

The Functional Beginning of Belligerent Occupation



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Executive Summary

Occupation of foreign territory by means of warfare can be traced back to ancient times. An important step towards the codification of the modern law of belligerent occupation was achieved with the Lieber Code of 1863. Since then the notion and definition of belligerent occupation evolved and found a crowning point in the Hague Regulations of 1907. At the heart of the definition of belligerent occupation as laid down in Article 42 of the 1907 Hague Regulations lies the idea that part of a belligerent State's territory has *de facto* been brought under the effective control of the hostile armed forces of another Party to the armed conflict. For a state of belligerent occupation to be established, it is generally accepted that a certain degree of stability is required. Furthermore, the majoritarian conception of belligerent occupation follows a strict distinction between invasion and occupation, whereby the mere presence of armed forces cannot establish a state of belligerent occupation.

In 1949, the long awaited Fourth Geneva Convention put the emphasis on the protection of civilians in the hands of an enemy power and significantly elaborated the law of belligerent occupation. However, for the sake of the law of belligerent occupation there seems to exist an important imperfection: the 1949 Geneva Conventions do not contain any legal definition of belligerent occupation! Consequently, the question arises whether the provisions of the Fourth Geneva Convention relative to occupied territories apply only once the criteria of the 1907 Hague Regulations have been met or, as suggested in the ICRC Commentary, that they apply in accordance with the functional beginning of belligerent occupation from the moment that a protected person finds itself in the hands of the enemy. A distinction between invasion and a state of belligerent occupation would be superfluous since the 1949 Geneva Conventions would follow their own rules of applicability. It is argued that the preferred solution is the latter. Without the functional concept, intolerable gaps in protection would exist during the invasion phase. An analysis of the provisions of the Fourth Geneva Convention relative to belligerent occupation reveals that the functional beginning of belligerent occupation is realistic and would not impose burdensome and unfeasible obligations upon already constrained troops. The rules formulating the rights and obligations of an occupying power are flexible enough to take the necessities arising during invasion into account while maximising the protection to the local population.

“L'équilibre entre humanité et nécessité revêt un autre aspect, qui lui est étroitement lié: la vieille opposition entre Don Quichotte et Sancho Pança, c'est-à-dire entre pragmatisme et idéalisme. Dans l'élaboration du droit humanitaire, comme dans toute grande entreprise, on ne fera rien sans l'idéalisme, qui défie toute intelligence. Ce n'est qu'une étincelle au milieu des ténèbres, mais elle allumera le foyer d'où monteront les flammes. Pour réaliser l'œuvre, le secret du succès est de rester réaliste.” Jean S. Pictet

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Abbreviations

1899 Hague Regulations	Regulations Respecting the Laws and Customs of War on Land annexed to the Convention (II) with Respect to the Laws and Customs of War on Land of 1899
1907 Hague Regulations	Regulations Respecting the Laws and Customs of War on Land annexed to Convention (IV) Respecting the Laws and Customs of War on Land of 1907
1949 Geneva Conventions	The Geneva Conventions of 12 August 1949
1977 Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
Brussels Project	1874 Brussels Conference: Project of an International Declaration concerning the Laws and Customs of War of 27 August 1874 (available at: http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument)
ed(s).	editor(s)
EJIL	European Journal of International Law
et al.	<i>et alii</i> (and others)
etc.	<i>et cetera</i>
First Geneva Convention	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
Fourth Geneva Convention	Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
GYIL	German Yearbook of International Law
Ibid.	<i>Ibidem</i>
ICJ	International Court of Justice

ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	international humanitarian law
IRRC	International Review of the Red Cross
Lieber Code	<i>Instructions for the Government of Armies of the United States in the Field</i> of 24 April 1863
Oxford Manual	Oxford Manual on the Laws of War on Land of 9 September 1880
p.	page
para(s).	paragraph(s)
pp.	pages
Rome Statute	Rome Statute of the International Criminal Court of 17 July 1998
TC	Trial Chamber
UK	United Kingdom
US	United States of America
Vol.	Volume

Introduction

From ancient times on Powers occupied and acquired additional territory by means of warfare. Until the 19th century, military occupation of the adversary's territory resulted in the transfer of property and sovereignty to the occupying power. The new sovereign could quite freely dispose of the territory and its inhabitants. The nature of belligerent occupation, as we know it today, developed largely throughout the period between the Lieber Code of 1863 and the Hague Regulations of 1907. While the definition of occupation continued to be subject to some controversy, it became apparent that belligerent occupation is only of a temporary nature, that the powers of the occupant are limited and that invasion alone should not decide over the future status of a territory. Essential for the definition of belligerent occupation as crystallised in Article 42 of the 1907 Hague Regulations is the idea that occupation must be both actual and effective. For belligerent occupation to be established, the armed forces that have invaded the enemy's territory must have gained *de facto* control over a given area through their physical presence and must have substituted their authority for that of the legitimate sovereign. As a consequence, a state of belligerent occupation seems to be clearly distinguishable from the invasion phase.

The atrocities of World War II, however, made evident the insufficiencies of the 1907 Hague Regulations and its rules on belligerent occupation. The Fourth Geneva Convention subsequently elaborated, inter alia, on the rules applicable to occupied territories. As the 1949 Geneva Conventions lack a definition of occupation, the question arises whether these provisions apply only once a state of occupation as set out in Article 42 of the 1907 Hague Regulations has been established, or whether Section III of the Fourth Geneva Convention relative to occupied territories follows its own rules on applicability.

The ICRC Commentary on the Fourth Geneva Convention advocates the so-called functional beginning of belligerent occupation. Accordingly, the rules on occupied territories of the Fourth Geneva Convention apply as soon as a "protected person" falls into the hands of a party to the conflict present in enemy territory. Consequently, the application of these rules would not depend upon the existence of a state of occupation as defined in the 1907 Hague Regulations and there would not be an intermediate period between invasion and a state of occupation. This holds true for at least the Fourth Geneva Convention and as far as

individuals are concerned. The theory is called “functional beginning” because the provisions on occupation would become applicable in a progressive manner and in correspondence to the contacts between the local population and the invading troops. According to the famous example given in the ICRC Commentary, even a patrol that penetrates into enemy territory must respect the Fourth Geneva Convention in its dealings with civilians and must not, for instance, deport them, for that would be contrary to Article 49 of the Fourth Geneva Convention.¹

It is argued in this paper that the application of the functional beginning of occupation is the preferred solution. This would fill probable gaps of protection during the invasion phase and would be in line with the object and purpose of the Geneva Conventions. Moreover, an analysis of the rules relating to belligerent occupation suggests that invading troops would not be disproportionately burdened with additional and impractical obligations. Quite the contrary, the wording of most articles leaves enough leeway to adapt and take into account the difficult circumstances prevailing during an invasion. Furthermore, the functional beginning of belligerent occupation would also bestow certain rights upon the invading power, like a legal basis for security measures and internment.

¹ See Pictet, Jean S. (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Fourth Geneva Convention Relative to the Treatment of Civilian Persons in Time of War* (Geneva: ICRC, 1958), [cited: Pictet, *Commentary...*], at Article 6, p. 60.

Part A: The Notion and Beginning of Belligerent Occupation

I. Development of the Law of Belligerent Occupation prior to the 1899/1907 Hague Regulations

From ancient times on, Powers occupied and acquired additional territory by means of warfare. Until the 19th century, military occupation of the adversary's territory resulted in the transfer of property and sovereignty. The new sovereign could quite freely dispose of the territory and its inhabitants.² Although rules imposing restrictions on the conduct of war can be traced back to ancient times, it was not until the 19th century that the codification and written development of the law of belligerent occupation began.³ This section shortly describes some major steps in the development of the law of belligerent occupation.

1. The Lieber Code of 1863

1.1 The Lieber Code of 1863

On behalf of President Lincoln, Francis Lieber, a German-American scholar, prepared a set of instructions governing the Union forces' conduct in the American Civil War of 1861-65, promulgated as General Orders No. 100 of the Union Army in 1863.⁴ The *Instructions for the Government of Armies of the United States in the Field* of 24 April 1863 (hereafter: Lieber Code) contained the first relatively complete and systematic presentation of the modern law of belligerent occupation.⁵

Despite the fact that the Lieber Code was issued during the American Civil War and as such remained a national act, it can be considered as codifying rules applicable to international wars. Indeed, to the extent that belligerency of the Confederate forces was recognised, the conflict was transformed into an international one.⁶ Furthermore, the Lieber Code was also

2 Graber, Doris Appel, *The Development of the Law of Belligerent Occupation 1863 - 1914: A Historical Survey* (New York: Columbia University Press, 1949).

3 See Greenwood, Christopher, *Historical Development and Legal Basis*, in: Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, second edition (Oxford: University Press, 2008), pp. 1 – 43, at p. 15 onwards; Sassòli, Marco; Bouvier Antoine A., *How Does Law Protect in War?*, 2nd edition (Geneva: ICRC, 2006), [cited: Sassòli/Bouvier, How...], at p. 126; David, Eric, *Principes de Droit des Conflits Armés*, 3rd edition (Bruxelles: Bruylant, 2002), at p. 38.

4 Graber, *The Development...*, at p. 14.

5 Ibid.

6 See Supreme Court of the United States, *The Amy Warwick (The Prize Cases)*, 67 US 635 (1862).

used in the Spanish-American war of 1898, and figured in part in the 1914 US manual “Rules of Land Warfare”.⁷

1.2 The Notion and Beginning of Belligerent Occupation in the Lieber Code

The Lieber Code indicated the temporary nature of belligerent occupation in stating that martial law would suspend local criminal and civil law as well as the local administration and government in so far as military necessity so requires.⁸ Yet, Article 33 of the Lieber Code still permitted annexation of occupied regions already before the conclusion of peace, a practice conflicting with modern standards.

According to the Lieber Code the “presence of a hostile army proclaims its martial law” and the application of martial law would be “the immediate and direct effect and consequence of occupation [...]”.⁹ Martial law was defined as being “military authority exercised in accordance with the laws and usages of war”.¹⁰ One can thus conclude that under the Lieber Code belligerent occupation was established through the physical presence of military forces on the territory of an adversary.

2. Brussels Conference of 1874: Project of an International Declaration concerning the Laws and Customs of War (Brussels Project)

2.1 Historical Background

On invitation by Russia an international conference striving to codify, for the first time, the laws and usages of war was held in Brussels in 1874.¹¹ Even though the Brussels Conference of 1874 never lead to the conclusion of an international convention, the project should influence subsequent codes, in particular the 1899/1907 Hague Regulations. Thus, the definition of occupation, for instance, is identical in both the Brussels Project and the 1899/1907 Hague Regulations.¹² It is for this reason that the discussion leading to the adoption of the Brussels text is of interest for the present paper.

7 Graber, *The Development...*, at p. 18-9.

8 See Article 3 Lieber Code.

9 See Article 1 Lieber Code.

10 See Article 4 Lieber Code.

11 See Graber, *The Development...*, at p. 20.

12 Compare Article 1 of the Brussels Project and Article 42 of the 1907 Hague Regulations.

2.2 The Notion of Belligerent Occupation in the Brussels Project

The attempt to define the circumstances as well as the geographical and temporal extent triggering the application of the law of belligerent occupation was subject to lengthy debate at the Brussels Conference of 1874 and different views were put forward.¹³ However, the questions whether or not physical occupation is required and what size of occupation forces is necessary for making an occupation effective remained unanswered.¹⁴

Adhering to the principle of effective control the plenipotentiaries eventually adopted the following definition of belligerent occupation:

“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”¹⁵

By contrast to the Lieber Code, the Brussels Project seemingly has departed from the idea of legitimate annexation. The latter does not reproduce the wording of Article 33 of the Lieber Code and instead indicates that the occupation results in a suspension of the legitimate power’s authority.¹⁶

3. The Oxford Manual of 1880

3.1 Historical Background

After the failure of the Brussels Project the Institute of International Law adopted on 9 September 1880 the *Oxford Manual on the Laws of War on Land* (hereafter: the Oxford Manual). The purpose was to specify and codify the law of war as it was recognised at the time.¹⁷ The Oxford Manual was then sent to various European governments, which were encouraged to adopt similar manuals.¹⁸

13 For a detailed description see Graber, *The Development...*, at p. 43 onwards.

14 Graber, *The Development...*, at p. 45.

15 Article 1 of the Brussels Project.

16 See Article 2 Brussels Project; Graber, *The Development...*, at p. 47.

17 See Oxford Manual, at Preface.

18 See Graber, *The Development...*, at p. 30.

3.2 The Notion of Belligerent Occupation in the Oxford Manual

The Oxford Manual laid down that:

“[t]erritory is regarded as occupied when, as the consequence of invasion by hostile forces, the State to which it belongs has ceased, in fact, to exercise its ordinary authority therein, and the invading State is alone in a position to maintain order there”.¹⁹

Accordingly, belligerent occupation required that the local authorities were driven out by the invading forces and could therefore no longer exercise its authority. In addition, the invading State had to be in a position to solely maintain order in the territory concerned. The Oxford Manual thus amplified the principle of effective control as set out in the Brussels Project and indicates that resistance must have ceased. Furthermore, the Oxford Manual added a rather subjective element to the definition of belligerent occupation. It required that the occupying power inform the inhabitants as soon as possible about the territorial extent of occupation and the powers it exercises.²⁰ Like previous works, the Oxford Manual indicated the “essentially provisional [...] character” of belligerent occupation.²¹

During the period following the Oxford Manual, one of the preponderant issues discussed by writers at the time was the continuing controversy whether or not physical presence of troops was necessary for the existence and delimitation of occupation.²²

II. The Notion and Beginning of Belligerent Occupation under the 1899/1907 Hague Conventions

1. Historical Background

The First Hague Peace Conference convened in 1899 aspired, *inter alia*, the revision of the Brussels Project of 1874. As stated by Graber, the adopted *Convention (II) with Respect to the Laws and Customs of War on Land* and its annexed *Regulations Respecting the Laws and*

19 Article 41 Oxford Manual.

20 Article 42 Oxford Manual.

21 Article 6 Oxford Manual.

22 See Graber, *The Development...*, at p. 54-58.

Customs of War on Land (hereafter: 1899 Hague Regulations) generally followed the rules laid down in the Brussels Project of 1874. As a consequence of this interlinkage “the discussions and controversies arising during the formulation of the code parallel those at Brussels”.²³ Significantly, ambiguous or unsettled aspects of belligerent occupation could not be settled over the twenty-five year period since the Brussels Project. The concept of belligerent occupation adopted in The Hague in 1899 differs only slightly from the one of the Brussels Project.²⁴ Although the delegates discussed several proposals to revise the definition, they eventually preferred the text of the Brussels Project.²⁵ While the ratifying States were obliged to “issue instructions to their armed land forces, which shall be in conformity with the [1899 Hague Regulations]”,²⁶ many failed or did so inadequately.²⁷

In 1907 the Second Peace Conference was held in The Hague, representing virtually the entire civilised world.²⁸ Its purpose was to revise the 1899 Hague Regulations by clarifying or amending points of detail.²⁹ The provisions on belligerent occupation, however, remained largely unchanged. Particularly the definition of belligerent occupation remained undisputed at the Second Peace Conference and hence the *Regulations Respecting the Laws and Customs of War on Land* (hereafter: the 1907 Hague Regulations) annexed to *Convention (IV) Respecting the Laws and Customs of War on Land* brought no clarification in that respect.³⁰

The development of the definition and nature of belligerent occupation thus underwent no noticeable change and remained as vague as thirty-five years earlier. It should also be noted that the concept of occupation as set out in the 1907 Hague Regulations was formulated against the backdrop of the confrontations and battles of the big Powers of the 19th century and the Franco-Prussian War of 1870, in particular.³¹ At that time, war was conducted between governments and their armies, and as a consequence, civilians were usually kept out

23 Ibid., at p. 32.

24 For the difference regarding the nature of belligerent occupation compare Article 2 of the 1874 Brussels Project and Article 43 of the 1899 Hague Regulations.

25 Graber, *The Development...*, at p. 61.

26 Article 1 Convention (II) with Respect to the Laws and Customs of War on Land of 1899.

27 See Graber, *The Development...*, at p. 33.

28 Ibid.

29 Ibid.

30 Ibid., at p. 61.

31 Kolb, Robert; Vité, Sylvain, *Le droit de l'occupation militaire: Perspectives historiques et enjeux juridiques actuels* (Bruxelles: Bruylant, 2009), [cited: Kolb/Vité, *Le droit...*], at p. 66.

of war.³² Individuals were not yet subjects of international law and while their treatment remained largely within the exclusive domain of States, the period leading to the 1899/1907 Hague Regulations was also characterised by a trend to limit the competences of the occupying power and towards a greater protection of the inhabitants of the occupied territory.³³ Still, the increased recognition of individuals as participants and subjects of international law has occurred to a great extent through human rights law in the 20th century.³⁴ The 1907 Hague Regulations therefore primarily regulated the conduct between the armed forces and endeavoured to serve State interests.³⁵

2. The Notion of Belligerent Occupation in the 1907 Hague Regulations

Under the heading “Military Authority over the Territory of the Hostile State”, Article 42 of the 1907 Hague Regulation puts forward an apparently simple test as to what constitutes belligerent occupation:

“Territory is considered occupied when it is actually placed under the authority of the hostile army.
The occupation extends only to the territory where such authority has been established and can be exercised.”³⁶

The 1907 Hague Regulations emphasise that the existence of belligerent occupation is based on objective circumstances, that is to say that territory (and its population) is “actually” placed under the authority of the enemy army. The fundamental element of a state of belligerent occupation hence lies within the notion of effective control *over the territory* of a State by the hostile armed forces of another State. Belligerent occupation within the meaning of the 1907 Hague Regulations hence is contingent upon the principle of effectiveness.³⁷

For a state of belligerent occupation to exist it is not necessary that the whole territory of a belligerent State must be occupied. The second paragraph of Article 42 of the 1907 Hague

32 Benvenisti, Eyal, *The International Law of Occupation*, With a new preface by the author (Princeton and Oxford: Princeton University Press, second printing 2004), at p. 27.

33 See Kolb/Vité, *Le droit...*, at p. 27.

34 See Shaw, Malcolm N., *International Law*, 6th edition, (Cambridge: University Press, 2008), at pp. 45 to 46 and 257 to 258.

35 Benvenisti, *The International...*, pp. 99 – 100; see also Kolb/Vité, *Le droit...*, at p. 116.

36 Article 42 of the 1907 Hague Regulations.

37 See Kolb/Vité, *Le droit...*, at p. 63.

Regulations stipulates that belligerent occupation may be limited to a relatively small part of the enemy's territory. The article neither requires a minimal (anticipated) duration of the occupation. As a result, even a relatively short period of a foreign presence might lead to a state of belligerent occupation.

3. The Beginning of Belligerent Occupation according to the 1907 Hague Regulations

3.1 Elements of Belligerent Occupation

As seen above, the concept of belligerent occupation as set out in the 1907 Hague Regulations is based on the principle of effectiveness. From the definition of belligerent occupation one can deduce that it must be “both actual and effective”.³⁸ The UK Manual, for instance, puts forward a two-pronged test indicating the existence of belligerent occupation:

“first, that the former government has been rendered incapable of publicly exercising its authority in that area; and, secondly, that the occupying power is in a position to substitute its own authority for that of the former government.”³⁹

The two elements required by the 1907 Hague Regulations for belligerent occupation are a) effective control over the enemy territory and b) the establishment of authority.⁴⁰

a) Effective Control

The constitutive element of belligerent occupation is effective control. For belligerent occupation to be established, the armed forces that have invaded the enemy's territory must have gained, as a matter of fact, the control over the area concerned through their physical presence.⁴¹ Whether or not physical presence of troops is actually required to establish and maintain belligerent occupation has been subject of much controversy since the Brussels

38 Department of the Army of the United States of America, FM 27.10: *The Law of Land Warfare* (Washington, 1956) [cited: US Army Field Manual], at para. 356.

39 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: University Press, 2004) [cited: UK Manual], at para. 11.3; see also US Army Field Manual, at para. 355.

40 See Article 42 of the 1907 Hague Regulations.

41 Gasser, Hans-Peter, *Protection of the Civilian Population*, in: Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, second edition (Oxford: University Press, 2008), pp. 237 – 324, at p. 274.

Conference of 1874.⁴² The prevailing opinion, however, gives preference to the interpretation that enemy troops must be present on the invaded territory in order to establish a state of belligerent occupation.⁴³ On the other hand, it is also accepted that once a state of belligerent occupation has been established, the permanent stationing of troops is not essential for the maintenance of belligerent occupation, provided that enough troops are available to enforce authority in the area.⁴⁴ The number or kind of troops necessary must be assessed on a case-by-case basis and depends on various considerations.⁴⁵ This conception seems to be consistent with the discussions held at the 1874 Brussels Project,⁴⁶ and was subsequently upheld in the *Hostage Case* in which the American Military Tribunal sitting in Nuremberg held that because the German Armed Forces “could at any time they desired assume physical control of any part of the country” they maintained belligerent occupation of Greece and Yugoslavia even though partisans temporarily controlled parts of these countries.⁴⁷ Similarly, one of the guidelines to determine whether authority has been established put forward by the Trial Chamber of the ICTY in the *Naletilić case*, require that “the occupying power has a sufficient force present, *or the capacity to send troops within a reasonable time to make the authority of the occupying power felt* [emphasis added]”.⁴⁸

Lack of clarity also remains with regard to the object that has to be brought under the effective control of the hostile army and its content. Is it just territory over which authority must be established, or is it something else?⁴⁹ In interpreting the relevant provisions of the 1907 Hague Regulations, particularly Article 43 thereof, Dikker Hupkes concludes, “the government functions of the legitimate authority must be brought under the effective control of the occupant”.⁵⁰ Furthermore, the occupying power would not need to be in control of all government functions but must be, at a minimum, in control of those functions necessary for the enforcement of the authority such as police and military.⁵¹ According to another author,

42 For a detailed description of the arguments see Graber, *The Development...*, at p. 44 onwards.

43 See Gasser, *Protection...*, at p. 274.

44 See Dikker Hupkes, Sander D., *What Constitutes Occupation?: Israel as the occupying power in the Gaza Strip after the Disengagement* (Leiden: Jongbloed, 2008), at p. 21; UK Manual, at para. 11.3.2.

45 See US Army Field Manual, at para. 356.

46 See Graber, *The Development...*, at pp. 44 - 45.

47 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. XI, *The United States of America against Wilhelm List et al.* (The Hostage Case), at p. 56.

48 ICTY, TC, *Prosecutor v. Mladen Naletilić and Vinko Martinović* (Judgement), IT-98-34-T (31 March 2003), at para. 217.

49 See Article 42 1907 Hague Regulations.

50 Dikker Hupkes, *What Constitutes...*, at p. 23.

51 *Ibid.*, at p. 24.

the control over the invaded territory must be such as to enable the armed forces to “assume the responsibility of an occupying power”, which would include “the ability to issue directives to the inhabitants [...] and to enforce their respect”.⁵²

Indeed, the *substitution of the occupying power’s authority* for that of the legitimate government seems to be the most relied upon criterion to assess whether foreign troops occupy the invaded territory in the sense of Article 42 of the 1907 Hague Regulations.⁵³ In the *Armed Activities Case*, the International Court of Justice (hereafter: ICJ) had to “satisfy itself that the Ugandan armed forces in the DRC [Democratic Republic of the Congo] were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government”.⁵⁴ On the basis that a Ugandan commander created a new province and appointed its Governor, the ICJ found that Ugandan troops effectively controlled the Ituri region and that Uganda hence was an occupying power there.⁵⁵ By contrast, other areas where Ugandan troops were stationed, such as the Kisangani Airport under their “administrative control”, did not classify as belligerent occupation in the sense of Article 42 of the 1907 Hague Regulations.⁵⁶

b) *Military Authority*

Belligerent occupation as understood in the 1907 Hague Regulations calls for the establishment of military authority. This can be deduced from the second paragraph of Article 42 and the title of Section III of the 1907 Hague Regulations.⁵⁷ At the time when the 1907 Hague Regulations were adopted, it was assumed that the occupant, once having gained control, would establish its authority by introducing “a system of direct administration”.⁵⁸ Roberts also concludes that “an open and identifiable command structure is thus a central feature of the Hague definition of military occupation”.⁵⁹ By contrast, the ICJ held in the *Armed Activities Case* that the establishment of a “structured military administration of the

52 Gasser, *Protection...*, at p. 274; see also Federal Ministry of Defence of the Federal Republic of Germany, *Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch*, 1992, available at: <http://www.humanitaeres-voelkerrecht.de/HbZDV15.2.pdf>, [cited: German Manual], at para. 527.

53 See ICTY, *Naletilić case*, supra note 48, at para. 217; UK Manual, at para. 11.3.

54 ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgement of 19 December 2005, at para. 173.

55 *Ibid.*, at paras. 175 - 176.

56 *Ibid.*, at para. 177.

57 The title reads: “Military Authority over the territory of the hostile state”.

58 Eyal Benvenisti, *The International...*, at p. 4.

59 Roberts, Adam, *What is a Military Occupation?*, in: *The British Year Book of International Law*, Vol. 55, 1984 (Oxford: Clarendon Press, 1985), pp. 249 - 305, at p. 252.

territory occupied” would not be relevant in order to decide whether or not Uganda was an occupying power.⁶⁰ Instead, the Court contented itself with examining whether “authority was in fact established and exercised”.⁶¹ Indeed, the practice of establishing a direct administration seems to have become rather the exception but a failure to do so will not free an occupying power to comply with the rules on occupation.⁶² On the other hand, the establishment of an occupation administration certainly would facilitate the compliance with the duties of an occupying power.⁶³

3.2 Distinction between invasion and belligerent occupation

The traditional and majoritarian conception of a state of belligerent occupation is founded on a strict distinction between invasion and occupation.⁶⁴ The term “invasion” depicts the phase in which a hostile army penetrates the territory of an enemy State.⁶⁵ According to this conception, “authority”, and thus belligerent occupation, as required by the 1907 Hague Regulations cannot be established by the mere presence of armed forces on the territory of a hostile State.⁶⁶ For belligerent occupation to be established, an additional condition must be realised.⁶⁷ After World War II the American Military Tribunal in the *Hostages* trial took the view that:

“Whether an invasion has developed into an occupation is a question of fact. The term invasion implies a military operation while occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant’s control is maintained and that of the civil government eliminated, the area will be said to be occupied.”⁶⁸

60 ICJ, *Armed Activities Case*, supra note 54, at para. 173.

61 Ibid.; note that Article 42 of the 1907 Hague Regulations only state that “occupation extends only to the territory where such authority has been established and can be exercised [emphasis added]”.

62 Benvenisti, *The International...*, at p. 5.

63 See Dikker Hupkes, *What Constitutes...*, at p. 20.

64 See Kolb/Vité, *Le droit...*, at p. 137.

65 Ibid., at p. 138.

66 UK Manual, at para. 11.3.2.

67 For the different elements of belligerent occupation see above at p. 10 onwards.

68 American Military Tribunal, *The Hostage Case*, supra note 47, at pp. 55 - 56.

The US Army Field Manual, for instance, describes the difference between invasion and occupation as follows:

“If resistance is offered, the state of invasion within any portion of a belligerent’s territory corresponds with the period of resistance. If the invasion is unresisted, the state of invasion lasts only until the invader has taken firm control of the area with the intention of holding it. Invasion is not necessarily occupation, although occupation is normally preceded by invasion and may frequently coincide with it. [...] Occupation, on the other hand, is *invasion plus taking firm possession* of enemy territory for the purpose of holding it [emphasis added].”⁶⁹

Similarly, in the *Naletilić* case the Trial Chamber of the ICTY proposed guidelines providing assistance to determine whether the occupying power has actually established the authority required by the 1907 Hague Regulations for a state of belligerent occupation.⁷⁰ The Trial Chamber highlighted that “battle areas may not be considered as occupied territory” since one of guideline would be the surrender, defeat or withdrawal of the enemy’s forces.⁷¹ On the other hand, once a state of belligerent occupation has been established, “sporadic local resistance, even successful,” does not end or negate it.⁷²

A state of belligerent occupation is thus interpreted as “a transitional period following invasion and preceding the agreement on the cessation of the hostilities”.⁷³ According to this “traditional” conception, invasion and belligerent occupation are considered as two distinct categories calling for two distinct sets of rules.

Granted, resistance by armed forces of the invaded country is a strong indication that the authority has not yet fully passed to the invading forces. Yet, one problem of a strict distinction between invasion and belligerent occupation is that the transition from one concept to the other may be gradual and without a clear dividing line. The US Army Field Manual hence acknowledges itself that belligerent occupation “[...] may frequently coincide with

69 US Army Field Manual, at para. 352.

70 See ICTY, *Naletilić case*, supra note 48, at para. 217.

71 Ibid.

72 Ibid.

73 Ibid., at para. 214.

[invasion]”.⁷⁴ Furthermore, once a state of belligerent occupation has been established, occupation and hostilities as a result of local resistance may co-exist.⁷⁵ In other words, a state of belligerent occupation does not exclude the parallel applicability of the rules governing hostilities. The possibility of a parallel application of the law of belligerent occupation and the rules governing the conduct of hostilities further complicates the determination of the exact point in time when invasion ends and a state of belligerent occupation begins.

III. Belligerent occupation under the Fourth Geneva Convention of 1949

1. Historical Background

The First World War already made clear that the few provisions on civilians in the 1907 Hague Regulations were inadequate for their protection. This prompted the International Committee of the Red Cross to propose a project dealing with the fate of civilians and servicemen at the same time. Yet, against the backdrop of a “young” League of Nations engaged in establishing eternal peace, the Powers considered that the creation of a convention dealing with the status of civilians in wartime would be inappropriate. Consequently, the Diplomatic Conference of 1929 discussed the treatment of servicemen only.⁷⁶ A draft of the “Civilian Convention” still was adopted in 1934 on the occasion of the International Conference of the Red Cross in Tokyo. However, the outbreak of the Second World War prevented the convening of a Diplomatic Conference and thus frustrated the conclusion of an international convention. Particularly civilians in occupied territory were lacking protection and faced horrendous practices; crowds of civilians have been deported to faraway camps where they went through incredible suffering and many among them met with a ghastly death. Ironically enough, the nightmare of World War II should become the birth of the Geneva Conventions as we know and apply them until today. The Diplomatic Conference held at Geneva in 1949 resulted in three revised Conventions⁷⁷ and the long awaited *Geneva*

74 US Army Field Manual, at para. 352.

75 See below at p. 24.

76 Pictet, Jean S., *La formation du droit international humanitaire*, in: IRRC, Vol. 84, N° 846 (2002), pp. 321 - 344 [cited: Pictet, *La formation...*], at p. 324.

77 The current *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*; the *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*; and the *Geneva Convention (III) relative to the Treatment of Prisoners of War*.

Convention (IV) Relative to the Protection of Civilian Persons in Time of War (hereafter: Fourth Geneva Convention).⁷⁸

The 1949 Geneva Conventions have revolutionised contemporary international humanitarian law, particularly with reference to the treatment of civilians. In addition, the Fourth Geneva Convention clearly elaborated the law of occupation. While the 1907 Hague Regulations were intended to regulate relations between States, and hence focused on the rights and duties a State acquires by occupying an enemy territory during war, the Fourth Geneva Convention was concerned with the rights of individuals and puts the emphasis on the protection of civilians in the hands of an enemy power.⁷⁹

2. Application of the Fourth Geneva Convention to Occupied Territories

2.1 Application *ratione materiae*

Although the term “occupation” is mentioned only in the second paragraph of Article 2 common to the 1949 Geneva Conventions, most belligerent occupations are covered by virtue of the first paragraph of the article. According to the latter, the four Geneva Conventions apply in all cases of declared war or armed conflict between two or more High Contracting Parties.⁸⁰ Every belligerent occupation established as a consequence of an armed conflict, that is to say through the conduct of hostilities, or subsequent to a declaration of war is therefore covered by the first paragraph of Article 2 common to the 1949 Geneva Conventions. One landmark advance of the 1949 Geneva Conventions is that they also apply to cases where partial or total occupation meet with no armed resistance.⁸¹ The purpose of the second paragraph is thus solely to underline that the 1949 Geneva Conventions also apply in the special situation that neither hostilities nor a declaration of war have lead to the occupation of the territory of a State.⁸²

78 Pictet, *La Formation...*, at p. 331.

79 See Federal Political Department of Switzerland, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section A (Berne) [cited: Final Record, Vol. II], statement of Mr. Pilloud (ICRC) at p. 675; Kolb/Vité, *Le droit...*, at p. 68.

80 Article 2(1) of the Fourth Geneva Convention.

81 See Article 2(2) of the Fourth Geneva Convention.

82 Pictet, *Commentary...*, Article 2, at p. 21.

2.2 Application *ratione personae*

a) *General Aspects*

Most provisions of the Fourth Geneva Convention governing the treatment of civilians are contingent upon the notion of “protected persons”. Civilians not falling within that category still benefit from the protection of the general rules protecting the “populations against certain consequences of war”⁸³ and other fundamental guarantees,⁸⁴ but almost exclusively protected persons qualify for “special” treatment in accordance with the rules on belligerent occupation laid down in the Fourth Geneva Convention. The legal concept of “protected persons” was introduced by the 1949 Geneva Conventions. Before, the 1907 Hague Regulations were more concerned with governing the “military authority over the territory of the hostile State”⁸⁵ and thus reflected the classical inter-State relationship of international law. Therefore, rules directly governing the treatment of individuals are rather scarce. On the other hand, the 1907 Hague Regulations did not distinguish between different categories of civilians; they simply addressed “inhabitants of occupied territory” or the “population” in general, and distinguished between private and State property.⁸⁶ With the adoption of the Fourth Geneva Convention the focus shifted, as its title suggests, from the inter-State relationship to “the protection of civilian persons in time of war”.⁸⁷ This can be seen as convergence with human rights law and the Fourth Geneva Convention indeed protects the civilian individuals against arbitrary action by the enemy.⁸⁸

83 See Articles 13 to 26 of the Fourth Geneva Convention.

84 Article 3 common to the 1949 Geneva Conventions; Article 75 of the 1977 Additional Protocol I.

85 Title of Section III of the 1907 Hague Regulations.

86 See Articles 44, 45, 46, 50, 52, 53 and 56 of the 1907 Hague Regulations.

87 See Title of the Fourth Geneva Convention.

88 See Kolb/Vité, *Le droit...*, at p. 118; Pictet, *Commentary...*, Title of the Convention, at p. 10.

b) *Definition of Protected Persons*

In accordance with Article 4 of the Fourth Geneva Convention protected persons are:

“those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.⁸⁹

Excluded from the “protected persons” system of the Fourth Geneva Convention are individuals that are covered by one of the three other Geneva Conventions,⁹⁰ and, in case of normal diplomatic relations with the State in which hands they are, nationals of a co-belligerent State in occupied or allied territory and nationals of a neutral State in the territory of a belligerent State.⁹¹

Furthermore, the persons satisfying this nationality-test must find themselves “in the hands of a Party to the conflict or Occupying Power”.⁹² It is, therefore, crucial to clarify this expression. Note that the French text refers to persons who find themselves in the power (“*au pouvoir*”) of a party to the conflict or occupying power. Being “in the hands” of the enemy suggests that a party to the conflict exercises control over the person concerned.⁹³ This is, without any doubt, the case when a person physically, or directly, is in the power of the enemy’s forces or authorities. Take arrested people or individuals working for the occupying power as an example. Yet, as the Commentary stresses, the expression “in the hands of” must be understood in “an extremely general sense”.⁹⁴ Therefore, not only persons physically in the power of the enemy are protected persons; it suffices that the person is present in the territory of a party to the conflict or in occupied territory.⁹⁵ Neither is it necessary that the power has actually exercised authority over the protected person; all that is required is that the person comes within the sphere of control by the occupying power.⁹⁶ Otherwise, argue some authors, only detained or interned civilians would benefit from the protection of the Fourth Geneva

89 Article 4(1) of the Fourth Geneva Convention.

90 See Article 4(4) of the Fourth Geneva Convention.

91 See Article 4(2) of the Fourth Geneva Convention.

92 See Article 4(1) of the Fourth Geneva Convention.

93 Dikker Hupkes, *What Constitutes...*, at p. 30.

94 Pictet, *Commentary...*, Article 4, at p. 47.

95 *Ibid.*

96 *Ibid.*

Convention and, as a result, the latter would be partly deprived of its protective content.⁹⁷ This indirect form of being in the power of the enemy has also been adopted in recent case law.⁹⁸ According to one author the necessary control over the person has been established “when the physical, economic and social wellbeing of an individual are in the hands of a party to the conflict”.⁹⁹

Finally, the expression “at any given moment and in any manner whatsoever”¹⁰⁰ underlines that the manner in which a person falls into the hands of the enemy does not matter. The purpose of the expression is to cover “all situations and cases”.¹⁰¹

However, the scope of Article 4 of the Fourth Geneva Convention is not unlimited. No matter how broad the expression “in the hands of” may be interpreted, the article is certainly not designed to protect civilians from the effects of hostilities.¹⁰² For the latter, one has to consult the rules concerning the conduct of hostilities set out in the Hague Conventions of 1907 and the 1977 Additional Protocol I.

One can thus conclude that as soon an adversary has control over person or group of persons in accordance with Article 4 of the Fourth Geneva Convention the provisions relative to occupied territories are applicable

2.3 Application *ratione temporis* - Does the Fourth Geneva Convention redefine the beginning of belligerent occupation?

Because the 1949 Geneva Conventions do not contain a definition of belligerent occupation the question arises when the provisions relating to occupied territories laid down in the Fourth Geneva Convention begin to apply. It can be maintained that these rules apply only once a state of belligerent occupation in accordance with Article 42 of the 1907 Hague Regulations has been established. On the other hand the concept of protected persons is at the heart of the

97 See Kolb/Vité, *Le droit...*, at p. 122.

98 ICTY, TC, *Prosecutor v. Duško Tadić* (Opinion and Judgment), IT-94-I-T (7 May 1997), at para. 579.

99 Dikker Hupkes, *What Constitutes...*, at p. 30.

100 See Article 4(1) of the Fourth Geneva Convention..

101 Pictet, *Commentary...*, Article 4 at p. 47.

102 *Ibid.*, Title of the Convention, at p. 10.

argument often put forward in favour of a broader scope of application with regard to the provisions relating to occupied territories.

a) Reliance upon the 1907 Hague Regulations?

One way to deal with the lack of a definition of occupation in the Fourth Geneva Convention would be to rely upon Article 42 of the 1907 Hague Regulations as the key to the applicability of Section III of the Fourth Geneva Convention. In other words, those provisions of the Fourth Geneva Convention governing belligerent occupation are only applicable once the criteria of Article 42 of the 1907 Hague Regulations are met.¹⁰³ It can be argued that this would be in line with an interpretation based on the ordinary meaning of a term in its context,¹⁰⁴ and with Article 154 of the Fourth Geneva Convention, which states that the convention supplements in part the 1907 Hague Regulations.¹⁰⁵ Furthermore, the 1949 Geneva Conventions themselves seem to distinguish between invasion and occupation.¹⁰⁶ It should also be noted that many military manuals apply the rules on belligerent occupation only once a state of belligerent occupation within the meaning of Article 42 of the 1907 Hague Regulations has been established.¹⁰⁷

However, in keeping the object and purpose of the Fourth Geneva Convention in mind, that is the protection of civilians, it seems that the beginning of belligerent occupation as set out in the 1907 Hague Regulations is too narrow. Besides the problem that invasion and belligerent occupation may be difficult to distinguish,¹⁰⁸ such a distinction may also result in a diminution in protection of the civilian population. As long as the invading army has not, or is not willing, to establish and affirm its control over the foreign territory the material conditions for the application of the law of belligerent occupation and its detailed protective provisions would not be satisfied. It is argued, however, that during this intermediate phase no gap of protection would exist because until a state of belligerent occupation is established the local population still is protected by the rules governing the conduct of hostilities and the Articles 13 to 26 of the Fourth Geneva Convention offering general protection against certain

103 See above at p. 10 onwards.

104 See Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969.

105 See Article 154 of the Fourth Geneva Convention.

106 See Article 18(2) of the First Geneva Convention.

107 See UK Manual, at para. 11.2 onwards, US Army Field Manual, at para. 352; Department of National Defence of Canada, *Law of Armed Conflict at the Operational and Tactical Level* (B-GJ-005-104/FP-021), August 2001, available at: <http://www.cfd-cdf.forces.gc.ca/sites/page-eng.asp?page=3481>, [cited: Canadian Manual] at para. 1203; German Manual, at para. 526 onwards.

108 See above at p. 13 onwards.

consequences of war.¹⁰⁹ Yet, it is particularly in cases where the invading troops interact with the local population, or take administrative measures against them, that these rules do not offer adequate protection. Moreover, the fundamental guarantees laid down in Articles 27 to 34 of the Fourth Geneva Convention would not apply to people in invaded territory if one followed a strict distinction between invasion and belligerent occupation.¹¹⁰ According to the *travaux préparatoires*, Part III of the Fourth Geneva Convention addresses “two situations presenting fundamental differences [...]: that of aliens in the territory of a belligerent State and that of the population – national or alien – resident in a country occupied by the enemy”.¹¹¹ Section I of Part III of the Fourth Geneva Convention (Articles 27 to 34) accordingly contains the rules common to these two situations only. A strict distinction between invasion and belligerent occupation would create an unacceptable gap of protection for some people at a phase when they are already extremely vulnerable,¹¹² especially considering that they do not address, for instance, the internment or deportations and transfers of protected persons. Therefore the drafters of the Fourth Geneva Convention must have assumed that every protected person finds himself or herself either in the territory of an enemy State (as an alien) or in occupied territories.

In order to overcome probable gaps of protection the US Army Field Manual proposes that the rules of the law of occupation should be observed, as far as possible, already before a situation amounts to belligerent occupation proper, that is to say, before the material criteria of application of the law of occupation have been realised.¹¹³ The US Army Field Manual envisages this *de facto* application of the law of belligerent occupation for situations where troops are passing through enemy territory and even on the battlefield.¹¹⁴ Although this is a positive step in overcoming legal and protective gaps caused by a strict distinction between invasion and belligerent occupation, this approach leaves the applicability of the law of occupation unpredictable. The beginning as well as the decision regarding to which rules apply would depend purely upon the will of the invading force.¹¹⁵

109 See Gasser, *Protection...*, at p. 176 onwards.

110 Contrary: Kolb, Robert, *Ius in bello: Le droit international des conflits armés*, second edition (Basle etc.: Helbing Lichtenhahn, 2009), at pp. 366 to 367; Dörmann, Knut; Colassis, Laurent, *International Humanitarian Law in the Iraq Conflict*, in: GYIL, Vol. 47, 2004 (Berlin: Duncker & Humblot, 2005), pp. 293 – 342, at p. 300 who seem to accept the application of Articles 27 to 34 of the Fourth Geneva Convention at all times.

111 Final Record, Vol. II, at p. 821.

112 For a further analysis see below Part B, at p. 38 onwards.

113 US Army Field Manual, at para. 352.

114 *Ibid.*

115 Kolb/Vité, *Le droit...*, at pp. 141 - 142.

b) *The functional beginning of belligerent occupation*

As seen above, civilians would benefit of less protection during the invasion period than the one they have once occupation is established. With regard to some provisions a gap in protection would be created.¹¹⁶ It is thus possible that the Fourth Geneva Convention has modified the understanding of what constitutes belligerent occupation or follows another regime of applicability.

In conjunction with Articles 2 and 6 of the Fourth Geneva Convention the concept of protected persons elaborated in Article 4 thereof is the cornerstone of the functional beginning of belligerent occupation.¹¹⁷ This concept has been developed by the International Committee of the Red Cross (ICRC) in its Commentary on the Fourth Geneva Convention and advocates a wider meaning of the term “occupation” in the Fourth Geneva Convention than it has in the 1907 Hague Regulations.¹¹⁸ The Commentary draws attention to the fact that:

“[s]o far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 [of the 1907 Hague Regulations] referred to above. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation.”¹¹⁹

According to the first paragraph of Article 6 of the Fourth Geneva Convention the convention applies “from the outset of any conflict or occupation mentioned in Article 2”. As seen above, Article 2 common to the Geneva Conventions defines the cases in which the Geneva Conventions are applicable, that is to say in cases of armed conflict, including subsequent belligerent occupation, and belligerent occupations meeting with no armed resistance. The first paragraph of Article 6 of the Fourth Geneva Convention, on the other hand, sets out the beginning of the application by the parties to the conflict. From that moment onwards the Fourth Geneva Convention applies to all protected persons.¹²⁰ The expression “from the

116 See below, Part B, at p. 38 onwards.

117 See Articles 2(1) and 6(1) of the Fourth Geneva Convention.

118 See Pictet, *Commentary...*, Article 6, at p. 60.

119 *Ibid.*

120 See *Ibid.*, at p. 59.

outset”¹²¹ should underline the fact that the Fourth Geneva Convention applies from the first act of violence onwards,¹²² which includes situations in which invading troops do not encounter armed resistance.¹²³ As a consequence, the Fourth Geneva Convention “should be applied as soon as troops are in foreign territory and in contact with the civilian population there”.¹²⁴ The functional approach thus proposes a new understanding of one of the constitutive elements of belligerent occupation,¹²⁵ at least with regard to the applicability of the provisions contained in Section III of Part III of the Fourth Geneva Convention. In contrast to the 1907 Hague Regulations, which required the establishment of effective control over the enemy’s territory, Article 4 of the Fourth Geneva Convention suggests a broader interpretation as to when the rules on occupation set out in the Fourth Geneva Convention apply.¹²⁶

In line with the overall humanitarian character of the 1949 Geneva Conventions the Fourth Geneva Convention generally focuses on the individual,¹²⁷ and grants protection to persons who, “at a given moment and in any manner whatsoever, find themselves [...] in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.¹²⁸ Effective control as understood in the Fourth Geneva Convention would therefore not relate to the territory and its authority but rather to its inhabitants.¹²⁹ In other words, the relationship between an invading power and “protected persons” is, for the functional beginning of belligerent occupation, the determining factor for the application of the provisions in the Fourth Geneva Convention relative to occupied territories. Accordingly, as soon as invading forces actually act in a manner, or enter into relationships with the local population, which are governed in Section III of the Fourth Geneva Convention, the law of belligerent occupation becomes applicable, even though not all elements required by Article 42 of the 1907 Hague Regulations have been fulfilled.¹³⁰ In other words, the fact that in such cases the invading power acts, or is in the position to act, like an occupying power warrants the application of the law of belligerent occupation, even though this transitional stage might not represent a proper

121 Article 6(1) of the Fourth Geneva Convention.

122 See Pictet, *Commentary...*, Article 6, at p. 59.

123 See Article 2(2) of the Fourth Geneva Convention.

124 Pictet, *Commentary...*, Article 6, at p. 59.

125 Kolb/Vité, *Le droit...*, at p. 143.

126 See Dikker Hupkes, *What Constitutes...*, at p. 31.

127 See Kolb/Vité, *Le droit...*, at p. 144.

128 Article 4(1) of the Fourth Geneva Convention.

129 See Dikker Hupkes, *What Constitutes...*, at p. 32.

130 See Kolb/Vité, *Le droit...*, at p. 144.

state of belligerent occupation.¹³¹ This is, at the least, true in so far as individuals are concerned and for the Fourth Geneva Convention.¹³²

This concept developed by the ICRC is called “functional beginning of belligerent occupation” because the provisions of the Fourth Geneva Convention applicable to occupation become applicable in a progressive manner and not *en bloc*. The Fourth Geneva Convention applies by degrees and in correspondence to the contacts between the local population and the enemy troops; some provisions will thus apply immediately, others only at a later stage.¹³³ The functional approach of occupation thus results in a flexible and fluid regime, which perfectly adapts to the complex situations occurring during the usually turbulent and unstable period starting from the invasion of foreign territory.¹³⁴ The duties and rights of an invading power would thus depend upon the kind of contacts the troops have with the local population and upon the powers they exercise.

The author feels to stress already at this point that the functional approach of occupation does not conflict *a priori* with the overall aim of the invading troops, that is to say the overcoming of the enemy.¹³⁵ Once a state of belligerent occupation has been established, occupation and hostilities as a result of local resistance may co-exist. As one author points out, “the law of occupation and the law of hostilities are not mutually exclusive, but may apply in parallel to different activities occurring within the same territory at the same time”.¹³⁶ Consequently, the conduct of hostilities with a view to establish and maintain military control over a territory would be governed by the paradigm of hostilities, while administrative measures adopted in order to maintain public order and life, as well as guaranteeing the security of the occupying forces would be governed by, what the authors calls the paradigm of law enforcement, which includes both the law of belligerent occupation and human rights law.¹³⁷ When the acts of the invading troops relate to hostilities, the law on the conduct of hostilities represents the *lex specialis* and thus prevails over the law of belligerent occupation. As long as active fighting lasts, the relationship of the belligerents is governed by the rules relating to the conduct of

131 See Dinstein, *The International...*, at pp. 41 - 42; conceding that at least some provisions of the Fourth Geneva Convention relating to occupation may apply as soon as a person falls in the hands of the invading army.

132 See Pictet, *Commentary...*, Article 6, at p. 60.

133 Ibid.

134 See Kolb/Vité, *Le droit...*, at p. 146.

135 For the analysis of the feasibility of the functional beginning of belligerent occupation see below Part B, at p. 35 onwards.

136 Melzer, Nils, *Targeted Killing in International Law* (Oxford: University Press, 2008), at p. 157.

137 Ibid.

hostilities. Once combatants or other persons taking a direct part in hostilities are captured or otherwise put *hors de combat* the 1949 Geneva Conventions apply and individuals qualifying as protected persons must be treated accordingly. At the same time, the Geneva Conventions and the provisions on belligerent occupation in particular, govern all other activities carried out by the invading troops on foreign territory. Through the application of the functional beginning of belligerent occupation the distinction between two distinct phases, invasion and belligerent occupation, thus becomes superfluous for at least the Fourth Geneva Convention. Instead, the circumstances of each case determine whether a provision relative to occupied territory or one on the conduct of hostilities applies.

Furthermore, it should be noted that the law of belligerent occupation does not solely restrain the occupant in its dealings with the local population through minimum rules, with most of which any power should easily be able to comply with, but it also leaves the occupant important competencies to deal with the individuals under its authority.¹³⁸ The law of belligerent occupation, for instance, offers the legal basis for the resort to measures related to security requirements or related to military operations.¹³⁹ While these rules are of paramount importance during a state of belligerent occupation, they are even more important if hostilities are ongoing or the security situation is not yet stabilised.¹⁴⁰

3. The Relationship between the Fourth Geneva Convention and the 1907 Hague Regulations

While the Fourth Geneva Convention has taken up some provisions of the 1907 Hague Regulations, others have been omitted or amended. Most prominently, even though Section III of Part III of the Fourth Geneva Convention exclusively deals with occupied territories, Article 42 of the 1907 Hague Regulations defining belligerent occupation and its beginning has not been taken up. As discussed above, the Fourth Geneva Convention follows its own rules of applicability even for the norms relating to occupied territories. This raises the question whether the functional beginning of belligerent occupation also has repercussions on the application of Section III of the 1907 Hague Regulations. The following constellations are thus conceivable:

¹³⁸ Roberts, *What...*, at p. 304.

¹³⁹ See, for instance, Articles 64(1) and 49(2) of the Fourth Geneva Convention respectively.

¹⁴⁰ See Roberts, *What...*, at p. 304.

1. The Fourth Geneva Convention, containing its own (broader) rules of application, is completely independent from the 1907 Hague Regulations and its definition of belligerent occupation. Both instruments follow a different notion of belligerent occupation and both instruments apply independently of each other; or
2. The new and broader rules of application put forward in the Fourth Geneva Convention have *de facto* also enlarged the scope of application of the 1907 Hague Regulations.

According to the Draft Convention approved by the 17th International Red Cross Conference (the Stockholm Draft), the Fourth Geneva Convention should have replaced the 1907 Hague Regulations in respect of matters, which were dealt with in the newer instrument.¹⁴¹ Yet, the plenipotentiaries felt that it would be preferable to adopt a text, which does neither indicate any limitations between the two instruments nor establishes a hierarchy.¹⁴² Instead, they have chosen a text according to which the Fourth Geneva Convention explicitly does not abrogate the 1907 Hague Regulations and instead is supplementary to the latter's Sections II and III relative to hostilities and occupation.¹⁴³ In case of potential divergences the plenipotentiaries envisioned that they "should be settled according to recognized principles of law, in particular according to the rule that a latter law superseded an earlier one".¹⁴⁴ This entails several interesting implications. First, since the Geneva Conventions follow their own rules of applicability, the 1907 Hague Regulations do not directly influence the application of the former.¹⁴⁵ Second, in accordance with the principle of *lex posterior derogat legi priori*, the provisions of the 1907 Hague Regulations remain applicable to the extent that they have not been amended or elaborated in the Fourth Geneva Convention.¹⁴⁶ In other words, the Fourth Geneva Convention derogates provisions of the 1907 Hague Regulations only to the extent that they have been stated differently or more precisely in the younger text. The Fourth Geneva Convention has taken up most provisions of the 1907 Hague Regulations concerning the treatment of civilians in time of war in one way or another. With a few exceptions, the new provisions of the Fourth Geneva Convention have thus "entirely replaced the 1907

141 See Article 135 of the Draft Convention for the Protection of Civilian Persons in Time of War, as approved by the 17th International Red Cross Conference.

142 See Final Record, Vol. II, at pp. 787 and 846.

143 See Article 154 of the Fourth Geneva Convention.

144 Final Record, Vol. II, at p. 787.

145 See Dikker Hupkes, *What Constitutes...*, at p. 30.

146 See Kolb/Vité, *Le droit...*, at p. 70.

Hague Regulations”.¹⁴⁷ With regard to the prohibition of pillage,¹⁴⁸ for instance, the Fourth Geneva Convention omits the term “formally”, appearing in the text of Article 47 of the 1907 Hague Regulations in order to underline the absoluteness of the prohibition.¹⁴⁹ Similarly, the Fourth Geneva Convention reinforced the prohibition of coercion¹⁵⁰ by outlawing all forms of coercion no matter for what purpose.¹⁵¹ The cases where certain provisions have been completely omitted, on the other hand, raise more challenging questions as to the relationship between the two instruments. Kolb and Vité propose that even in case that provisions of the 1907 Hague Regulations do not appear in one way or another in the Fourth Geneva Convention, the former must be interpreted and, if necessary, modified in accordance with the new system of international humanitarian law of the latter.¹⁵² With regard to Article 42 of the 1907 Hague Regulations they advocate that the provision “*doit dès lors être compris à la lumière des dispositions correspondantes de la Convention*”,¹⁵³ the case notably of Article 2 common to the 1949 Geneva Conventions, which has extended the material scope of applicability of the 1907 Hague Regulations by way of subsequent practice. If States complied with the functional beginning of belligerent occupation, and hence would accept through subsequent practice the broader scope of application for the provisions relating to belligerent occupation of the Fourth Geneva Convention, then this should consequently also enlarge the application of the 1907 Hague Regulations.¹⁵⁴

IV. Examples of recent case law dealing with the definition and beginning of belligerent occupation

1. ICJ, Armed Activities Case (2005)

In the *Case Concerning Armed Activities on the Territory of the Congo* the ICJ adjudicated, *inter alia*, on the issue of belligerent occupation.¹⁵⁵ The Democratic Republic of the Congo asserted that Ugandan troops occupied, following attacks in border regions of eastern Congo

147 Pictet, *Commentary...*, Article 154 at p. 614.

148 See Article 33(2) of the Fourth Geneva Convention; Articles 28 and 47 of the 1907 Hague Regulations.

149 See Final Record, Vol. II, at p. 823.

150 See Article 44 of the 1907 Hague Regulations; Article 31 of the Fourth Geneva Convention.

151 See Pictet, *Commentary...*, Article 31, at pp. 219 - 220.

152 Kolb/Vité, *Le droit...*, at p. 70.

153 *Ibid.*

154 Note that many military manuals do not adopt the functional beginning of belligerent occupation; see above p. 20.

155 ICJ, *Armed Activities case*, supra note 54, at paras. 166 - 180.

between 7 and 8 August 1998, several provinces and violated provisions of the 1907 Hague Regulations and the Fourth Geneva Convention relating to occupied territory.¹⁵⁶ In order to determine whether or not Uganda was an occupying power in the parts of the Congolese territory where its troops were present, the ICJ referred to the definition of belligerent occupation as set out in Article 42 of the 1907 Hague Regulations.¹⁵⁷ It required that the authority of the hostile army “was in fact established *and exercised* by the intervening State in the areas in question [emphasis added]”.¹⁵⁸ The ICJ hence endorsed the view that the law of belligerent occupation as set out in the 1907 Hague Regulations and the Fourth Geneva Convention applies only once a state of occupation within the meaning of Article 42 of the 1907 Hague Regulations has been established. Furthermore, it would seem that the ICJ applied an even more restrictive test, as it not only required the establishment of authority but also that the latter actually is being exercised. This seems to be contrary to the text of Article 42 of the 1907 Hague Regulations, which states “occupation extends only to the territory where such authority has been established and *can* be exercised [emphasis added]”.¹⁵⁹

While the ICJ in the present case was convinced that Uganda established and exercised authority in Ituri district as an occupying Power,¹⁶⁰ it concluded that the DRC had not provided specific evidence “to show that authority was exercised by Ugandan armed forces in any areas other than Ituri”.¹⁶¹ Accordingly, the ICJ deemed the presence of Ugandan troops at Kisangani Airport, where Uganda admittedly exercised “administrative control”, as insufficient to be characterised as a state of belligerent occupation.¹⁶²

2. ICTY, *Naletilić Case* (2003)

The Trial Chamber of the ICTY recently dealt with the definition and the beginning of belligerent occupation in the *Prosecutor v. Mladen Naletilić and Vinko Martinović*. Amongst others, the Trial Chamber was confronted with cases of forced transfers and deportations, forced labour and wanton destruction. These were taking place following the attacks of the

156 Ibid., at para. 167.

157 Ibid., at para. 172.

158 Ibid., at para. 173.

159 See Article 42(2) of the 1907 Hague Regulations.

160 ICJ, *Armed Activities case*, supra note 54, at para. 176.

161 Ibid., at para. 177.

162 Ibid.

Croatian Defence Council (HVO) on the villages of Sovići and Doljani, the city of Mostar and the village of Raštani between 17 April 1993 and January 1994.

Given the absence of a definition of belligerent occupation in the Fourth Geneva Convention the Trial Chamber concluded that one has to turn to the 1907 Hague Regulations and endorsed the definition set out in Article 42 of the latter.¹⁶³ The Trial Chamber further held that “[o]ccupation is defined as a transitional period following invasion and preceding the agreement on the cessation of the hostilities” and hence endorsed the traditional distinction between invasion and belligerent occupation as described above.¹⁶⁴

While the Trial Chamber adopted the traditional understanding of the beginning of belligerent occupation, it also accepted, in referring to the Commentary of the Fourth Geneva Convention, “that the application of the law of occupation to the civilian population differs from its application under Article 42 of the 1907 Hague Regulations”.¹⁶⁵ The Trial Chamber held that, as far as “protected persons” are concerned, a state of occupation existed upon their falling into “the hands of the occupying power”¹⁶⁶ and “that the application of the law of occupation as it effects ‘individuals’ as civilians protected under Geneva Convention IV does not require that the occupying power have actual authority”.¹⁶⁷ It concluded that this would hold true “regardless of the stage of hostilities” and that there would be “no further need to establish that an actual state of occupation as defined under Article 42 of the 1907 Hague Regulations existed”.¹⁶⁸

The Trial Chamber thus followed the functional beginning of occupation as far as individuals are concerned. As a result, the Trial Chamber ended up with two legal tests and notions of occupations: The functional beginning of belligerent occupation for dealings with individuals and the requirements on a state of belligerent occupation as defined under Article 42 of the 1907 Hague Regulations for dealings “with property and other matters”.¹⁶⁹

163 ICTY, *Naletilić case*, supra note 48, at paras. 215 and 216.

164 Ibid., at para. 214.

165 Ibid., at para. 219.

166 See. Article 4 of the Fourth Geneva Convention.

167 ICTY, *Naletilić case*, supra note 48, at para. 221.

168 ICTY, *Naletilić case*, supra note 48, at para. 222.

169 Ibid.

3. Permanent Court of Arbitration, Eritrea-Ethiopia Claims Commission (2004)

In accordance with Article 5 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, done at Algiers on the 12 December 2000 (hereafter: December Agreement) the Eritrea-Ethiopia Claims Commission (the Commission) had to adjudicate claims for loss, damage or injury that were related to the conflict between the two States and resulted from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.¹⁷⁰

The two parties disagreed, *inter alia*, on whether the provisions of the Fourth Geneva Convention relative to occupied territories were applicable to “Eritrean sub-zobas in which Ethiopian armed forces were present only for limited periods, particularly in areas where the troops were passing through on their way to other locations”.¹⁷¹ With reference to paragraphs 351 to 356 of the US Army Field Manual the Commission concluded that:

“[O]n the one hand, clearly an area where combat is ongoing and the attacking forces have not yet established control *cannot normally* be considered occupied within the meaning of the Geneva Conventions of 1949. On the other hand, where combat is not occurring in an area controlled even for just a few days by armed forces of a hostile Power, the Commission believes that the legal rules applicable to occupied territory should apply [emphasis added].”¹⁷²

Later, in dealing with claims related to the Western Front, the Commission found that the Ethiopian military presence would generally have been more transitory than it was on the Central Front and clarified that:

“[...] *not all* of the obligations of Section III of Part III of Geneva Convention IV (the section that deals with occupied territories) can reasonably be applied to an armed force anticipating combat and present in an area for only a few days [emphasis added].”¹⁷³

¹⁷⁰ See Article 5(1) of the December Agreement.

¹⁷¹ Eritrea-Ethiopia Claims Commission, *Central Front - Eritrea's Claims 2, 4, 6, 7, 8 & 22* (Partial Award of 28 April 2004), at para. 57.

¹⁷² *Ibid.*

¹⁷³ Eritrea-Ethiopia Claims Commission, *Western Front, Aerial Bombardment and Related Claims - Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26* (Partial Award of 19 December 2005), at para. 27.

The Commission thus seems to advance a compromise between the conservative approach maintained by the ICJ in the *Armed Activities Case* and the ICTY's view held in the *Naletilić case* just mentioned, which largely follows the functional beginning approach. First, for a state of occupation to exist, a certain stabilisation of the situation is necessary and the invading armed forces must have established control; thus generally excluding actual combat zones. Nevertheless, it should be noted that the Commission, in using the adverb “normally”, seems to have been prepared to contemplate special situations where, for instance, the intensity or regularity of contacts with enemy civilians call for protection.¹⁷⁴ Second, in recognising that “not all” obligations of the Fourth Geneva Convention relating to occupied territories could reasonably be applied to a particularly transitory military presence on foreign territory, the Commission accepted that many, or at least some, provisions are already applicable.

Thürer and MacLaren deem, on the one hand, that raiding parties, amongst others, would lack “a sustained, physical presence” and could therefore not be considered to be exercising control necessary for occupation to exist.¹⁷⁵ On the other hand, they seem to take a middle course similar to that of the Eritrea-Ethiopia Claims Commission when they advocate a functional interpretation, “designed to maximize the protection afforded by IHL to all persons during hostilities, even in the invasion phase of the conflict”.¹⁷⁶ Accordingly, belligerent occupation would exist as soon as “a party to a conflict is exercising *some* level of authority over enemy territory”.¹⁷⁷ Given that majoritarian doctrine and practice hardly accept that a state of belligerent occupation can be established as long as active hostilities persist, this last proposition as to the beginning of belligerent occupation may strike a balance between the traditional definition of belligerent occupation and the extensive humanitarian view. Yet, what seems to be a fine compromise at first, turns out to be flawed as well. First, the solution maintained by the Eritrea-Ethiopia Claims Commission creates a legal uncertainty. How many days amounts to “just a few days” necessary to give effect to the law of occupation? It is highly questionable that one can specify the period of time after the cessation of combat necessary for belligerent occupation to be established. Second, this solution creates, like the

174 See Kolb/Vité, *Le droit...*, at p. 148.

175 Thürer, Daniel; MacLaren, Malcolm, “*Ius Post Bellum*” in *Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law?*, in: Dicke, Klaus et al. (eds.), *Weltinnenrecht: Liber amicorum Jost Delbrück* (Berlin: Duncker & Humblot, 2005), at pp. 753 to 782 [cited: Thürer/MacLaren, “*Ius...*], at p. 757.

176 *Ibid.*

177 *Ibid.*

traditional definition of belligerent occupation, a gap in protection; in an intermediate phase the civilian population could not benefit of the protection that that the law of occupation offers. Furthermore, if already a few days suffice to establish a state of occupation, it seems even more doubtful why the protection of the civilian population should not benefit from at least certain provisions of the law of belligerent occupation.¹⁷⁸

V. Conclusion of Part A

While the specific issues regarding the definition of occupation continued to be subject to controversy almost since the Lieber Code, it became apparent that occupation is only of a temporary nature, that the powers of the occupant are limited and that invasion alone should not decide over the future status of a territory. Common to the texts from the Lieber Code to the 1907 Hague Regulations is also the focus on the territorial status and the idea that occupation must be “effective”. The rights and duties emanating from occupation were strongly tied to authority exercised over a definable territory. The predominant point of contention over that period remained whether or not the physical presence of troops on foreign territory was necessary in order to establish effective occupation. Writers at the time also focused on the distinction of invasion *and* occupation.¹⁷⁹ Cessation of resistance, more or less complete, was considered an indication that the legitimate power does not any longer exercise authority and was thus a requirement for the existence of occupation. Otherwise mere invasion would exist.

Graber concluded in her seminal work that, at the beginning of the First World War:

“while there are many factual situations in which all writers would agree that effective occupation exists, there are many other in which the fact of occupation would be in doubt. This uncertainty has serious consequences because it makes it impossible to state with precision at what point *territory* is subject to the laws of belligerent occupation and its people must obey these laws or be liable to severe penalties [emphasis added]”.¹⁸⁰

178 See Kolb/Vité, *Le droit...*, at p. 148.

179 See Graber, *The Development...*, at p. 68.

180 *Ibid.*, at p. 69.

The atrocities of World War II made apparent the insufficiencies of the 1907 Hague Regulations and, at the same time, were a trigger for the adoption of the 1949 Geneva Convention. The latter have revolutionised contemporary international humanitarian law, particularly with reference to the treatment of civilians and they clearly elaborated the law of occupation. Yet, the fact that many provisions of the Fourth Geneva Convention apply explicitly to occupied territories and the lack of an explicit definition of belligerent occupation led to uncertainties as to when these provisions begin to apply. In order to guarantee a protection without any gaps the functional beginning of belligerent occupation was advocated. According to this interpretation the provisions of the Fourth Geneva Convention relative to occupied territories apply from the moment that a protected person finds itself in the hands of the enemy. This holds true for all cases covered by common Article 2 of the 1949 Geneva Conventions, that is to say declared war, international armed conflict and occupations that meet with no armed resistance. A distinction between invasion and a state of belligerent occupation has become superfluous because of the new rules defining the scope of applicability of the Fourth Geneva Convention.

Depending on the relationship between the Fourth Geneva Convention and the 1907 Hague Regulations the functional beginning of belligerent occupation might lead to a distinction between a state of belligerent occupation as defined in Article 42 of the 1907 Hague Regulations and what one could call the “Fourth Geneva Convention-occupation”. The latter, having a lower threshold of application than the former, covers potentially more situations or becomes applicable at an earlier stage than the 1907 Hague Regulations. The Fourth Geneva Convention thus breaks with the traditional definition of occupation. Whether or not the functional approach of occupation has in fact changed the definition of occupation under the 1907 Hague Regulations remains subject of controversy.

Where does all this leave us? For the time being it seems unlikely that situations where provisions (of the Fourth Geneva Convention) relating to occupation apply in accordance with the functional approach can be called occupation proper. Accordingly, the term “occupation” in the narrow sense could only be used in order to denominate situations that fulfil the criteria of Article 42 of the 1907 Hague Regulations. Before that moment, provisions apply in accordance with the functional approach of occupation, without there being a state of occupation. On the other hand, once a state of occupation in the narrow sense has been established the law of belligerent occupation must be applied as a whole.

As Roberts has shown in his seminal paper on military occupation there exist multiple forms of occupation and the law on occupation may be formally applied to them.¹⁸¹ The functional beginning of belligerent occupation, following the rules of applicability as advanced in the Fourth Geneva Convention, remains independent of the classical definition of belligerent occupation set out in the 1907 Hague Regulations, and would as a consequence overcome some uncertainties, controversies and negative connotations that might be attached to the term “occupation”. As a whole, the functional beginning of belligerent occupation seems to result in a more flexible regime, which maximises the protection of protected persons.

181 See Roberts, *What...*, at p. 304.

**Part B: Feasibility of the Application of the Functional Beginning
of Belligerent Occupation**

I. Clauses without independent normative content

1. Responsibilities - Article 29 of the Fourth Geneva Convention

Article 29 of the Fourth Geneva Convention lays down the overall responsibility of a State for the treatment of protected persons, who are in its hands. State responsibility arises when a binding international legal obligation is breached (an internationally wrongful act) and the conduct is attributable to the State responsible.¹⁸² Protected persons are considered to be in the hands of the occupying power when they are present in the occupied territory. Hence, it is not necessary that they be physically in enemy hands.¹⁸³ The functional approach of occupation, however, and the consequent application of the provisions on occupation, is contingent on *de facto* authority or control over persons and, more controversially, objects present in the invaded territory. Once the necessary degree of authority or control has been attained, and hence a given provision of the law of belligerent occupation applies, the principle of State responsibility as set out in Article 29 of the Fourth Geneva Convention consequently must be applicable at the same time.

2. Inviolability of rights - Article 47 of the Fourth Geneva Convention

The primary aim of Article 47 of the Fourth Geneva Convention is to prevent protected persons being deprived of their rights and safeguards laid down in the Fourth Geneva Convention.¹⁸⁴ According to this provision changes introduced into the institutions or government of the occupied territory, agreements or annexation cannot be brought forward to deny the application of the Fourth Geneva Convention in its entirety. The expression “in any case or in any manner whatsoever”¹⁸⁵ clearly underlines the absoluteness of this rule. In order to guarantee its effectiveness, Article 47 of the Fourth Geneva Convention cannot be contingent upon the establishment of occupation in the traditional understanding and should be applied at all times.

Admittedly, Article 47 of a Fourth Geneva Convention generally is of greatest importance only once a part of a State’s territory has been brought under the authority of the hostile army.

182 See Article 2 of the International Law Commission's Articles on State Responsibility.

183 See Dinstein, *The International...*, at p. 57; Pictet, *Commentary...*, at p. 47; ICTY, *Tadić case*, supra note 98, at para. 579.

184 See Article 47 of the Fourth Geneva Convention; Pictet, *Commentary...*, Article 47, at p. 274.

185 Article 47 of the Fourth Geneva Convention.

Yet, a non-application of one of the fundamental principles of the Fourth Geneva Convention, that is to say that agreements with local authorities cannot be to the detriment of protected persons,¹⁸⁶ would produce a gap of protection. By way of a *de jure* annexation, for instance, an *invading power* could abrogate the protection offered in the Fourth Geneva Convention during the invasion phase and hence do what is expressly forbidden for an occupying power. This simply cannot be within the spirit of the Fourth Geneva Convention and thus calls for an application of the functional beginning of belligerent occupation. Moreover, it needs to be stressed that the application of Article 47 of the Fourth Geneva Convention from the beginning of the invasion does not present any burden upon the invading troops since sets out a negative duty.

3. Definition of protected persons - Article 4 of the Fourth Geneva Convention

Article 4 of the Fourth Geneva Convention is, as stated in the Commentary, “the key to the [Fourth Geneva] Convention”.¹⁸⁷ It defines the persons who qualify as “protected persons” of the Fourth Geneva Convention and hence benefit of all its rights and safeguards.¹⁸⁸ As explained above,¹⁸⁹ that article also presents, in combination with Articles 2 and 6 of the Fourth Geneva Convention, the cornerstone of the functional beginning of belligerent occupation. As a logical consequence and in accordance with the wording of the text, individuals that fulfil the qualifications of the second and third paragraph of the article are, from the outset of an armed conflict, protected persons within the meaning of the Fourth Geneva Convention when they fall in the hands of a party to a conflict.

186 See also Article 7(1) of the Fourth Geneva Convention expressing the general rule limiting special agreements between High Contracting Parties, which is reaffirmed in Article 47 of the Fourth Geneva Convention.

187 Pictet, *Commentary...*, Article 4, at p. 45.

188 For a detailed analysis of Article 4 of the Fourth Geneva Convention see above at p. 18 onwards.

189 See above at p. 22 onwards.

II. Core Guarantees Applicable to both the Territories of the Parties to the Conflict and Occupied Territories

With regard to the fundamental guarantees laid down in Articles 27 to 34 of the Fourth Geneva Convention two interpretations seem possible. As argued above,¹⁹⁰ it seems that the drafters distinguished between aliens in the territory of a belligerent State, on the one hand, and the population of an occupied territory, on the other, and that consequently the Articles 27 to 34 of the Fourth Geneva Convention were provisions common to these two situations only.¹⁹¹ Also, the plenipotentiaries must have assumed that every protected person finds itself either in the territory of an enemy State (as an alien) or in occupied territories, because otherwise, as will be seen in this section of the present paper, an unacceptable gap of protection for some people would exist. On the other hand, one can argue that the heading “Provisions common to the territories of the parties to the conflict and to occupied territories”¹⁹² indicates that the articles of Section I of Part III of the Fourth Geneva Convention apply not only in the own territory of a party to the conflict (with regard to aliens) and in occupied territories but also on the territory of another party to the conflict that has been invaded.¹⁹³

Depending on which of the two above-mentioned interpretations one adopts, the potential gap in protection caused through a non-application of the functional beginning of belligerent occupation would vary. If one adopted the latter interpretation that these core guarantees apply to the territories of the parties to a conflict regardless of whether or not a state of occupation has been established, no gap of protection would exist with regard to these core guarantees. The functional beginning of belligerent occupation is, however, of paramount importance to prevent gaps of protection if one follows the interpretation suggested in the *travaux préparatoires*.

Despite overlaps with the next section of this paper, an own section is devoted to these core guarantees.

190 See above at p. 21.

191 Final Record, Vol. II, at p. 821.

192 Heading of Section I of Part III of the Fourth Geneva Convention.

193 See Kolb, *Ius...*, at pp. 366 to 367; Dörmann/Colassis, *International...*, at p. 300, who seem to accept that Articles 27 to 34 of the Fourth Geneva Convention would apply in all situations, including invasion.

1. Treatment: General observations - Article 27 of the Fourth Geneva Convention

Article 27 of the Fourth Geneva Convention is the opening article of Section I of Part III applicable to the territories of the parties to the conflict and to occupied territory. It represents, together with Articles 31 to 34 of the Fourth Geneva Convention, sort of a mini human rights convention in expressing fundamental rights of protected persons.¹⁹⁴ As Arai-Takahashi noticed, the articles of Section I indeed seem to “largely correspond to the catalogue of human rights which are non-derogable and peremptory in nature”.¹⁹⁵

Article 27 of the Fourth Geneva Convention lays down three core guarantees relating to:

- ▶ The respect for the fundamental rights of protected persons, which includes the principles calling for the respect of person, honour, family rights, religious convictions and practices, manners and customs as well as an obligation to humane treatment;¹⁹⁶
- ▶ The protection of women by denouncing attacks on their honour in general and forms of sexual violence in particular;¹⁹⁷
- ▶ The right of equality and non-discrimination.¹⁹⁸

These core guarantees proclaim the basic principles upon which the whole 1949 Geneva Conventions are founded.¹⁹⁹ In denying protected persons these core guarantees one would come very close to a perversion of the 1949 Geneva Conventions and their protective purpose. It is hardly conceivable that the drafters, when stating that Part III of the Fourth Geneva Convention would govern only the situations in which aliens are in the territory of a belligerent State and that of the inhabitants of occupied territory,²⁰⁰ wanted to exclude people from the protection of Section I of Part III of the Fourth Geneva Convention during an invasion phase. On the contrary, they must have assumed that every protected person would

194 See Pictet, *Commentary...*, Article 27, at p. 200, explaining that the preamble should have made reference to certain rules representing "the basis of universal human law". However, the plenipotentiaries adopted another text for the preamble and hence Articles 27 and 31 to 34 of the Fourth Geneva Convention must be regarded as the rules laying down the "basis of universal human law".

195 Arai-Takahashi, Yutaka, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden; Boston: Nijhoff, 2009), at p. 270.

196 See Article 27(1) of the Fourth Geneva Convention.

197 See Article 27(2) of the Fourth Geneva Convention.

198 See Article 27(3) of the Fourth Geneva Convention.

199 See Pictet, *Commentary...*, Article 27, at p. 200.

200 See Final Record, Vol. II, at p. 821.

be either an alien in the territory of a belligerent State or in occupied territory, the latter being understood in the wider meaning of the functional beginning of belligerent occupation.

Moreover, Article 27 of the Fourth Geneva Convention does not only bestow rights and liberties upon protected persons. Its fourth paragraph also takes into account the various military considerations that can arise as a result of an armed conflict and authorises the parties to the conflict to “take measures of control and security”.²⁰¹ The parties to the conflict are left with a great discretion with regard to their choice of measures, as long as they respect the fundamental rights of the persons concerned and are not otherwise contrary to the Fourth Geneva Convention.²⁰² This right somewhat balances the duties incurring on a party to the conflict.

Having said this, one can conclude that Article 27 of the Fourth Geneva Convention, considering the negative nature of the duties embodied therein, that is to say the duty to respect, as well as its reservation in regard to security measures, must be applied at all times and in any place where a party to the conflict deals with protected persons or takes measures which could affect them in a way contrary to the article.

2. Danger zones - Article 28 of the Fourth Geneva Convention

Article 28 of the Fourth Geneva Convention lays down that “the presence of a protected person may not be used to render certain points or areas immune from military operations”.²⁰³ This provision thus codifies the prohibition of the use of protected persons as of human shields and “applies to the belligerents’ own territory as well as to occupied territory”.²⁰⁴ The seventh paragraph of Article 51 of the 1977 Additional Protocol I develops and clarifies the multiple rules of the 1949 Geneva Conventions prohibiting the use of protected persons and objects as shields from military operations.²⁰⁵ The former extends the scope of application to all civilians and also covers “movements” of the civilian population or civilian individuals as

201 See Article 27(4) of the Fourth Geneva Convention.

202 See Pictet, *Commentary...*, Article 27, at p. 207.

203 Article 28 of the Fourth Geneva Convention.

204 Pictet, *Commentary...*, Article 28, at p. 209.

205 For prisoners of war see Article 23 of Geneva Convention (III); for medical units and establishments see Article 19 of Geneva Convention (I) and Article 12 of Geneva Convention (II).

well.²⁰⁶ Furthermore, the prohibition of the use of human shields is also an established rule of customary international humanitarian law as described in the recent study conducted by the ICRC.²⁰⁷

This multitude of rules prohibiting the use of human shields underlines the general validity of this principle. Furthermore, it should be noted that the formal application of Article 28 of the Fourth Geneva Convention already during the invasion phase does not involve any additional obligations for a party to the conflict as the latter remains bound by the other rules relating to human shields. Compliance with these provisions results in a *de facto* compliance with Article 28 of the Fourth Geneva Convention. Hence, the application of Article 28 of the Fourth Geneva Convention should not be contingent upon an exaggerated formalism whether or not belligerent occupation within the traditional meaning has been established. The article can be applied without difficulties in own territory of a party to the conflict as well as on foreign enemy territory from the beginning of invasion.

3. Prohibition of coercion - Article 31 of the Fourth Geneva Convention

Article 31 of the Fourth Geneva Convention which is applicable to both the territories of the parties to the conflict and to occupied territories declares that:

“No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”

Article 31 of the Fourth Geneva Convention is the *pendant* to Article 44 of the 1907 Hague Regulation. Yet, the former has extended the protective scope of the latter as it is more general and prohibits coercion for any purpose or reason.²⁰⁸ It should be noted that the prohibition of coercion does not prevent the questioning of protected persons in order to obtain information, for instance, about the army of the adversary. Furthermore, the prohibition of coercion applies only to the extent that “force is permitted whenever it is necessary to use it in the application of measures taken under the Convention”.²⁰⁹

206 See Article 51(7) of the 1977 Additional Protocol I.

207 See Henckaerts/Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: University Press, 2005), Rule 97, at p. 337.

208 Pictet, *Commentary...*, Article 31, at p. 220.

209 *Ibid.*

In stating “[...] the custom [...] that an invasion army may force the inhabitants of an occupied territory to serve as ‘guides’ is now forbidden”,²¹⁰ it seems that the Commentary applies an approach which does not require a state of occupation for Article 31 of the Fourth Geneva Convention to apply. Indeed, this approach seems to be warranted because otherwise a significant gap in protection of civilians would exist. In any case Article 31 of the Fourth Geneva Convention presupposes that a protected person actually is in the hands of an invading army. From that moment onwards the provision becomes applicable in accordance with the functional beginning of belligerent occupation.²¹¹ Compliance with Article 31 of the Fourth Geneva Convention, containing such a fundamental principle of humanity, from the outset of hostilities cannot present a real burden for a party to a conflict. Hence, no reasonable argument can be put forward that would justify physical or moral coercion of protected persons already before a state of occupation has been established. Moreover, the line between physical or moral coercion and cruel treatment and torture (prohibited by common Article 3 of the 1949 Geneva Conventions), is a very thin one. Allowing physical or moral coercion during an invasion phase bears a great risk of abuse easily leading to cruel treatment or torture.

4. Prohibition of measures causing physical suffering or extermination - Article 32 of the Fourth Geneva Convention

The prohibition of measures causing physical suffering or extermination of protected persons in the hands of a High Contracting Party reinforces the general principles relating to the protection of fundamental rights as set out in Article 27 of the Fourth Geneva Convention.²¹² According to one author the article is a “reflection of crimes against humanity committed by Axis powers against the civilian populations in invaded and occupied territories during World War II”.²¹³ It is thus not surprising that the prohibited measures falling within the scope of Article 32 of the Fourth Geneva Convention by and large are considered grave breaches of the Fourth Geneva Convention.²¹⁴ The condemnation of these egregious acts is so strong that they also have been taken up in Article 3 common to the 1949 Geneva Conventions, Article 75 of the 1977 Additional Protocol I and form part of customary international humanitarian

210 Ibid.

211 See ICTY, *Naletilić case*, supra note 48, at para. 221.

212 See Pictet, *Commentary...*, Article 32, at p. 221.

213 Yutaka Arai-Takahashi, *The Law...*, at p. 280.

214 See Article 147 of the Fourth Geneva Convention.

law as well.²¹⁵ Furthermore, they also constitute war crimes under the Rome Statute of the International Criminal Court²¹⁶ and may amount to Crimes against humanity if they are “committed as part of a widespread or systematic attack directed against any civilian population”.²¹⁷

What has been argued with regard to Article 28 of the Fourth Geneva Convention holds also true for the prohibition of measures causing physical suffering or extermination. Consequently, no evident reason justifies the non-application of Article 32 of the Fourth Geneva Convention already during the invasion phase. Although, it was proposed, at the time of drafting, that the article should cover the “whole civilian population, whoever and wherever they were”,²¹⁸ mostly Western States feared an interference with the 1907 Hague Regulations and the majority voted for a text limited to “protected persons in the hand” of a High Contracting Party.²¹⁹ The intention of the drafters was to clearly show that the article would not apply to the conduct of military operations.²²⁰ As discussed above the functional beginning of occupation does not interfere with the rules on the conduct of hostilities, the latter being *lex specialis*, but only requires that the provisions of the Fourth Geneva Convention apply from the moment that a hostile army has control over the protected person.²²¹

Therefore one can conclude that control over the person must be sufficient for the application of Article 32 of the Fourth Geneva Convention.

5. Principle of individual responsibility and prohibition of collective penalties - First paragraph of Article 33 of the Fourth Geneva Convention

Article 33 of the Fourth Geneva Convention is derived from Article 50 of the 1907 Hague Regulations, which prohibits the infliction of penalties on persons for acts for which they are not responsible.²²² The first paragraph enshrines the principle of individual criminal

215 See Henckaerts/Doswald-Beck, *Customary...*, Rules 89 to 92, at p. 311 onwards.

216 See Articles 8(2)(a)(i) to (iii), 8(2)(b)(x) and 8(2)(b)(xxi) of the Rome Statute.

217 See Article 7(1) of the Rome Statute.

218 See Final Record, Vol. II, at p. 717.

219 Ibid., at p. 719; Pictet, *Commentary...*, Article 32, at p. 222.

220 See Final Record Vol. II B, at pp. 407 - 410.

221 See above at pp. 24 to 25.

222 See Pictet, *Commentary...*, Article 33, at p. 225; Article 50 of the 1907 Hague Regulations.

responsibility and prohibits collective penalties and “all measures of intimidation or of terrorism”.²²³ This last expression was chosen to make clear that the prohibition of collective penalties does not only include those penalties repressing breaches of the law but also any intimidatory or terroristic measures intended to prevent hostile acts.²²⁴ The principle of individual criminal responsibility, according to which no one shall be held accountable for an act he or she has not personally committed or co-perpetrated,²²⁵ is also pinned down as a fundamental guarantee in paragraph (4)(b) of Article 75 of Additional Protocol I, reflecting customary international humanitarian law,²²⁶ and is a maxim for all recent international tribunals.²²⁷ Furthermore, the principle seems also to be upheld in “most, if not all, national legal systems”.²²⁸ Likewise, the prohibition of collective penalties, which includes not only criminal sanctions but “sanctions and harassment of any sort, administrative, by police action or otherwise” as well,²²⁹ is recognised as a fundamental guarantee in paragraph 2(d) of Article 75 of Additional Protocol I and reflecting customary international humanitarian law.²³⁰

Because of this strong and wide incorporation of these principles in international and national law, it would seem odd not to apply the first paragraph of Article 33 of the Fourth Geneva Convention already during the invasion phase. A power that is in a position to impose penalties on protected persons already before the establishment of a state of occupation within the traditional meaning must not be exempt from applying the principle of individual criminal responsibility or the prohibition of collective penalties.

6. The prohibition of pillage - Second paragraph of Article 33 of the Fourth Geneva Convention

The Hague Regulations contain the prohibition of pillage in two separate provisions. Firstly, in Article 28 under Section II relative to the conduct of hostilities and secondly in Article 47

223 Article 33(1) of the Fourth Geneva Convention.

224 See Pictet, *Commentary...*, Article 33, at pp. 225 to 226.

225 Cassese, Antonio, *International Criminal Law*, 2nd edition (Oxford: University Press, 2008), at p. 33; Pictet, *Commentary...*, Article 33, at p. 225.

226 See Henckaerts/Doswald-Beck, *Customary...*, Rule 102, at p. 372 onwards.

227 See Article 25 Rome Statute; Article 6 of the Statute of the Special Court for Sierra Leone; Article 6 of the Statute of the International Tribunal for Rwanda; Article 7 of the ICTY Statute.

228 Henckaerts/Doswald-Beck, *Customary...*, Rule 102, at p. 373.

229 Sandoz, Yves; Swinarski, Christophe; Zimmermann, Bruno (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), [cited: Commentary AP], at para. 3055.

230 See Henckaerts/Doswald-Beck, *Customary...*, Rule 103, at p. 374 onwards.

applicable in occupied territories.²³¹ The Fourth Geneva Convention took up that old principle of international law and underlined its absolute character.²³² Furthermore, the prohibition of pillage is also recognised as being part of customary international humanitarian law.²³³

The prohibition of pillage applies to both the “territory of a Party to the conflict as well as occupied territories” and protects all types of property, that is to say private and public one.²³⁴ Since the prohibition explicitly applies to hostilities and occupied territory it is only logical that pillage must be prohibited at any stage of an armed conflict and thus, in application of the functional beginning, also during the early stages of invasion outside the battlefields.

7. Reprisals - Third paragraph of Article 33 of the Fourth Geneva Convention

“Reprisals are acts which are in themselves illegal and have been adopted by one state in retaliation for the commission of an earlier illegal act by another state.”²³⁵

Although belligerent reprisals may be legitimate under certain circumstances as an enforcement measure,²³⁶ the categories of persons and objects that can be subject of reprisals have continuously been reduced during the past century and there seems to be a trend to outlaw them altogether.²³⁷

The third paragraph of Article 33 of the Fourth Geneva Convention prohibits reprisals against protected persons and their property in the territory of a party to the conflict and occupied territories. It is a prohibition “essentially based on the protection of the human person”²³⁸ and is in itself a form of collective punishment, outlawed under the first paragraph of Article 33 of the Fourth Geneva Convention. Belligerent reprisals during the conduct of hostilities, by way of attacks against the civilian population or civilians and civilian objects, are also outlawed by the 1977 Additional Protocol I.²³⁹ While the customary status of the prohibition of reprisals

231 See Articles 28 and 47 of the 1907 Hague Regulations.

232 See Pictet, *Commentary...*, Article 33, at p. 226.

233 See Henckaerts/Doswald-Beck, *Customary...*, Rule 52, at p. 182 onwards.

234 Pictet, *Commentary...*, Article 33, at p. 226.

235 Shaw, *International Law...*, at p. 1129.

236 For the conditions see: Henckaerts/Doswald-Beck, *Customary...*, Rule 145, at p. 515 onwards.

237 See Henckaerts/Doswald-Beck, *Customary...*, Rule 145, at p. 513.

238 Pictet, *Commentary...*, Article 33, at p. 228.

239 See Articles 51(6) and 52(1) 1977 Additional Protocol I respectively.

against civilian persons and object during the conduct of hostilities remains controversial, customary international humanitarian law imposes strict conditions on belligerent reprisals in general,²⁴⁰ and completely prohibits reprisals against protected persons and objects in the hand of an adverse party.²⁴¹

The protection of protected persons would suffer a severe blow if one would accept that the prohibition of reprisals against protected persons and their property only applies to the own territory of a High Contracting Party and belligerent occupation in the traditional sense. This would create a gap of protection between the beginning of the invasion and the establishment of a state of occupation. Here, the application of the functional approach of occupation would dispel any doubts that reprisals against protected persons and their property is unlawful in all circumstances.

8. Hostages - Article 34 of the Fourth Geneva Convention

Hostage-taking consist in the seizure or detention of a person (the hostage), combined with threats to kill, to injure or to continue to detain the hostage “in order to compel a third party [...] to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage”.²⁴²

After World War II, and the controversial decision of the American Military Tribunal at Nuremberg in the *Wilhelm List and Others* case (the *Hostage Case*) of 1948 in particular, the prohibition of hostage-taking strongly developed in treaty law and customary international law as well.²⁴³ Article 34 of the Fourth Geneva Convention prohibits in an absolute manner the hostage-taking of protected persons in enemy or occupied territory. The taking of hostages is also prohibited as one of the minimum safeguards by common Article 3(1)(b) of the Geneva Conventions, applicable to international and non-international armed conflicts²⁴⁴, and is reiterated as a fundamental guarantee in Article 75(2)(b)(c) of the 1977 Additional Protocol I. The taking of hostages is also a grave breach of the Fourth Geneva Convention²⁴⁵ and is

240 See Henckaerts/Doswald-Beck, *Customary...*, Rule 145, at p. 513 onwards.

241 See *Ibid.*, Rules 146 and 147 respectively, p. 519 onwards.

242 Article 1 of the International Convention against the Taking of Hostages of 17 December 1979.

243 See Arai-Takahashi, *The Law...*, at p. 293 onwards; Dinstein, *The International...*, at p. 151 onwards.

244 ICJ, *Armed Activities case*, *supra* note 54, at para. 218.

245 See Article 147 of the Fourth Geneva Convention.

recognised as such as a war crime under Article 8(2)(a)(viii) of the Rome Statute. State practice in the post-World War II era has firmly established the prohibition of hostage taking as part of customary international humanitarian law.²⁴⁶

The prohibition of hostage-taking has become so firmly entrenched in international humanitarian law and international criminal law that it would be odd to deny the application of Article 34 of the Fourth Geneva Convention already during the invasion phase. Considering that the taking of hostages requires control or authority over the protected persons concerned, as well as over the place where the hostage is held, a strong argument speaks in favour of an application of Article 34 of the Fourth Geneva Convention according to the functional beginning of occupation.

III. Non-application of the functional beginning risks a gap in protection

1. Deportations, transfers, evacuations - Article 49 of the Fourth Geneva Convention

The first paragraph of Article 49 of the Fourth Geneva Convention is of utmost importance and its principle is repeated, or implied, in other provisions of the Convention.²⁴⁷ Moreover, the prohibition of forced transfers or deportations has become part of customary international law.²⁴⁸ The first paragraph of Article 49 of the Fourth Geneva Convention outlaws forcible transfers and deportations from the occupied territory to any other country. While the term “forcible transfer” seems to relate to displacement of persons within the occupied State, or even within the occupied territory, the term “deportation” involves the displacement beyond the boundaries of the occupied State.²⁴⁹

This prohibition is not absolute since the second paragraph of Article 49 of the Fourth Geneva Convention allows evacuations if required for the “security of the population or imperative

246 See Henckaerts/Doswald-Beck, *Customary...*, Rule 96, p. 334 onwards.

247 See Articles 51(3), 52(2) and 76(1) of the Fourth Geneva Convention.

248 See Henckaerts/Doswald-Beck, *Customary...*, Rule 129, p. 457 onwards.

249 ICTY, TC, *Prosecutor v. Radislav Krstić*, (Judgement), IT-98-33-T (2 August 2001), at para. 521.

military reasons”²⁵⁰ within the occupied territory and, under certain circumstances, even outside of the bounds of the occupied territory.²⁵¹ Such evacuations, however, are subject to stringent conditions, one of which states that the evacuated persons need to be transferred back to their homes.²⁵² Similarly, while an occupying power is generally prohibited to retain protected persons in an “area particularly exposed to the dangers of war”, it is nevertheless entitled to prevent them from moving if “the security of the population or imperative military reasons so demand”.²⁵³

The article also outlaws the practice of deporting or transferring parts of the occupant’s civilian population into the territory it occupies.²⁵⁴ According to the ICJ’s Advisory Opinion on the Legal Consequences of the Construction of a Wall in the occupied Palestinian territory the prohibition of the sixth paragraph of Article 49 of the Fourth Geneva Convention also includes “any measures taken by an occupying Power in order to organize or encourage transfers”.²⁵⁵

On the example of forced transfers or deportation of protected persons, the gap of protection that can result in a strict distinction between invasion and occupation becomes striking. In case of a non-application of the Article 49 of the Fourth Geneva Convention in accordance with the functional beginning of belligerent occupation no other provision of international humanitarian law would regulate the issue of transfers or deportations of protected persons during the invasion. As a consequence, the invading troops would be free to transfer or deport protected persons until a state of belligerent occupation has been established. Such an argumentation would fly in the face of the protective purpose of the Fourth Geneva Convention.

In accordance with the functional beginning of belligerent occupation the prohibition on forced transfers and deportations would apply from the moment that a protected person falls

250 Article 49(2) of the Fourth Geneva Convention.

251 See Article 49(2) of the Fourth Geneva Convention.

252 See Article 49(2)-(4) of the Fourth Geneva Convention.

253 Article 49(5) of the Fourth Geneva Convention; see also Pictet, *Commentary...*, Article 49, at pp. 282 to 283; note that the French text of Article 49(5) of the Fourth Geneva Convention reads “retenir” compared to “detain” in the English version. The French terminology seems more appropriate and reflects better the purpose of the article, which is to regulate a concrete application of the rule contained in Article 27 of the Fourth Geneva Convention whereby protected persons’ liberty of movement may be restricted and not to provide a legal basis to actually detain them in the literal sense of the word.

254 See Article 49(6) of the Fourth Geneva Convention.

255 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, at para. 120.

into the hands of invading troops.²⁵⁶ On the other hand, this interpretation would also authorise the retention of protected persons in an “area particularly exposed to the dangers of war” for reasons of “the security of the population or imperative military reasons”.²⁵⁷

While the functional approach of occupation is of particular importance with regard to forced transfers or deportations of protected persons, it carries a lesser weight for transfers or deportations of parts of the occupying power’s civilian population into the occupied territory.²⁵⁸ It is hardly conceivable that an enemy power starts to organise or encourage transfers of its own population into a territory, which it does not fully control. While there might not exist a serious gap in protection, the functional beginning of belligerent occupation would outlaw such a practice, and hence prevent colonisation, from the outset of a military campaign on foreign territory.

2. Labour - Paragraphs two to four of Article 51 of the Fourth Geneva Convention

Article 52 of the 1907 Hague Regulations authorises an occupying power to requisition, *inter alia*, services for the “need of the army of occupation” as long as they are in proportion to the resources of the country and do not involve the inhabitants in military operations against their own country.²⁵⁹ The egregious forced labour system created by the Nazi during World War II proofed the deficiencies of that provision. Although compulsory labour was not outlawed completely, the second, third and fourth paragraphs of Article 51 of the Fourth Geneva Convention nevertheless reinforce and regulate in detail the conditions of forced labour.²⁶⁰ They regulate, for instance, the minimum age of workers, as well as the place and kind of work that protected persons are allowed to carry out

An occupying power may only compel protected persons over the age of eighteen to carry out work, which is required either for the “needs of the army of occupation or the needs of the population of the occupied territory”.²⁶¹ Such work must not involve protected persons in

256 See ICTY, *Naletilić case*, supra note 48, at paras. 222 and 517.

257 Article 49(5) of the Fourth Geneva Convention.

258 See Article 49(6) of the Fourth Geneva Convention.

259 See Article 52(1) of the 1907 Hague Regulations.

260 See Pictet, *Commentary...*, Article 51, at p. 292.

261 Article 51(2) of the Fourth Geneva Convention.

military operations,²⁶² and protected persons may not be compelled to employ force to ensure the security of the place of work.²⁶³

The third paragraph of Article 51 of the Fourth Geneva Convention lays down the working conditions. Accordingly, labour must be carried out within the occupied territory and, as far as possible, in the usual place of employment. Furthermore they shall be paid fair wages and the work must be “proportionate to their physical and intellectual capacities”.²⁶⁴ Reiterating the obligation to maintain existing legislation in the occupied territory²⁶⁵ the plenipotentiaries underlined that the “legislation in force in the occupied territory concerning working conditions, and safeguards” remains applicable.²⁶⁶ Finally, compulsory work shall not result in labourers being mobilised in an organisation of a military or semi-military character.²⁶⁷

The capacity to compel protected persons to work and the associated duties regarding working conditions presuppose that the protected persons find themselves in the hands of the invading army. The non-application of the functional beginning of belligerent occupation would create a serious gap in protection because no other provision of IHL regulates the issue of compulsory work. Any imposition of compulsory work by an opposing power must therefore be regulated by paragraphs two to four of Article 51 of the Fourth Geneva Convention.²⁶⁸

3. Measures aiming at creating unemployment - Article 52(2) of the Fourth Geneva Convention

The second paragraph of Article 52 of the Fourth Geneva Convention prohibits measures intended to create unemployment, or to restrict employment opportunities in the occupied territory, in order to induce inhabitants to work for the occupying power.

An armed conflict usually produces severe repercussions on the economies of the belligerent parties. The conduct of hostilities will inevitably affect the economic activities of a given

262 See Article 51(2) of the Fourth Geneva Convention; Article 52 of the 1907 Hague Regulations.

263 See Article 51(2) of the Fourth Geneva Convention.

264 Article 51(3) second sentence of the Fourth Geneva Convention.

265 See Article 43 of the 1907 Hague Regulations; Final Record, Vol. II, statement by Mr. Maresca (Italy), at p. 665.

266 Article 51(3) of the Fourth Geneva Convention.

267 See Article 51(4) of the Fourth Geneva Convention.

268 In that sense, see ICTY, *Naletilić case*, supra note 48, at para. 222.

territory and may itself lead to unemployment. Particularly the local economy of an invaded country may be affected. The application of the second paragraph of Article 52 of the Fourth Geneva Convention, however, requires that the occupying power is in a position to implement the measures covered by that provision. Creating unemployment or restricting employment opportunities with a view to induce the inhabitants of a territory to work for the occupying power will usually coincide with a well established authority over a certain territory. On the other hand, the second paragraph of Article 52 of the Fourth Geneva Convention is a negative duty, that is to say the occupying power must abstain from a certain behaviour. Therefore an invading power does not acquire any additional obligations where it has no full control. Having in mind the restrictions on movements implemented by Israel in the Palestinian occupied territories, it is by all means imaginable that already an invading power could be in a position to impose restrictions which are severely affecting the invaded territory and hence creating unemployment or restricting working opportunities.²⁶⁹ Whether this is being done in order to induce workers of an occupied territory to work for the invading power would then be a different question and, most likely, a difficult one to prove. In case of an invasion the functional beginning of occupation would only require an invading power to abstain from a policy that induces workers of the invaded territory to work for said power. As a result the invading power will automatically comply with the second paragraph of Article 52 of the Fourth Geneva Convention. An application of this prohibition only once a state of occupation has been established could create a gap in protection and might even erode the prohibition of deportation set out in the first paragraph of Article 49 of the Fourth Geneva Convention.²⁷⁰

4. Prohibited destructions - Article 53 of the Fourth Geneva Convention

Article 53 of the Fourth Geneva Convention protects all property, real and personal, situated in occupied territory from destruction, unless such destruction is “absolutely necessary by military operations”.²⁷¹ This provision reinforces and extends the rules regarding property in occupied territory already laid down in the 1907 Hague Regulations as it covers also property owned collectively or belonging to the State.²⁷² At the same time, the Commentary stresses that the geographical scope of Article 23(g) of the 1907 Hague Regulations relating to

269 See B'Tselem, *Restrictions on Movement - Effects of restriction on the economy*, available at: http://www.btselem.org/english/Freedom_of_Movement/Economy.asp.

270 See Pictet, *Commentary...*, Article 52(2), at p. 300 in combination with Article 51(3), at p. 298.

271 Article 53 of the Fourth Geneva Convention.

272 See Pictet, *Commentary...*, Article 53, at p. 301.

hostilities was wider because it would cover all property in a territory involved in war. The scope of Article 53 of the Fourth Geneva Convention, on the other hand, would be limited to occupied territory and to “destruction resulting from action by the occupying power”.²⁷³ As an example the Commentary mentions the bombardment of factories in an enemy country which has not yet been occupied and where consequently Article 53 of the Fourth Geneva Convention and the grave breaches regime would not apply.²⁷⁴ It would seem that the Commentary wanted to underline that the rules on the conduct of hostilities prevail over the application of the rules on belligerent occupation.

Article 23(g) of the 1907 Hague Regulations, figuring under the section “*Hostilities*”,²⁷⁵ prohibits the destruction or seizure of enemy property unless it is “imperatively demanded by the necessities of war”.²⁷⁶ This cardinal rule does not distinguish between kinds of property and covers movable and immovable as well as private and public property.²⁷⁷ It would thus appear that both Article 23(g) of the 1907 Hague Regulations and Article 53 of the Fourth Geneva Convention have the same material content, but only their geographical scope differs.

To judge whether a gap in protection would exist if Article 53 of the Fourth Geneva Convention applies only once a state of occupation within the traditional meaning has been established, one crucial question is whether or not the expressions “imperatively demanded by the necessities of war”²⁷⁸ and “absolutely necessary by military operations”²⁷⁹ are identical. Dinstein believes that the difference between the two expressions “seems to be nominal”.²⁸⁰ As a matter of fact, the Commentary refers, with regard to when destruction of property is justifiable, to “imperative military requirements” as well.²⁸¹ It would thus seem that the expressions “absolutely necessary” and “imperatively demanded” have the same connotation. On the other hand, one could argue that necessities of war, that is to say all “measures which are indispensable for securing the ends of the war, and which are lawful according to the

273 Ibid., Article 53, at p. 301; See Articles 46 and 56 of the 1907 Hague Regulations.

274 Pictet, *Commentary...*, Article 147, at p. 601.

275 Title of Section II of the 1907 Hague Regulations.

276 Article 23(g) of the 1907 Hague Regulations.

277 Dinstein, *The International...*, at p. 195.

278 Article 23(g) of the 1907 Hague Regulations.

279 Article 53 of the Fourth Geneva Convention.

280 Dinstein, *The International...*, at p. 196.

281 Pictet, *Commentary...*, Article 53, at p. 302.

modern law and usages of war”,²⁸² have a wider scope than “military operations”.²⁸³ The latter expression being often used synonymously with the term “hostilities”,²⁸⁴ need not necessarily be connected with all the necessities of war,²⁸⁵ and hence has a more restricted meaning.

Should one adopt the interpretation that both expressions have virtually the same meaning, the material content of the prohibition of unjustified destruction would hence seem to be the same in Article 23(g) of the 1907 Hague Regulations and Article 53 of the Fourth Geneva Convention. One major difference between the two articles would consequently be the different geographical scope and that only unjustified destructions in occupied territories, that is to say a violation of Article 53 of the Fourth Geneva Convention, could amount to a grave breach of the 1949 Geneva Conventions.²⁸⁶ In case one accepts that Article 53 of the Fourth Geneva Convention has a more restrictive meaning than Article 23(g) of the 1907 Hague Regulations, be it only for the sake of the grave breaches regime, the functional approach of occupation becomes relevant.

Moreover, an even more fundamental difference between Article 23(g) of the 1907 Hague Regulations and Article 53 of the Fourth Geneva Convention results from the very concept of hostilities and risks to create a serious gap of protection. As soon as military operations pass the threshold of an armed conflict, the concept of hostilities covers the means and methods to which belligerents resort in order to injure the enemy.²⁸⁷ Yet, not all conduct by belligerents actually constitutes part of hostilities.²⁸⁸ While treaty law does not provide for a definition of hostilities, it is proposed that the concept of hostilities refers to all acts, which are designed to support a party to the conflict *against another* and which are “likely to adversely affect the military operation or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects *protected against direct attack* [emphasis added]”.²⁸⁹ Furthermore, there must exist a direct causation between the act and the

282 Article 14 of the 1863 Lieber Code.

283 See Greenspan, Morris, *The Modern Law of Land Warfare*, (Berkeley and Los Angeles: University of California Press, 1959), at p. 287

284 See Melzer, *Targeted...*, at pp. 271 to 272.

285 *Ibid.*, at pp. 273 to 274.

286 See Article 147 of the Fourth Geneva Convention.

287 See ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC: Geneva, 2009), at p. 43.

288 See *Ibid.*, at p. 41.

289 *Ibid.*, at p. 46; see also Melzer, *Targeted...*, at p. 276.

harm in question.²⁹⁰ During the conduct of hostilities only military objectives may be attacked,²⁹¹ and even attacks on military objectives, which may be expected to cause disproportionate damage to civilian objects are outlawed.²⁹² Article 49 of the 1977 Additional Protocol I defines the term “attacks” as “acts of violence *against the adversary*, whether in offence or defence [emphasis added]”.²⁹³

The shortcoming of the concept of hostilities, and hence of Article 23(g) of the 1907 Hague Regulations, is that this concept and the definition of military objectives, in particular, do not cover attacks and the destruction of property by an invading power of objects that are already under the control of said power. While the second paragraph of Article 49 of the 1977 Additional Protocol covers attacks of the legal sovereign against its own territory under the control of an adverse Party,²⁹⁴ no provision relative to the conduct of hostilities, other than Article 53 of the Fourth Geneva Convention, governs the case that the property to be destroyed is already in the hands of the invading power.

In order to guarantee the protection of property without gaps it is thus of the greatest importance that one distinguishes between two situations:

- ▶ During hostilities the destruction of property *under the control of the adversary* is governed by the rules on the conduct of hostilities, that is to say only military objectives may be destroyed. Should hostilities take place in occupied territory, they are no different from the conduct of hostilities elsewhere, and hence the rules governing the conduct of hostilities will prevail as *lex specialis*.²⁹⁵
- ▶ On the other hand, if invading forces destroy *property that is under their control*, one can argue that the object is in occupied territory in accordance with the functional beginning of belligerent occupation and hence Article 53 of the Fourth Geneva Convention governs the destruction such property. This could particularly be the case if the invading troops resort to operations with a view to maintain law and order, or to ensure their safety, and proceed, for instance, with house searches.

290 Ibid.

291 See Articles 48 and 52 of the 1977 Additional Protocol I.

292 See Article 51(5)(b) of the 1977 Additional Protocol I.

293 Article 49(1) of the 1977 Additional Protocol I.

294 See Article 49(2) of the 1977 Additional Protocol I.

295 See above at pp. 24 - 25; Dinstein, *The International...*, at p. 196.

This interpretation would respect the specificities encountered during hostilities, where destruction of property under control of the enemy is almost an inexorable result. At the same time, the application of Article 53 Fourth Geneva Convention to objects under control of an invading power offers protection from destruction to such property, and is especially reinforced by means of the grave breaches regime.

However, it must also be noted that this interpretation is contrary to the recent interpretation of the functional beginning of belligerent occupation by the ICTY. In the *Naletilić case*, the ICTY accepted that “for the purposes of individuals’ rights, a state of occupation exists upon their falling into ‘the hands of the occupying power’”,²⁹⁶ but required a state of occupation as defined in Article 42 of the 1907 Hague Regulations for the destruction of property outlawed by Article 53 of the Fourth Geneva Convention.²⁹⁷

5. Requisition of hospitals - Article 57 of the Fourth Geneva Convention

Under the 1907 Hague Regulations, the requisition of hospitals in occupied territory is permitted in accordance with the general rule on requisition, that is to say only for the needs of the army of occupation and must be proportionate.²⁹⁸ Article 57 of the Fourth Geneva Convention has not changed this basic rule, but has added some safeguards.²⁹⁹ The requisition of civilian hospitals must be temporarily and only in cases of urgent necessity. Furthermore, the occupying power must make suitable arrangements in due time for the care and treatment of the patients and for the needs of the civilian population.³⁰⁰ These conditions are a “logical inference” from Article 56 of the Fourth Geneva Convention, which provides that, *inter alia*, hospitals and their services must be maintained.³⁰¹ In the same vein, the second paragraph of Article 57 of the Fourth Geneva Convention prohibits the requisition of material and stores of civilian hospitals “so long as they are necessary for the needs of the civilian population”.³⁰²

296 ICTY, *Naletilić case*, supra note 48, at para. 221.

297 See *Ibid.*, at para. 222; in casu the TC found that at the time the destruction took place the HVO did not, with certainty, control the area at question because fighting and mopping up of ABiH (Army of Bosnia and Herzegovina) soldiers continued (See para. 587).

298 See Article 52(1) of the 1907 Hague Regulations; Pictet, *Commentary...*, Article 57, at p. 316.

299 See Pictet, *Commentary...*, Article 57, at p. 316.

300 See Article 57(1) of the Fourth Geneva Convention.

301 See Final Record, Vol. II, at p. 831.

302 Article 57(2) of the Fourth Geneva Convention.

Due to the absence of another provision that would govern the requisition of civilian hospitals and its material and stores during a phase prior to the establishment of a state of occupation within the traditional meaning, the functional beginning of belligerent occupation would regulate and, to a certain degree, authorise an invading army to requisition civilian hospitals and resources for the treatment of its own wounded and sick. At the same time the invading army would be legally obliged to take into account the needs of the population, which are within its sphere of control.

6. National Red Cross and other relief societies - Article 63 of the Fourth Geneva Convention

Article 63 of the Fourth Geneva Convention is of paramount importance for the work of National Red Cross and other relief societies. It sets forth that recognised National Red Cross Societies must be allowed to continue their activities in accordance with Red Cross principles, unless “urgent reasons of security” require temporary and exceptional measures put forward by the occupying power.³⁰³ Under similar conditions other relief societies must also be permitted to continue their humanitarian activities.³⁰⁴ Furthermore, the provision forbids an occupying power to require changes of the personnel or structure of these societies, which would prejudice their humanitarian activities.³⁰⁵

During an armed conflict the National Red Cross and other relief societies offer services of an inestimable value for the population affected by the armed conflict. The non-application of the functional beginning of belligerent occupation with regard to this provision could lead to a gap of protection. For such time as the invasion persists and a state of occupation in the traditional understanding has not been established, no legal basis provides for the continued existence and work of National Red Cross and other societies if they are within the sphere of control of the invading army. This could result in a “suspension” of their work and, ultimately, in more suffering for the local population. Note that in accordance with Article 18 of the First Geneva Convention military authorities shall permit the spontaneous collection

303 See Article 63(1) of the Fourth Geneva Convention.

304 See Article 63(1)(a) and (2) of the Fourth Geneva Convention.

305 See Article 63(1)(b) of the Fourth Geneva Convention.

and care of wounded and sick persons belonging to the armed forces by inhabitants and relief societies.³⁰⁶

Moreover, the functional beginning of belligerent occupation offers a win-win situation: National Red Cross and other relief societies in the hands of the enemy power would have a legal basis for the continuance of their work, which benefits the local population. On the other hand, the invading army could profit from the work of these societies, eventually helping the invading power in complying with its duties *vis-à-vis* the local population,³⁰⁷ and would have a legal basis to suspend their work by “temporary and exceptional measures imposed for urgent reasons of security”.³⁰⁸

IV. Obligations to provide or respect due to activities of the occupying power

1. Legislative competences - Articles 64 to 75 of the Fourth Geneva Convention

Article 43 of the 1907 Hague Regulations expresses the basic principle that an occupying power has to respect, unless absolutely prevented, the laws in force in the occupied country. Its Genevan *pendant*, Article 64 of the Fourth Geneva Convention, may be considered as elucidating the expression “unless absolutely prevented”.³⁰⁹ Notwithstanding that the first paragraph of Article 64 of the Fourth Geneva Convention seems to refer only to “penal laws”,³¹⁰ the Commentary reaffirms that

“[...] the idea of the continuity of the legal system applies to the whole of the law (civil law and penal law) in the occupied territory. [...] there is no reason to infer a contrario

306 See Article 18(2) of the First Geneva Convention; for a definition of protected persons within the meaning of the First Geneva Convention see Articles 12 and 13 of the First Geneva Convention.

307 By virtue of Article 16 of the Fourth Geneva Convention an invading power has at least the obligation to “facilitate the steps taken to search for the killed and wounded [...]”; for an analysis whether an invading power has also further duties toward the local population before a state of belligerent occupation is established, see below at p. 57 onwards (Section IV.) and at p. 64 onwards (Section V.).

308 Article 63(1) of the Fourth Geneva Convention.

309 See Pictet, *Commentary...*, Article 64, at p. 335.

310 See Article 64(1) of the Fourth Geneva Convention; Also the context and Article 66 of the Fourth Geneva Convention could lead to the conclusion that Article 64 of the Fourth Geneva Convention refers only to “penal laws”.

that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution.”³¹¹

The second paragraph of Article 64 of the Fourth Geneva Convention then omits the reference to penal laws with respect to legislative activities by the occupying power, and thus seems to be broader in scope.³¹² One could also argue that the article should be construed to encompass the whole legal system for both the occupying power’s discretion to repeal or suspend existing local law, and for its legislative competencies.³¹³

Accordingly, an occupying power could repeal or suspend existing legislation for two reasons:³¹⁴

- ▶ Existing provisions threaten the occupying power’s security. Provisions, for instance, that call for recruitment or resistance; or
- ▶ Existing provisions constitute an obstacle to fulfil the obligations of the Fourth Geneva Convention.

The second paragraph of Article 64 of the Fourth Geneva Convention sets out three situations in which an occupying power may legislate. The enacted provision must be essential to:³¹⁵

- ▶ Ensure the fulfilment of its obligations under the Fourth Geneva Convention;
- ▶ Protect the occupying power, its members and property, including establishments and lines of communication used by the occupying power; and
- ▶ “Maintain the orderly government of the territory”.

Note that the two first necessity exceptions converge with the ones permitting the repeal or suspension of existing legislation.

During an invasion the invading forces may encounter the enemy civilian population and, most likely, they will deem it necessary to impose their will and to take measures for their security. As a consequence of the functional beginning of belligerent occupation they must respect the laws in force in the invaded territory unless, of course, they constitute a threat to

311 Pictet, *Commentary...*, Article 64, at p. 335.

312 Sassòli, Marco, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, in: EJIL, Vol.16 no.4 (2005), pp. 661-694, at p. 669.

313 See Arai-Takahashi, *The Law...*, at p.121; Dinstein, *The International...*, at p. 111, calling for an application by analogy at least.

314 See Article 64(1) of the Fourth Geneva Convention.

315 See Article 64(2) of the Fourth Geneva Convention.

their security or impede the application of the Fourth Geneva Convention. The rule demanding respect of the laws in force in the occupied territory laid down in Article 43 of the 1907 Hague Regulations and Article 64 of the Fourth Geneva Convention is a negative duty that can be respected from the first moments of an invasion onwards. With the application of the functional beginning of belligerent occupation, Article 64 of the Fourth Geneva Convention would also offer an appropriate legal basis for legislative acts by an invading army in these early and, without any doubt, challenging times. At the same time, the application of the functional beginning of belligerent occupation provides protection from arbitrary acts in that the safeguards of Article 64 of the Fourth Geneva Convention, that is to say the necessity exceptions, would also apply from the initiation of the invasion. It should further be noted that Article 64 of the Fourth Geneva Convention is a perfect example where a protected person need not be virtually “in the hands of” the enemy, but it is enough that the person might be affected or comes within the scope of application of the enacted legislation.³¹⁶

An application of Article 64 of the Fourth Geneva Convention in accordance with the functional beginning of belligerent occupation consequently requires an invading army also to comply with several limitations and judicial guarantees set forth in the following articles.³¹⁷ With reference to legislative activities, this would be true for the obligation to publish and bring to the knowledge of the inhabitants the enacted penal provisions in the official language of the occupied territory before they enter into force. Furthermore, introduced penal provisions shall not have a retroactive effect.³¹⁸

Considering that the enactment of laws, in accordance with all the limitations and safeguards, is usually a highly complex process, it is very likely that a power must have already, or at least comes very close to having control as required by Article 42 of the 1907 Hague Regulations for a state of belligerent occupation.

316 See the observation made with regard to Article 4 of the Fourth Geneva Convention, above at p. 18.

317 See Articles 65 to 75 of the Fourth Geneva Convention; although these articles refer to penal provisions enacted by the occupying power, most, if not all, should be applicable, at least by analogy, to newly legislated civil law as well.

318 See Article 65 of the Fourth Geneva Convention.

2. Judicial system

Having analysed the feasibility of the functional beginning of belligerent occupation for legislative activities of an invading army, assessment now turns to the judicial system. Allowing an invading army to legislate in accordance with the functional beginning of belligerent occupation consequently also has repercussions on the judicial system.

2.1 Judges and public officials - Article 54 of the Fourth Geneva Convention

The first paragraph of Article 54 of the Fourth Geneva Convention forbids an occupying power to alter the status of public officials and judges in the occupied territory. Neither may an occupying power sanction, coerce or discriminate them if they do not fulfil their functions for reasons of conscience.³¹⁹ The purpose of this provision is to ensure that public officials and judges are in a position to continue their pre-occupation duties as independent as possible.³²⁰ Since the superintendence passes to the occupant, a continued performance of their duties may be in conflict with their conscience. Therefore, public officials and judges have, in principle, the right to resign without fearing sanctions or measures of coercion or discrimination.³²¹ In accordance with paragraphs two to four of Article 51 of the Fourth Geneva Convention an occupying power may, however, compel them to continue their work.³²² Furthermore, the occupying power has the right to remove public officials of any kind from their posts and for any reason.³²³ Yet, the continuation of the work of public officials and judges should, whenever possible, help the occupying power in achieving its duty to maintain public order and life as required by Article 43 of the 1907 Hague Regulations.

No other rule deals with the status of public official and judges under the authority of a foreign power. On the one hand, the possibility to alter the status of public officials and judges, or even to remove them from their posts, usually requires a fair degree of authority and control of the area affected. The kind of authority and control necessary will most likely coincide with Article 42 of the 1907 Hague Regulations. Furthermore, as long as Article 54 of

319 See Article 54(1) of the Fourth Geneva Convention

320 See Pictet, *Commentary...*, Article 54, at p. 304.

321 See *Ibid.*, at p. 305.

322 See Article 54(2) of the Fourth Geneva Convention.

323 See Article 54(2) of the Fourth Geneva Convention; Pictet, *Commentary...*, Article 54, at p. 308.

the Fourth Geneva Convention does not apply, judges and public officials remain protected persons and benefit of the protection generally accorded to such persons by the Geneva Conventions. On the other hand, Article 54 of the Fourth Geneva Convention could easily be applied in early phases of invasion and would prevent any possible gaps in protection. Moreover, an application of the functional beginning of belligerent occupation would leave the invading troops with a legal basis to remove public officials that could use their authority in a detrimental manner.

Although the non-application of the functional beginning of belligerent occupation would not create a serious gap in protection, the application of Article 54 of the Fourth Geneva Convention already at the early stages of invasion would clarify the relationship between the invading troops on the one side, and judges and public officials on the other.

2.2 Occupation courts - Articles 64(1) and 66 of the Fourth Geneva Convention

As a general rule, an occupying power is required to allow existing courts to continue their work and the latter keep jurisdiction over the local penal (and civil) laws in force.³²⁴ In the same way as with existing legislation, an occupying power is permitted to repeal or suspend “courts or tribunals which have been instructed to apply inhumane or discriminatory laws”³²⁵ and thus represent an obstacle to the application of the Fourth Geneva Convention. The second exception to the general rule may be deduced from the “necessity for ensuring the effective administration of justice”.³²⁶ In order to fulfil this obligation an occupying power may call upon inhabitants to assume positions within the judicial system or may even set up own courts applying local law.³²⁷

The setting-up of own courts in order to deal with violations of penal provisions enacted by the occupying power is expressly envisaged in Article 66 of the Fourth Geneva Convention. If it so wished, the occupying power may set up its own, properly constituted, non-political

324 See Article 64(1) second sentence of the Fourth Geneva Convention.

325 Pictet, *Commentary...*, Article 64, at p. 336.

326 Article 64(1) second sentence of the Fourth Geneva Convention.

327 See Pictet, *Commentary...*, Article 64, at p. 336.

military courts. In any case, trial courts must sit in the occupied territory, and, whenever possible, courts of appeal as well.³²⁸

What has been said with regard to the legislative powers of an invading army in accordance with the functional beginning of belligerent occupation is largely valid for the judicial system as well. First of all, invading forces shall, in principle, respect the existing courts and let them continue to work. It is again a negative duty that can be respected from the beginning of invasion. Subject to amendments or appointments where necessary and as far as permitted by the Fourth Geneva Convention, the power shall rely upon the existing judicial system in order to try protected persons. However, it should be noted that the establishment of courts on foreign territory and the trial of protected persons will usually require an Article 42 of the 1907 Hague Regulations like control. Nevertheless, the functional beginning of belligerent occupation explicitly outlaws summary trials of protected persons in invaded territory. Should an invading army indeed be in a position to carry out a trial already before a state of belligerent occupation has been established, the local courts or tribunals and the introduced military courts consequently must also follow the safeguards and procedural provisions set out in Articles 67 to 75 of the Fourth Geneva Convention. These provisions relate to minimum guarantees regarding deprivation of liberty and fair trial of protected persons and set forth minimum requirements as to the pronouncement of the death penalty as well.

According to Article 67 of the Fourth Geneva Convention, for instance, courts shall only apply penal provisions that were already in force at the time of commission of the offence and which are in conformity with general principles of law, in particular that the penalty must be proportionate to the offence. Offences intending only to harm the occupying power and not falling within the ambit of offences justifying the death penalty may at most be punished with internment or simple imprisonment that is proportionate to the offence.³²⁹ Furthermore, any duration a protected person accused of an offence spent in pre-trial detention must be deducted from the duration of imprisonment.³³⁰

328 See Article 66 of the Fourth Geneva Convention.

329 See Article 68(1) of the Fourth Geneva Convention.

330 See Article 69 of the Fourth Geneva Convention.

The first paragraph of Article 70 of the Fourth Geneva Convention, which seems at first sight to be at odds with the functional beginning of belligerent occupation, provides that:

“Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war.”³³¹

For the functional beginning of belligerent occupation to make sense, this clause must be interpreted to mean that an invading army shall only arrest, prosecute or convict protected persons for acts or opinions expressed while they were within the sphere of control of the enemy forces, that is to say in their hands. Moreover, the invading army would be obliged to detain an accused or convicted protected person only within the occupied territory.³³² This clause reiterates the prohibition of deportations set out in Article 49 of the Fourth Geneva Convention. Article 76 of the Fourth Geneva Convention also sets forth the conditions of how detained persons shall be treated.³³³

It is only logical that the Articles 67 to 75 of the Fourth Geneva Convention apply from the moment that an invading or occupying power is in a position to either arrest or to sentence protected persons. The non-application of these fundamental rules in accordance with the functional beginning of belligerent occupation, most of which are to be found in Article 75 of the 1977 Additional Protocol I and representing customary international humanitarian law, would create a gap in protection of persons being at the mercy of the enemy.

3. Assigned residence and internment - Article 78 of the Fourth Geneva Convention

Article 78 of the Fourth Geneva Convention authorises an occupying power to take safety measures and to subject protected persons, at the most, to assigned residence or internment for “imperative reasons of security”.³³⁴ While the decision of who constitutes such a security risk remains with the occupying power, the second paragraph of Article 78 of the Fourth Geneva Convention requires a regular procedure including a right of appeal. Regarding the minimum

331 Article 70(1) of the Fourth Geneva Convention.

332 See Article 76(1) of the Fourth Geneva Convention.

333 See Article 76 of the Fourth Geneva Convention.

334 See Article 78(1) of the Fourth Geneva Convention.

requirements for the procedure the article refers to the one set out in Article 43 of the Fourth Geneva Convention relative to the internment of aliens in the territory of a party to the conflict.³³⁵

Except the Articles 42 and 43 of the Fourth Geneva Convention, relative to aliens in the territory of a party to the conflict, and Article 78 on occupied territories no other provision of IHL provides a legal basis for imposing assigned residence and internment of protected persons. Requiring a state of belligerent occupation within the traditional meaning, and thus a strict distinction between invasion and belligerent occupation, for the application of the provisions of Section III of Part III of the Fourth Geneva Convention would create an serious gap. As a consequence, an invading power would not have an express legal basis to subject protected persons presenting a security threat to assigned residence or internment. There would be a gap at least when it comes to the procedure. The functional beginning of belligerent occupation would thus be of service for the invading troops on the one hand, and protected person would be endowed with minimum safeguards and detailed standards of treatment³³⁶ on the other.

V. Obligations to provide or respect due to the mere fact of occupation

1. Maintaining law and order - Article 43 of the 1907 Hague Regulations

Although Article 43 of the 1907 Hague Regulations does not necessarily fall within the ambit of the functional beginning of belligerent occupation, the article is of such importance for the regime of belligerent occupation that it seems nevertheless appropriate to assess the feasibility of an application already before a state of belligerent occupation has been established. Maintaining public order and safety is one of the primary tasks of an occupying power and might as well be the most challenging one.

³³⁵ See Pictet, *Commentary...*, Article 78, at p. 368.

³³⁶ See Articles 79 to 135 of the Fourth Geneva Convention.

In its English translation Article 43 of the 1907 Hague Regulations lays down that:

“[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

By contrast, the authentic French text of Article 43 of the 1907 Hague Regulations reads:

“[L]’autorité du pouvoir légal ayant passé de fait entre les mains de l’occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d’assurer, autant qu’il est possible, l’ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.”

The two versions differ particularly with relation to the expression “public order and safety”. The authoritative French text does not mention safety, but refers to “ordre et vie publics” which includes also social and economic aspects of community life and hence is much broader than the English version.³³⁷ There is a tendency to accept that the scope of Article 43 of the 1907 Hague Regulations extends to “civil life” and therefore would encompass not only “public safety” but also other aspects of daily life.³³⁸

Article 43 of the 1907 Hague Regulations imposes two obligations upon an occupying power. The first one requires the occupying power to restore and ensure, *as far as possible*, public order and life. The occupying power’s leeway, however, is restricted by the second obligation, which requires the occupying power to respect the laws in force “*unless absolutely prevented*”.³³⁹ Both obligations are thus not absolute and their qualifications allow for certain flexibility.

The maintenance of public order and life, while respecting the existing law, is a complex and multifaceted task. The executive branch of the military government is responsible to take the directive to restore and ensure public order and life, which will require affirmative measures

337 Dinstein, *The International...*, at p. 89.

338 Sassòli, *Legislation...*, at p. 663 onwards.

339 See Article 43 of the 1907 Hague Regulations.

in order to comply with its duties.³⁴⁰ The purpose of the obligation to maintain public order and life is to protect the population of an occupied territory from “a meaningful decline in orderly life” even if the military government is not (seriously) affected or put at risk.³⁴¹ The obligation to restore and ensure public order and life is an obligation of means, that is to say, the occupying power must take reasonable steps in order to achieve the goal prescribed.³⁴²

The application of Article 43 of the 1907 Hague Regulations within the traditional meaning presupposes that the invading power has established a state of belligerent occupation, that is to say the legal sovereign cannot publicly exercise its authority any more and the occupying power is in a position to substitute its own authority for that of the former legal sovereign.³⁴³

Yet, as the invasion of Iraq in 2003 has shown, the presence of foreign troops may lead to riots and civil commotion or marauding groups already before a state of belligerent occupation has been established. If one follows a strict separation of invasion and belligerent occupation the invasion troops would not bear any responsibilities as to the maintenance of public order and life. Admittedly, this positive obligation requires a minimum degree of authority and power. It must be at least able to impose its will. An approach which would require a State to comply with Article 43 of the Hague Regulations even though it has not gained full control would seem to be unfair and impracticable.

The qualifying expression “as far as possible” contained in Article 43 of the 1907 Hague Regulations, however, underlines the conduct-oriented aspect of the obligation to restore and maintain public order and life. One can easily contemplate foreign troops storming a village and hence suspending the exercise of authority by the legal sovereign. As such, this would not yet constitute belligerent occupation within the traditional meaning. Yet, the present troops, vested with *de facto* authority, would be in a position to take proper and feasible steps to protect the population of a village that is in their power. At the least, the foreign troops would be able to take “measures of control and security”,³⁴⁴ applicable at all times with regard to protected persons. To address an economy in shambles or a social breakdown causing distress

340 See Dinstein, *The International...*, at p. 91.

341 Dinstein, *The International...*, at p. 92.

342 See Sassòli, *Legislation...*, at p. 664 onwards; Dinstein, *The International...*, at p. 92.

343 UK Manual, at para. 11.3.

344 Article 27(4) of the Fourth Geneva Convention.

to the civilian population would evidently presuppose a consolidated and continuous occupation of territory.

One can thus conclude that once a foreign army has gained control over a territory and its inhabitants, that is to say active hostilities in the area have ceased, and the armed forces are able to impose their will, compliance with the obligation to restore and maintain public order and life seems possible. If the ambit of the functional beginning of belligerent occupation encompassed the rules of Section III of the 1907 Hague Regulations, the invading troops would have a legal obligation to work towards the maintenance of public order and life as soon as they are in a position to impose their will.

Furthermore, invading troops would have to immediately respect, “unless absolutely prevented”, the domestic law in force.³⁴⁵ This second obligation of Article 43 of the 1907 Hague Regulations is a negative duty, which even permits exceptions. Therefore, no serious reasons prevent an application from the invasion phase onwards.

2. Special cases of repatriation - Article 48 of the Fourth Geneva Convention

Pursuant to Article 48 of the Fourth Geneva Convention protected persons, who are not nationals of the occupied territory, may avail themselves of the right to leave the territory subject to the provisions of Article 35 of the Fourth Geneva Convention.³⁴⁶ Subject to certain qualifications, the right to leave a territory at the outset of, or during a conflict, is already granted to aliens in the territory of a party to the conflict.³⁴⁷ The advancement of enemy troops, however, may impede the procedure instituted by the legal sovereign of the invaded State. Stringent requirements on the establishment of a state of belligerent occupation within the traditional meaning could result in protected person being “stranded” for as long as it takes either the legal sovereign to regain control or the invading power to consolidate its authority over a certain territory. Yet, there seems to be no objective reason why protected persons, which are neither nationals of the occupied country nor of the occupying power or its allies, should be prevented from leaving the territory as soon as possible upon the arrival of foreign troops.

³⁴⁵ See Article 43 of the 1907 Hague Regulations.

³⁴⁶ See Article 48 of the Fourth Geneva Convention.

³⁴⁷ See Article 35 of the Fourth Geneva Convention.

The text of Article 48 of the Fourth Geneva Convention stipulates that the decision whether a protected person may leave must be made by procedure instituted by the occupying power.³⁴⁸ For the applicable procedure the article refers to Article 35 of the Fourth Geneva Convention requiring “regularly established procedures”.³⁴⁹ The Commentary elaborates that this expression would require procedural safeguards preventing arbitrariness, which include previously specified conditions under which permission to depart is granted and the appointment of a responsible authority.³⁵⁰ In order to comply with the functional beginning of belligerent occupation a military commander, for instance, could decide as a first instance whether or not the application to leave of a protected person in the power of the advancing troops should be granted. In case of refusal, an “appropriate court or administrative board” would have to review, *as soon as possible*, the decision taken by the military commander.³⁵¹ The time until such a procedure is established depends upon the capabilities of the occupying power and the situation at hand. The necessary control and authority over a territory is certainly less exacting for a decision of first instance than it is for the review. The application of the right to leave the occupied territory in accordance with the functional beginning of belligerent occupation thus would not unreasonably burden the invading troops.

3. Children - Article 50 of the Fourth Geneva Convention

The first paragraph of Article 50 of the Fourth Geneva Convention obliges an occupying power to facilitate, with co-operation of the national and local authorities, the proper working of all institutions devoted to the care and education of children. Hence, an occupying authority must not only respect the existing institutions of a territory and their activities, but is also bound to support them so that they can fulfil their work.³⁵² While the obligation to respect local institutions devoted to the care and education of children and their work does not require any form of control or authority over foreign territory, the obligation to support these institutions might require a certain degree of control and authority. Yet, the kind of support required may be manifold and it will depend upon the circumstances and the capabilities of the invading troops whether can actually provide that support. Furthermore, supporting these institutions is an obligation of means, which only requires that the invading troops do

348 See Article 48 of the Fourth Geneva Convention; Pictet, *Commentary...*, Article 48, at p. 277.

349 Article 48 in combination of Article 35(1) of the Fourth Geneva Convention.

350 See Pictet, *Commentary...*, Article 35, at p. 236.

351 See Article 35(2) of the Fourth Geneva Convention.

352 See Pictet, *Commentary...*, Article 50, at p. 286.

whatever is feasible towards the proper working of institutions devoted to the care and education of children.

In accordance with the second paragraph of Article 50 of the Fourth Geneva Convention the occupying power has to take “all feasible steps to facilitate the identification of children and the registration of their parentage” and it may neither alter their personal status, nor enlist them in formations or organisations subordinate to it.³⁵³ By contrast to the third paragraph of Article 24 of the Fourth Geneva Convention the occupying power has a legal obligation to take action in order to identify children and to register their parentage.³⁵⁴ This work shall be supported by the Information Bureau set up in accordance with Article 136 of the Fourth Geneva Convention.³⁵⁵ This Information Bureau must be established at the outbreak of a conflict (and in all cases of occupation).³⁵⁶ Therefore, no further action in the occupied territory is needed. The application of the second paragraph of Article 50 of the Fourth Geneva Convention in accordance with the functional beginning of belligerent occupation hence requires only a modest level of control over foreign territory and presents no unreasonable burden. First of all, the invading troops should, in principle, be able to rely upon the normal working of the local administrative services responsible for the identification of children, and the former’s primary obligation is not to impede with the work of the latter.³⁵⁷ Only if the local authorities cannot establish the identity of a child has the occupying power to co-operate and open a special section of the Information Bureau in occupied territory.³⁵⁸ Therefore, the invading troops only need to be in a position to interview children and other people in order to gather the necessary information, which they then can transfer to their Information Bureau.

The obligation to refrain from altering the status or nationality of children set out in the second paragraph of Article 50 (second sentence) of the Fourth Geneva Convention is a valuable addition “to the essential principles enjoining respect for the human person and for family rights” as set out in Article 27 of the Fourth Geneva Convention.³⁵⁹ Furthermore, it

353 Article 50(2) of the Fourth Geneva Convention.

354 Ibid.

355 See Article 50(4) of the Fourth Geneva Convention.

356 See Article 136(1) of the Fourth Geneva Convention.

357 See Pictet, *Commentary...*, Article 50, at p. 287.

358 Ibid., at p. 289.

359 Pictet, *Commentary...*, Article 50, at p. 288.

outlaws the enlistment of children into “formations and organisation subordinate to [the occupying power]”.³⁶⁰ This clause deals with the enlistment into political movements and the like, as distinct from the recruitment into the armed forces, which is covered by the first paragraph of Article 51 of the Fourth Geneva Convention.³⁶¹

The third paragraph of Article 50 of the Fourth Geneva Convention requires an occupying power to make arrangements for the maintenance and education of orphans and children separated from their parents, if the local institutions should be inadequate.³⁶² At first, this paragraph seems to contain a duty to provide which presents an unreasonable burden for invading troops. It should be noted, however, that in accordance with Article 24 all parties to a conflict have a general obligation to:

“[...] take all measures to ensure that children under fifteen, who are orphaned or separated from their families as a result of war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances.”³⁶³

Therefore, the primary responsibility to look after orphans and children separated from their families lies within the local authorities and they should have instituted an appropriate system. The third paragraph of Article 50 of the Fourth Geneva Convention just underlines that in case of belligerent occupation this primary responsibility remains with the local authorities and that an occupying power is only bound to take necessary steps once the local system has collapsed or is otherwise insufficient and no near relative or friend can provide for the maintenance and education of the children concerned.³⁶⁴ Similar to what has been said regarding the first paragraph, it cannot constitute a heavy burden for invading troops to take at least some steps to ensure the maintenance and education of orphans and children separated from their parents, in case the local authorities would fail in carrying out their duties. Hence, even invading troops cannot be absolved to take care for such children.

360 Article 50(2) second sentence of the Fourth Geneva Convention.

361 See Pictet, *Commentary...*, Article 50, at p. 288.

362 See Article 50(3) of the Fourth Geneva Convention.

363 See Article 24(1) of the Fourth Geneva Convention.

364 See Pictet, *Commentary...*, Article 50, at p. 288.

Finally, in expressing the basic rule that, unless absolutely prevented, the laws in force must be respected, the fifth paragraph of Article 50 states that an occupying power:

“shall not hinder the application of any preferential measure in regard to food, medical care and protection against the effects of war, which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years”.³⁶⁵

Although changing the status of children or enlisting them into formations or organisations subordinate to the occupying power most likely will coincide with a rather consolidated authority over that territory, invading troops can comply with the prohibitions set out in Article 50 of the Fourth Geneva Convention from the outset of the armed conflict because of their negative nature.

4. Enlistment - Article 51(1) of the Fourth Geneva Convention

According to the first paragraph of Article 51 of the Fourth Geneva Convention an occupying power must not “compel protected person to serve in its armed or auxiliary forces”, nor is it allowed to exert pressure or propaganda aimed at securing voluntary enlistment.³⁶⁶ The first paragraph also covers the compulsory enlistment of children. The prohibition is based on the principle set out in Article 23(h) of the 1907 Hague Regulations stating that enemy nationals shall not be forced to “take part in the operations of war” against their own country. By contrast, the first paragraph of Article 51 of the Fourth Geneva Convention outlaws forced enlistment into the armed forces in general and thus is more restrictive. The Commentary is explicit that an occupying power is forbidden to resort to forced enlistment “whatever the theatre of operations and whoever the opposing forces might be”.³⁶⁷ The scope of the prohibition of set out in the first paragraph of the Fourth Geneva Convention is thus wider than in Article 23(h) of the 1907 Hague Regulations. Forced enlistment is a specific type of forced labour and its prohibition is part of customary international humanitarian law as

³⁶⁵ Article 50(5) of the Fourth Geneva Convention.

³⁶⁶ Article 51(1) of the Fourth Geneva Convention.

³⁶⁷ Pictet, *Commentary...*, Article 51, at p. 293.

well.³⁶⁸ Furthermore, it can be considered as an application of the general prohibition of coercion.³⁶⁹

The obligation to refrain from such activities is not contingent upon the presence of an established occupation. Already during hostilities a party to the conflict is forbidden to compel nationals of the adversary to take part in the operations of war against their country.³⁷⁰ If taken together with Article 44 of the 1907 Hague Regulations and Articles 31 and 51(1) of the Fourth Geneva Convention one can indisputably discern a conviction that such a practice must be outlawed. Furthermore, giving information to the invading army and, even more so, participating in operations of war directed against one's own country, could be regarded as treason and presents an insoluble dilemma for the person concerned. It should be further noted that forced enlistment into the forces of a hostile power is listed among the grave breaches in Article 147 of the Fourth Geneva Convention, which underlines the importance of this prohibition.

The prohibition of forced enrolment is thus a rule that must be applied under any circumstances and at all times. An application of this negative obligation in accordance with the functional beginning of belligerent occupation would not impose any additional duties upon invading forces. It would only reaffirm and reinforce the prohibition already existing with regard to the conduct of hostilities and extend it to all protected persons wherever they find themselves in the hands of the enemy forces, be it within or outside the areas where hostilities are conducted.

5. Food and medical supplies for the population - Article 55 of the Fourth Geneva Convention

Pursuant to the second paragraph of Article 54 of the 1977 Additional Protocol I "objects indispensable to the survival of the civilian population" shall not be attacked, destroyed, removed or rendered useless.

³⁶⁸ See Henckaerts/Doswald-Beck, *Customary...*, Rule 95, at p. 333.

³⁶⁹ See Article 31 of the Fourth Geneva Convention.

³⁷⁰ See Article 23(h) of the 1907 Hague Regulations.

The first paragraph of Article 55 of the Fourth Geneva Convention requires the occupying power to ensure, to the fullest extent of the means available to it, a sufficient provision of food and medical supplies for the *population*, and includes the duty to import needed articles in case of inadequate resources within the occupied territory.³⁷¹ The provision thus extends and reinforces the general obligation to allow the free passage of medical supplies, food and clothing as well as the facilitation of relief schemes laid down in Articles 23 and 59 of the Fourth Geneva Convention.

In particular the duty to provide food and medical supplies may seem, at first sight, irreconcilable with the difficulties an invading army experiences. The qualification “to the fullest extent of the means available”,³⁷² however, precisely takes into account the difficulties an invading army and occupying power might face. Furthermore, the Fourth Geneva Convention does not fix the method by which the needed articles are imported. It should be noted, as the Commentary highlights, that the “spirit behind Article 55 represents a happy return to the traditional idea of the law of war, according to which belligerents sought to destroy the power of the enemy State, and not individuals”.³⁷³

For the above reasons, the duty to ensure food and medical supplies for the population laid down in this paragraph is thus not diametrically opposed to an application in accordance with the functional beginning of belligerent occupation. All an invading army is asked for is to work towards sufficient provisions for the population that finds itself within its sphere of control.

The second paragraph of Article 55 of the Fourth Geneva Convention regulates the requisition of foodstuffs, articles or medical supplies available in the occupied territory, that is to say goods that may be essential to life. It is an elaboration of the general rule on requisitions in kind and services laid down in Article 52 of the 1907 Hague Regulations. The requisition of such items is only permitted for the use of the occupation forces and administrative personnel, and that only after the needs of the population have been taken into account.³⁷⁴ Furthermore,

371 See Article 55(1) of the Fourth Geneva Convention.

372 Article 51(1) of the Fourth Geneva Convention.

373 Pictet, *Commentary...*, Article 55, at pp. 309 and 310.

374 See Article 55(2) first sentence of the Fourth Geneva Convention.

the occupying power must ensure that fair compensation is paid for requisitioned goods.³⁷⁵ It should also be noted that “extensive appropriation of property, not justified by military necessity”, which includes requisitions, is a grave breach of the Fourth Geneva Convention.³⁷⁶

During hostilities, Article 23(g) of the 1907 Hague Regulations permits the seizure of the enemy’s property if it is “imperatively demanded by the necessities of war”. This reservation seems to be fairly broad if compared to the qualifications applicable in occupied territories, limiting requisitions for “the needs of the army of occupation”³⁷⁷ or for “the use by the occupation forces and administration of personnel”.³⁷⁸ Significantly, the necessity test contained in the provision of the 1907 Hague Regulations applicable during hostilities does not require a belligerent to consider the requirements of the civilian population.³⁷⁹ The provision of the Fourth Geneva Convention is thus more restrictive than Article 23(g) of the 1907 Hague Regulations. Because the second paragraph of Article 55 of the Fourth Geneva Convention covers goods that may be essential for life it would seem appropriate to apply it to all situations on foreign territory and which are outside the theatre of hostilities. This interpretation would prevent possible gaps of protection and would ensure that the needs of the population must be considered in resorting to requisitions of these essential goods.

6. Hygiene and public health - Article 56 of the Fourth Geneva Convention

Article 56 of the Fourth Geneva Convention requires an occupying power to ensure and maintain, to the fullest extent of the means available to it and with the co-operation of national and local authorities, the medical and hospital establishments and services, public health and hygiene. Particular reference is given to prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics.³⁸⁰ As the Commentary stresses, the duty to organise hospitals and health services, and taking measures to control epidemics “is above all one for the competent services of the occupied territory itself”.³⁸¹ As

375 See Article 55(2) second sentence of the Fourth Geneva Convention.

376 Article 147 of the Fourth Geneva Convention.

377 Article 52(1) of the 1907 Hague Regulations.

378 Article 55(2) of the Fourth Geneva Convention.

379 See Article 14 of the Lieber Code defining military necessity as “the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war”.

380 See Article 56(1) first sentence of the Fourth Geneva Convention.

381 Pictet, *Commentary...*, Article 56, at p. 313.

long as the national authorities are able to fulfil these tasks, the occupying power is merely required not to hamper with their work.³⁸² The author sees no reasons why the functional beginning of belligerent occupation should not apply in such cases. Only when hospitals and medical services are not properly functioning will the occupying power be required to provide services, and these only to the means available to it. Similarly as what has been said above with regard to the first paragraph of Article 55 of the Fourth Geneva Convention, the application of the duty to ensure and maintain the medical and hospital establishments and medical and services seems, at worst, to present a minimal additional burden. In order to achieve this obligation invading forces could also resort, in accordance with Article 51 of the Fourth Geneva Convention, to compelling protected persons to work for it.³⁸³ Furthermore, the obligation that “medical personnel of all categories shall be allowed to carry out their duties”³⁸⁴ can also be considered as a means of ensuring and maintaining the hospitals and medical services and establishments, public health and hygiene and benefits, eventually, the invading forces. Finally, one can consider this obligation to provide to represent a fair correlative to the right to requisition civilian hospitals.³⁸⁵ For all these reasons, the application of this paragraph in accordance with the functional beginning of belligerent occupation seems warranted.

The second paragraph of Article 56 of the Fourth Geneva Convention addresses the issuance of documents according recognition and granting the right to display the Red Cross emblem of newly set up hospitals and the issuance of identity cards to its staff. Should an invading army be present on foreign territory and the newly set up hospitals and their staff cannot get the required documents from the competent body of the occupied State, it seems only natural that the power who controls the area concerned assumes this task.

The last paragraph of Article 56 of the Fourth Geneva Convention calls for respect of moral and ethical susceptibilities in case the occupying power adopts health or hygiene measures. As such it reiterates the principles set out in Article 27 of the Fourth Geneva Convention. The author believes that instructions given to the troops with regard to their behaviour abroad should already include the moral and ethical susceptibilities of the enemy population.

382 Ibid.

383 See Article 51(2) of the Fourth Geneva Convention.

384 See Article 56(1) second sentence of the Fourth Geneva Convention.

385 See Article 57 of the Fourth Geneva Convention.

Therefore, nothing stands in the way to apply the third paragraph of Article 56 of the Fourth Geneva Convention as soon as invading troops take such health and hygiene measures aimed at the population of the foreign territory.

7. Spiritual assistance - Article 58 of the Fourth Geneva Convention

That religious convictions and practice must be respected was already laid down in the first paragraph of Article 46 of the 1907 Hague Regulations and was reiterated in Article 27 of the Fourth Geneva Convention. According to the first paragraph of Article 58 of the Fourth Geneva Convention an occupying power “shall permit ministers of religion to give spiritual assistance to members of their religious communities”.³⁸⁶ Why should such a precious assistance to the troubled population be protected only after hostilities have ceased and a state of occupation within the traditional meaning has been established? The only conceivable reason would be the security of the invading army. As long as such fears are absent there is no plausible explanation why spiritual assistance should not be permitted in accordance with the functional beginning of belligerent occupation. Should ministers of religion present a security threat in a concrete case, the invading force could still take measures of control and security.³⁸⁷

By contrast, the acceptance of religious books and articles and particularly the facilitation of their distribution³⁸⁸ might require some consolidated control over foreign territory. Eventually, compliance with this obligation will depend upon the degree of control exercised by the invading army and their logistical means.

8. Collective Relief: Articles 59 to 61 of the Fourth Geneva Convention

Hostilities often lead to scarcities of foodstuffs and other essential supplies, leaving the civilian population of an affected territory very vulnerable. Once the territory is occupied the occupying power must agree to relief schemes and facilitate them if at least part of the civilian population is inadequately supplied.³⁸⁹ While the duties to provide laid down in Articles 55 and 56 of the Fourth Geneva Convention are contingent upon the means available to the

³⁸⁶ Article 58(1) of the Fourth Geneva Convention.

³⁸⁷ See Articles 27(4) and 78 of the Fourth Geneva Convention.

³⁸⁸ See Article 58(2) of the Fourth Geneva Convention.

³⁸⁹ See Article 59(1) of the Fourth Geneva Convention.

occupying power, the obligation of Article 59 of the Fourth Geneva Convention to accept collective relief is “unconditional”.³⁹⁰

The principle of free passage of consignments of humanitarian character is already set out in Article 23 of the Fourth Geneva Convention under the heading *General protection of populations against certain consequences of war*. One could thus argue that the general provision of Article 23 of the Fourth Geneva Convention would appropriately regulate humanitarian relief. However, the safeguards of the latter article relate primarily to the prevention of a definite advantage of the enemy and other beneficiaries,³⁹¹ whereas the safeguards of Article 59 of the Fourth Geneva Convention aim to prevent the occupying power from using consignments for its own benefit.³⁹² Moreover, while Articles 59 to 61 of the Fourth Geneva Convention are more limited in scope,³⁹³ they regulate in a more detailed manner the responsibilities of the occupying power as well as the distribution of the consignments.³⁹⁴

After all, the provisions on collective relief essentially add only minimal further obligations upon the invading power. Facilitation of relief schemes “by all the means available at its [the occupying power’s] disposal”,³⁹⁵ can be achieved by using manifold means such as transport, stores, facilities for distributing and supervising agencies.³⁹⁶ The application of the functional beginning of belligerent occupation would give the invading power even the possibility to divert, in the interest of the population of the occupied territory, consignments in exceptional circumstances.³⁹⁷ To the extent that an invading army already controls a certain area or has parts of the foreign population within its power, the application of Articles 59 to 61 of the Fourth Geneva Convention in accordance with the functional beginning of belligerent occupation, coupled with Article 23 of the Fourth Geneva Convention, seems to be possible and would alleviate the suffering of the population affected by war.

390 Pictet, *Commentary...*, Article 59, at p. 320.

391 See Article 23 of the Fourth Geneva Convention.

392 See Article 59(4) of the Fourth Geneva Convention.

393 See Pictet, *Commentary...*, Article 23, at p. 181.

394 See Articles 60 and 61 of the Fourth Geneva Convention respectively.

395 See Article 59(1) of the Fourth Geneva Convention.

396 Pictet, *Commentary...*, Article 59, at p. 320.

397 See Article 60 of the Fourth Geneva Convention.

9. Individual Relief: Article 62 of the Fourth Geneva Convention

What has been said above regarding collective relief is generally true for individual relief governed by Article 62 of the Fourth Geneva Convention as well. The provision on individual relief, however, confers the occupying power the right to refuse individual relief consignments in case of “imperative reasons of security”. The application of the functional beginning of belligerent occupation would hence be favourable to the invading army, which would be strengthened in their means to verify individual relief consignments.

VI. Conclusion Part B

Two arguments are commonly brought forward to dispute the application provisions relative to occupied territories in accordance with the functional beginning of belligerent occupation. First, it is often contended that the functional beginning of belligerent occupation would not be necessary because a strict distinction between invasion and a state of belligerent occupation does not create a gap in protection. The remaining rules next to the ones on belligerent occupation would be perfectly fine to deal with the exigencies of an invasion. Second, it is averred that the application of the rules on belligerent occupation during the invasion would impose burdensome and unfeasible obligations upon already constrained troops. The challenging and often tumultuous period of invasion would leave no room to deal with the majority of these rules.

The analysis of Part B of the present paper, however, has shown that these assertions and concerns can safely be refuted. As regards the second contention against an application of the functional beginning of belligerent occupation one can note that the provisions of the Fourth Geneva Convention, for which the functional beginning of belligerent occupation is mainly designed, well balance necessity and humanity against each other. Necessity has been taken into account with regard to provisions imposing positive obligations upon a party to the conflict in that they usually leave the parties with some leeway as to how they can achieve their duties or, are obligations by means, which takes into account the circumstances and the means available to the party to the conflict. Humanity, on the other hand, ensures that fundamental rights and safeguards cannot be abrogated. It is noteworthy that the respective provisions often are of a negative nature and hence do not require invading forces to provide

anything. All these rules are based on the principle underlying the whole 1949 Geneva Conventions: the axiom of respect for the person!

It has also been shown that many provisions of the Fourth Geneva Convention relative to occupied territories govern issues of paramount concern for the local population, which are not otherwise, or at least insufficiently, addressed in other branches of IHL. This is the case, for instance, for both the provisions offering general protection (Articles 13 to 26 of the Fourth Geneva Convention) and those common to the territories of a Party to the conflict and occupied territories (Articles 27 to 34 of the Fourth Geneva Conventions). The above analysis clearly discloses that a non-application of the functional beginning results in serious gaps of protection, which in itself warrants the promotion of this humanitarian interpretation of the law of belligerent occupation.

General Conclusion

Since approximately the mid-19th century powers and writers have tried to define the notion of belligerent occupation and, in particular, the beginning thereof. While certain aspects such as the temporary nature and the principle of effectiveness have crystallised over the years, the seemingly straightforward definition contained in Article 42 of the 1907 Hague Regulations still offers a broad spectrum of unanswered questions. While many situations undoubtedly fulfil the legal definition of occupation, there are many others in which a state of occupation is more controversial or even denied. When is control effective enough that an invasion turns into a state of belligerent occupation, or what is the minimum area of a territory that can be occupied; a town, a hamlet, a house or what about a hill taken by the armed forces? The definition of the 1907 Hague Regulations and the interpretations found in different military manuals do not offer a solution, which would allow to determine with precision at what point territory is considered occupied and the rules on belligerent occupation start to apply. Moreover, States deploying armed forces in another country often avoid, for various reasons, to making reference to the term occupation because of the negative connotations that may be associated with it. All this creates uncertainty as to when the law of belligerent occupation begins to apply and which, consequently, might entail serious consequences for the protection of the local population. The functional beginning of belligerent occupation, as advocated in the ICRC Commentary on the 1949 Geneva Conventions, is a humanitarian interpretation that frees the application of the rules relative to occupied territories contained in the Fourth Geneva Convention from the restraints of the Hague Regulations. It shifts the focus of the definition of belligerent occupation and the applicability of the respective rules from the territory to the individual as the decisive element. The provisions apply from the moment that a protected person is in the hands of the enemy; a distinction between invasion and a state of occupation has become superfluous.

Admittedly, the functional beginning of belligerent occupation may seem to be an idealistic, and maybe even extensive, interpretation of the Fourth Geneva Convention, which at first sight runs contrary to the interests of potential occupying powers. At the same time, the present paper shows that the rules formulating the rights and obligations of an occupying power are flexible enough to take the necessities arising during an invasion into account while maximising the protection to the local population. It turns out that the functional beginning of

belligerent occupation is more realistic than it seems. The law of belligerent occupation offers a vast array of answers to questions regarding the relationship between invading forces and the local population. The functional beginning of occupation could create greater legal certainty for both the invading forces and the local population.

Perhaps, one should not understand the application of provisions of the Fourth Geneva Convention generally applicable to occupied territories as actually representing a state of belligerent occupation but rather see it as a sensible way to govern a situation, and the protection needs of civilians, that the law otherwise would not adequately address.³⁹⁸

398 See Dörmann/Colassis, *International...*, at p. 301.