
**ON THE RIGHTS AND DUTIES OF OCCUPATION COURTS
COMMENTS ON ALEJANDRO CHEHTMAN'S ACCOUNT**

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ABSTRACT

Alejandro Chehtman has developed a sophisticated moral argument to support a limited version of the principle of symmetry between just and unjust belligerents. He argues that both types of belligerent have symmetric rights and duties to judge and punish criminal offenders in occupied territories. In this paper I argue that although his argument shows that there is symmetry regarding rights, it does not show the same regarding duties. Just occupants do not have a duty to provide criminal justice in the occupied territories, or at least not a duty as stringent as that of unjust occupants. The reason is that a self-defensive just occupant, unlike an unjust occupant, cannot be regarded as ultimately responsible for the occupation, nor for remedying its undesired consequences -such as the interruption of the system of criminal justice-, at least when remedying them would impose considerable costs on the occupant.

Keywords: Alejandro Chehtman; Criminal jurisdiction; Just and unjust occupants; Occupation courts; Rights and duties

RESUMEN

Alejandro Chehtman desarrolla un argumento moral sofisticado a favor de una versión limitada del principio de simetría entre los beligerantes justos e injustos. Chehtman afirma que ambos tipos de beligerante tienen derechos y deberes simétricos para juzgar y castigar a los criminales del territorio ocupado. En el presente artículo sostengo que aunque el argumento de Chehtman muestra

que hay simetría respecto a los derechos, no muestra lo mismo respecto a los deberes. Los ocupantes justos no tienen un deber de ejercer jurisdicción en lo criminal en los territorios ocupados, o al menos no tienen un deber tan estricto como el de los ocupantes injustos. La razón es que, a diferencia del ocupante injusto, el ocupante justo que actúa en defensa propia no puede considerarse responsable de la ocupación, ni de remediar sus consecuencias indeseables -tales como la interrupción del sistema de justicia en lo criminal-, al menos cuando remediarlas sería considerablemente costoso para el ocupante.

Palabras clave: Alejandro Chehtman; Derechos y deberes; Jurisdicción en lo criminal; Ocupantes justos e injustos; Tribunales de ocupación

1. Introduction

When a military power occupies an area, it acquires -according to international law- a duty to “restore and ensure, as far as possible, public order and safety” in that area (Hague Regulations, art. 43). This duty has been generally understood as implying a duty to exercise criminal jurisdiction, i.e., a duty to try and punish offenders in criminal courts. The reason for framing this as a duty, and not as a right, was that “the framers of the Hague Regulations were afraid that the occupying power might tolerate pervasive turmoil and turbulence, not lifting a finger to prevent rampant anarchy from paralyzing the whole life of the civilian population” (Dinstein 2009: 92). Occupations are many times followed by an explosion of criminality (looting, theft, etc.), as in Iraq after the 2003 US occupation. This problem is especially serious in prolonged occupations.

In international law no distinction is made between lawful and unlawful occupants in terms of their rights and duties to exercise criminal jurisdiction. This is due to the fact that occupation pertains to *jus in bello*, which in international law

is separate from *jus ad bellum* considerations. Jurisdictional rights stem from the mere fact that the occupant has effective control over the territory.¹ In his paper “Occupation Courts, *Jus ad Bellum*, and Non-State Actors: Revisiting the Ethics of Military Occupation” (2013) Alejandro Chehtman provides a sophisticated moral argument to support this international law provision. In the present paper I first explain his general argument (section 2). Then I present a conceptual framework for analyzing the relevant rights and duties regarding criminal jurisdiction (section 3) and I argue that only unjust occupants have a duty to provide criminal justice (section 4). This implies that there is an important asymmetry between just and unjust occupants.

2. Chehtman on military occupation and criminal courts

2.1 The neo-classical view

Cehtman provides an argument that aims to overcome the problems with the neo-classical view about the right to punish offenders in occupied territories. According to this view, that right is explained by the continuity between *ad bellum* and *in bello* rights and duties. Those fighting on the *ad bellum* just side have an *in bello* right to kill soldiers and military leaders who are fighting on the *ad bellum* unjust side, while the latter have a duty not to retaliate. Now, if unjust combatants are liable to being *killed* by just combatants, they are also liable to being *punished* by them, since punishing represents a lesser -or at least an equal- harm to killing. Therefore, just occupants have a right to punish offenders.²

1. For example, see United Nations War Crime Commission (1949), pp. 34, 59.

2. Elements of this view may be attributed to McMahan (2009a) and Fabre (2012).

The neo-classical view has two important problems. First, it only accounts for the right to punish soldiers and military leaders, but not to punish the rest of the population (at least when they were not involved in the battle). Second, the right to kill someone during a war seems unrelated to the right to punish someone for domestic crimes completely unrelated to war. Whether a high military commander is involved in instances of corruption seems completely irrelevant to rights and duties during a war (Chehtman 2013: 14).

2.1 Chehtman's argument

To overcome limitations in the neo-classical view, a specific argument is needed to account for the specific right in question: the right to punish criminal offenders. Chehtman's argument for that purpose has three steps. First, it shows why *States* have a right to punish offenders in their territories. Second, it shows that the same reasons hold for *just occupants*. Third, it claims that the same reasons hold for *unjust* occupants. This means that lawful and unlawful occupants have *symmetric rights* (and duties) regarding criminal jurisdiction.

The main reason why *States* have a right to punish in their territories is that it benefits its subjects. To show this, Chehtman adopts the interest theory of rights, according to which a right's function is to protect important interests (Raz 1988). In Chehtman's words:

“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. 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*” (Chehtman 2013: 9).

Next, Chehtman explains how the fact that a State exercises its criminal jurisdiction benefits its subjects. The idea is that believing that there is a system of legal rules prohibiting certain offences contributes to those subjects' sense of security and dignity. But if criminals are not generally punished by their offences, subjects quickly end up believing that there is no such legal system in force. Therefore, since there is a collective interest in there being a system of criminal law, and this requires that States punish criminal offenses, States have a right to this.

Similarly, individuals in an *occupied territory* also have a collective interest in there being a system of criminal laws in force (not any system, but *their* system). If this interest justified assigning a right to criminal jurisdiction to States, it seems that for the same reasons that right should be assigned to lawful occupants (Chehtman 2013: 15).³

Cehtman claims that this argument may be extended to *unlawful occupants*. The reason is simple. Regardless of whether the occupant is *ad bellum* lawful or unlawful, people living in the occupied territory still have a collective interest in there being criminal law in force. Since the unjust occupant is the only agent capable of providing that service, the occupant has the right and the duty to provide it. Chehtman

3. According to Chehtman, identifying an important interest is not sufficient, however, to grant the right to criminal jurisdiction to lawful occupants. Two additional conditions need to be met (Chehtman 2013: 15-16). First, the occupants should standardly provide accurate, reliable and fair procedures. This condition is in line with Joseph Raz's theory about the normal justification of authority. According to this theory there are reasons to recognize the authority of a court if by recognizing it we are more likely to conform with the reasons that apply to our choices (Raz 1988). Therefore, if a court decides cases on the basis of coerced confessions or unfair procedures, it would not meet the first condition. Second, occupants need to hold sufficient *de facto* authority to provide the alleged benefits of criminal law. Occupants characteristically fulfill the second condition. However, even lawful occupants may not fulfill the first condition.

illustrates his point by means of an analogy. Suppose Alan pushes Betty from his boat in the middle of a lake. If he does not help her climb back to the boat, she would drown. This puts Alan under a duty (and -we would add- at least a certain type of right)⁴ to rescue her. Moreover, Alan has an *especially strong* duty to rescue her, since he is the one who pushed her (this is explained by Chehtman by reference to a different case, but it applies to this case as well; see Chehtman 2013: 21). Similarly, unjust occupants are under an especially strong duty to provide criminal justice. This supports the principle of normative symmetry between belligerents, at least regarding the right and duty to punish criminal offenders in occupied territories.

3. Power, claim and duty

Criminal jurisdiction (i.e. the right to try and punish criminal offenders) is a certain type of right. Chehtman employs a Hohfeldian framework to talk about rights. In this framework, rights are classified according to certain 'incidents' that form them: liberties, claims, powers and immunities. Here I will focus on the idea of a claim-right and of a power-right (following Wenar 2005: 229-232). An agent A has a *claim-right* that agent B Φ iff B has a duty to A to Φ . For example, an employee has a claim-right that her employer pays her her salary iff her employer has a duty to pay her her salary. And an agent A has a *power-right* iff she has the ability, within a set of rules, to alter her or another agent's Hohfeldian incidents. For example, my property right over my computer includes

4. An agent cannot have a duty to Φ and no right to Φ (except in cases where the normative framework is inconsistent). Now, as will be explained below in terms of the Hohfeldian framework, a right to Φ may be of different kinds.

a power-right that allows me to waive my claim-right to my computer and transfer that claim-right to you.

What type of right is criminal jurisdiction? Chehtman rightly classifies it as a power-right: a second-order capacity to alter certain incidents in certain ways, namely, to alter subjects' rights to freedom from imprisonment and other punishments (Chehtman 2013: 8-9). For example, when a court decides that someone is guilty and should be punished with a fine, it exercises a power-right by altering that person's rights and duties, which now include a duty to give money away and no right to keep it.

It is certainly possible for an agent to have a *claim-right* to criminal jurisdiction. It would be a claim-right to a power-right. A legitimate government, for instance, may be said to have a claim-right to criminal jurisdiction. This means that the government is *entitled to the capability* of altering its subjects' rights and duties. This may be specified as a right not to be interfered with when exercising criminal jurisdiction, or as a right not to be deprived from that power. It may be directed against foreign powers and/or local subjects. What matters for future purposes is that having criminal jurisdiction as a power-right should not be confused with having a claim-right to criminal jurisdiction. The latter may be had without the former.

Finally, it is also possible for an agent to have a *duty* to exercise criminal jurisdiction. It would be a duty to (exercise) a power-right. It may seem that, since having a duty to Φ implies having permission to Φ , then having a duty to exercise criminal jurisdiction implies having a claim-right to criminal jurisdiction. However, having a duty to Φ does not require having a claim-right to Φ , but only a *liberty-right* to Φ (i.e., it only implies that the agent has no *duty not to* Φ).

These distinctions between criminal jurisdiction as a power-right, as a claim-right, and as a duty may help us to clarify Chehtman's main thesis. He tries to show that there is symmetry between just and unjust occupants in terms

of certain rights and duties that occupants hold regarding criminal jurisdiction. In particular, just and unjust occupants are alike in that:

- (a) both have a power-right to try and punish criminal offenders, and
- (b) both have a duty to try and punish criminal offenders.

These two claims should be distinguished from a third one:

- (c) just and unjust occupants have a *claim-right* to try and punish criminal offenders.

Chehtman does *not* try to make claim (c), nor does he need to. In fact, under a certain interpretation of it, this claim is untenable. As mentioned, a claim-right to punish offenders may mean either a claim-right not to be interfered with this power-right or a claim-right not to be deprived from it. According to the first interpretation, claim (c) is tenable, but according to the second, it is not. Although just occupants seem to have a claim-right not to be deprived from the power-right to punish criminal offenders, it seems that (at least) not all unjust occupants have this claim-right. To see this, consider first McMahan's distinction between "unjust but justified" occupants and "unjust and unjustified" occupants. Sometimes a military occupation may weaken the State infrastructure to a point where it becomes incapable to work. In these cases, unjust occupants are justified to exercise the right to punish criminal offenders, since there is no other power around with the *de facto* ability to provide this crucial service. However, when the State infrastructure has not been so weakened by the occupation, unjust occupants are not justified to exercise criminal jurisdiction. They are simply under a duty to "leave immediately" (McMahan 2009b). Chehtman rightly points out that unjust and unjustified occupants have nonetheless a duty

to punish criminal offenders. Indeed, this type of occupant is under two different, and in certain way independent, duties: to leave immediately, and to provide criminal justice as long as they do not leave. Not providing criminal justice would constitute an additional and separate wrong (Chehtman 2013: 22). Therefore, both "unjust but justified" and "unjust and unjustified" occupants have a duty to provide criminal justice. Notwithstanding this, it seems that the unjust and unjustified occupants lack a claim-right not to be deprived from this power-right by the deposed government (which, *ex hypothesi*, is still *de facto* capable of providing criminal justice). On the other hand, just occupants and (maybe also) unjust but justified occupants seem to have a claim-right not to be deprived from the power to punish criminal offenders. This means that claim (c) is not true at least in its general form.

4. Critique

In what follows my aim is to question claim (b). This challenges the general idea that there is symmetry between just and unjust occupants regarding criminal jurisdiction. However, it should be noticed that nothing in this section undermines claim (a), which is Chehtman's most interesting and original claim.

In what follows my focus will be on one type of just occupation: a self-defensive occupation motivated as a response to an illegitimate military attack initiated precisely from the occupied territory. This is what Chehtman calls an "unambiguously just, self-defensive occupant" (Chehtman 2013: 10). I do not deny that other types of just occupation may have different normative consequences in terms of occupants' duties (and it may be that claim (b) does apply to these types of occupation). However, this would not undermine the thesis that the symmetry between just and unjust occupants is not complete, since at least in some cases there would be important

connections between *ad bellum* and *in bello* considerations regarding criminal jurisdiction.

Before starting it is important to pinpoint Chehtman's reasons for attributing to occupants a duty to exercise criminal jurisdiction. We have seen that the reason for assigning to States the power-right of criminal jurisdiction was that citizens had a crucial interest in there being a system of criminal law in force (and the author claims that this reason also applies to occupants). The same fact is what, according to Chehtman, grounds State's *duty* to exercise that power: "that interest [which grounds criminal jurisdiction] can be so weighty so as to require putting that State under a duty to exercise its normative power" (Chehtman 2013: 9). The author thinks that the same reason for attributing this duty to States is valid also for occupants, as he explains with his boat analogy (Chehtman 2013: 22).

I claim that only unjust occupants have a duty to exercise criminal jurisdiction. Just occupants do not have this duty, or they have at most a weak duty (weaker than unjust occupants' duty). This may sound strange to neoclassical ears, which essentially viewed criminal punishment as a harm, to which the occupied were liable due to their own fault. Once we adopt Chehtman's view about criminal jurisdiction as a service or good, it makes sense to ask whether a just occupant should provide this service at all. To answer this question I will mainly rely on analogies.

We should first attempt to use Chehtman's own analogies. To begin with, I will consider the boat analogy, but I will revise it in order to make it match with the situation of a just occupant. Alan and Betty go fishing together. Once they are far away from the coast, Betty tries to kill Alan by choking him. The only way he has to stop her is to push her to the water. But now Betty will drown unless Alan picks her up from the water or throws her a lifesaver. Picking her up is dangerous, since she might resume her attempt to kill Allan. Throwing her a lifesaver, which would also definitively save her, would not be dangerous

for Alan at all. It seems to me that Alan should throw Betty a lifesaver. Undoubtedly, she does not deserve it, she brought this situation on herself (assume that she knew that her attempt to kill Alan could end up with her in the water). But since Alan could easily throw her the lifesaver, without putting himself in risk, and since Betty would otherwise suffer death, it seems that Alan has nevertheless a very strong duty to save her. This case seems analogous to a case of just occupation. What caused Betty to be in need of Alan's service is that Betty performed an attack on Alan that could only be stopped by putting Betty in a situation of need. Analogously, the defensive occupation, which puts the occupied in need of a service (criminal jurisdiction), was caused by an attack performed by the occupied in the past. Now, if the analogy stands, just occupants have a strong duty to exercise criminal jurisdiction. Claim (b) seems therefore to stand.

The fact that it was Betty who brought the life-threatening situation on herself may be said to diminish Alan's duty to save her. Even if this were true, it should be noticed that just occupation differs from the revised boat scenario in a crucial aspect: most of the population in the occupied territory may not have taken part of the unjust attack, and this attack may have even been performed by a dictatorial or, more generally, non-representative government. Therefore, a closer analogy would be one in which Betty has her innocent baby daughter attached to her back. In order to stop Betty's attack, Alan has no option but to push them both to the water. Since the daughter is completely innocent, it seems that Alan has a strong duty to save at least her from drowning (even if it was *Betty*, not Alan, who was responsible for putting the child in these dire straits). In the same way, just occupants have a strong duty to exercise criminal jurisdiction at least to the part of the population which was not involved in the unjust attack. Claim (b) therefore stands still.

However, the second revised boat analogy is inaccurate in two relevant aspects. First, providing criminal justice is not

as costless as throwing a lifesaver. It involves organizational and other costs. Second, lacking criminal justice is not as costly to the population in the occupied country as drowning would be for Betty or her daughter. Lacking criminal justice may generate a strong diminishment in life quality, but this is not as severe as death (i.e., death for *all* of the population; needless to say, the absence of law enforcement may cause a number of deaths). It may therefore be useful to consider a different analogy, which accounts for these two relevant factors. Suppose Jane is trying to stab Laura. Laura is strong enough to hold Jane's blow with her right hand, but not skillful enough to disarm her. The scene goes on which for a while. Now, Jane is under a certain financial obligation that requires her to transfer in the following minutes a certain amount of money to a bank. Otherwise, a big part of her property would be confiscated, so her siblings (and her) would end up living much worse than they do now (they would have to live in a shanty town, and with just enough food to survive; and this would last for at least a few years). Laura is aware of Jane's situation, and is also capable of transferring from her own account the required amount of money with her cell phone using her left hand, while continuing to contain Jane's attack with her right hand. No one else knows about Jane's financial situation, so Laura is the only person that could save her siblings (and her) from those very bad consequences. The amount of money is not trivial for Laura, and she would not be able to recover it. It seems to me that Laura is, at most, under a *very weak* duty to help the siblings. Why do we draw such a different conclusion in this case, compared with the second revised boat analogy? Because Jane's siblings are not about to die, but only about to lose very important (though not vital) goods, and because Laura would have to incur in considerable costs in order to help the siblings.

If this new case is actually analogous to just occupation, as I believe it is, then just occupants have at most a very weak duty to exercise criminal jurisdiction. It may be argued

that lacking criminal justice is actually as bad as dying. But even if we grant that point, the fact that Laura would have to wage non-trivial costs in order to save Jane and her daughter implies that her duties are not as strong (at least not as strong as they would be if Laura were responsible for their plight).

All this should be compared with the case of an unjust occupant. Even if providing criminal justice is costly and it is not such a vital service as being saved from drowning, when an occupant is unjustly occupying a territory, it is responsible for the occupied people's need. Therefore, it makes sense to assign to the occupant a strong duty to satisfy that need. At the bottom of the difference between the duties of just and unjust occupants is possibly the difference between duties of justice and duties of humanity. Unjust occupants' duties to provide criminal justice are duties of justice, in the sense that they are duties to rectify a prior injustice (the unjust invasion), while just occupants' duties to provide criminal justice are duties of humanity that do not derive from a prior violation of any duty. The latter are only grounded on the sheer need of the occupied. This type of duties is usually thought to be sensitive to costs in a way that duties of justice (and their derived duties to rectify one's own injustices) are not (Valentini 2009).

Conclusion

In this paper I have tried to show that there is no complete symmetry between just and unjust occupants in terms of their rights and duties to provide criminal justice, and that therefore *ad bellum* considerations are relevant for *in bello* considerations regarding those rights and duties. Although Chehtman is right to point out that both types of occupants have a power-right to punish criminal offenders, I have argued that just occupants do not have a duty to exercise this power-

right, or at least they do not have such a strong duty as unjust occupants do.

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