposition of a strict version of the Sharia law, which has included amputations, beatings, and death by stoning (see, eg, Adam Nossiter, "Jihadists' Fierce Justice Drives Thousands to Flee Mali" New York Times, July 17, 2012 (available at http://www.nytimes.com/2012/07/18/world/africa/jidhadists-fierce-justice-drives-thousands-to-flee-mali.html?pagewanted=all, last accessed on September 27, 2012).

secure the effective control over the relevant area.[114] 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 (and only over that area), much in the same way as a state occupying force.

Many would insist that armed opposition groups are usually, almost always, weaker than states.[115] Accordingly, it is only reasonable that IHL discriminates between them and states on grounds of their (comparative) lack of capacity. Yet the orthodox view might have difficulties consistently putting this argument forward. For as indicated above, IHL confers upon certain non-state armed forces, ie those which are fighting a war of national liberation, the powers recognized to states during armed conflict, including the right to exercise criminal jurisdiction on territory under their control. And there is no real difference, in terms of capacity and organization, between armed groups fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right to self determination and those which are not. Furthermore, the proposition advocated here is not that *any* non-state armed group should be conferred criminal jurisdiction; only those with *de facto* effective control over a territory would. This in turn requires a significant degree of organization, sufficient, at least, to provide with a serious and reliable investigation and a public trial. As a matter of treaty law Article 6(2) of AP II 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 AP II.[116] Thus, only non-state actors which can somewhat function as a surrogate of the state would be entitled to exercise criminal jurisdiction under the framework hereby advocated.[117]

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[114] Aguilera Peña, "Justicia Guerrillera", Section 1. The different attitudes these groups hold when trying to secure control over an area, and after this control has been secured is well illustrated by the contrasting actions of the LTTE in different parts of Sri Lanka around 2006; while in the North they 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" (Report of the Special Rapporteur, Philip Alston, E/CN.4/2006/53/Add.5).

[115] ibid, 459 [translation by the author].

[116] Art 1 of AP II. But see CA3 to the Geneva Conventions.

[117] 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, eg, Lisbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge: CUP, 2002). This proposition should not be construed as advocating such a demanding threshold for the application of IHL to conflicts not of an international character.

On these grounds alone one could reject Montoneros' right to "convict" and execute General Aramburu in 1970.[118] Montoneros was simply not the kind of organization which 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 the justificatory work. Nor is authority in this context based on fair proceedings *per se*. These two are necessary albeit not sufficient conditions to holding the power to punish during 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 which were binding upon anyone. If anything this kind of trial upsets that kind of belief. This would be the case even if Aramburu had received a minimally fair trial under contemporary standards. 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.[119]

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.[120] This is a controversial stance to take, as it often takes into account an external view, rather than that of the local population. To put 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 Taleban as *merely* a criminal organization; most of these, moreover, would not see them as a criminal organization at all. For them, the illegitimate authority may well be the US-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.

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[118] 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.
[119] Omar Costa, *Los tupamaros* (Mexico: Ediciones Era, 1972); and Aguilar Peña, "Justicia Guerrillera", 449, on the M-19 movement.
[120] Sassoli, "Taking Armed Groups Seriously", 8.

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 I have argued in the previous section, states which 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 so 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 legal rules which are actually in force. It is not their state or non-state character that has been making the argument all along. Put simply, provided one is prepared to admit that the LTTE would lack the moral standing to try offenders for regular offences perpetrated on the territory under its control on grounds of its responsibility in 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.[121] It is these features, and not its state or non-state status, which account for this normative implication.

### *7. Conclusion: from normative arguments to legal institutions*

This paper provides a limited defence 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 in contexts of occupation. The core argument put forward is that provided one is prepared to accept the jurisdiction of the lawful, state occupant, one would be committed to conferring parallel powers to unlawful state occupants 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 domain. Rather, I have defended them as a matter of normative argument. The paper argues that the relevant normative distinction between occupants should be drawn on different lines, namely on whether they can credibly and reliably be seen as meeting out legal punishment for the right reasons. Among the considerations that would undermine that right are that they

[121] See Report of the Special Rapporteur, Philip Alston, E/CN.4/2006/53/Add.5, at 10 and 11.

try defendants through unfair or unreliable proceedings, or that they are perceived as a criminal organization by the relevant stakeholders. Put differently, in order to hold such right occupants essentially need to try individuals through fair proceedings and be perceived as 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, occupant and sovereign states, 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 have argued that these conditions work as a matter of moral principle. Now we may consider, albeit briefly, how this moral argument should be implemented into legal rules. International law, namely the GC IV, AP I and II, and CA 3 only rely on procedural fairness to confer on occupants, be them lawful or unlawful, state and non-state criminal jurisdiction over domestic offences perpetrated on the territory under their control. This, admittedly, fails to capture one, and arguably the most important consideration undermining an occupant's power to enforce criminal rules, that is, the fact that it is perceived as a criminal organization. I think 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 occupants in the course of the war and do so authoritatively.[122] Under these circumstances procedural fairness may be a reasonable sufficient legal requirement to confer upon any occupant the power to exercise criminal jurisdiction on the territories under its control. Although criminal states or non-state groups could eventually exercise their jurisdiction respecting due process fundamental safeguards, this is extraordinarily unlikely, as history aptly shows. Thus I suspect that international law on this particular point could be defended, if not by noting its perfect fit with the moral principles underpinning military occupation, by

[122] For the opposite view, see Jeff McMahan, 'Individual Responsibility and the Law of Jus ad Bellum', in Yitzhak Benaji and Naomi Sussman (eds), *Reading Walzer* (London: Routledge, 2011).

suggesting it is the best possible way of capturing through law the relevant moral differences in the world we inhabit.