The Functional Beginning of Belligerent Occupation
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Since the mid-19th century military powers and various writers have tried to define the notion of belligerent occupation and, in particular, the beginning thereof. There are many situations in which a state of occupation is controversial or even denied. When is control so effective that an invasion turns into a state of belligerent occupation? 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? This paper examines what seems to be an important gap of the Fourth Geneva Convention: contrary to the Hague Regulations of 1907 it does not provide a definition of belligerent occupation. It is argued that the Fourth Geneva Convention follows its own rules of applicability and that therefore the provisions relative to occupied territories apply in accordance with the “functional beginning” of belligerent occupation approach from the moment that a protected person finds him or herself in the hands of the enemy.

Henry Dunant Prize 2010 from the Geneva Academy of International Humanitarian Law and Human Rights (ADH Geneva)

MICHAEL SIEGRIST

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Cover photo UN / Marco Dormino.
Executive Summary

1. 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. The notion and definition of belligerent occupation continued to evolve, the next stage of its development culminating in the Hague Regulations of 1907. The central 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 lies at the heart of the definition of belligerent occupation in Article 42 of these regulations. For a state of belligerent occupation to be established, it is generally accepted that a certain degree of stability is required. Furthermore, the dominant conception of belligerent occupation follows a strict distinction between invasion and occupation, whereby the mere presence of armed forces does not itself establish a state of belligerent occupation.

2. 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 on the law of belligerent occupation. However, for the sake of the law of belligerent occupation there seems to be an important imperfection: the 1949 Geneva Conventions do not contain any legal definition of belligerent occupation! A question therefore arises as to 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 him or herself in the hands of the enemy. It is argued that the preferred solution is the latter. A distinction between invasion and a state of belligerent occupation would be superfluous because the 1949 Geneva Conventions would follow their own rules of applicability. 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 approach 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 of the local population.
# Abbreviations

<table>
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<th>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</th>
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<td>1949 Geneva Conventions</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<td>First Geneva Convention</td>
<td>Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949</td>
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<td>Acronym</td>
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<td>GYIL</td>
<td>German Yearbook of International Law</td>
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<td>Ibid.</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>Lieber Code</td>
<td>Instructions for the Government of Armies of the United States in the Field of 24 April 1863</td>
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Introduction

1 Since ancient times armies have occupied and acquired additional territory by means of warfare. Until the 19th century, military occupation of an 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 treat its inhabitants as it wished. The nature of belligerent occupation, as we know it today, developed largely in 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 during which such de facto control and authority may not yet have been acquired.

2 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 on, inter alia, 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.

3 The ICRC Commentary on the Fourth Geneva Convention advocates the so-called “functional beginning” approach to 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 on the basis of the contact occurring 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.

It is argued in this paper that the application of the functional beginning of occupation theory 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. On the contrary, the wording of most of the relevant articles leaves enough leeway to adapt and take into account the difficult circumstances prevailing during an invasion. Furthermore, the functional beginning of belligerent occupation approach would also give invading powers certain rights, such as a legal basis for security measures and internment.

NOTES

2. See ibid.
Part A: The Notion and Beginning of Belligerent Occupation
I. Development of the Law of Belligerent Occupation prior to the 1899/1907 Hague Regulations

1 Since ancient times, military powers have occupied and acquired additional territory by means of warfare. Until the 19th century, military occupation of an adversary’s territory resulted in the transfer of property and sovereignty. The new sovereign could quite freely dispose of the territory and treat its inhabitants as it wished. 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. This section briefly describes some major steps in the development of the law of belligerent occupation.

1. The Lieber Code of 1863

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2 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. 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.

3 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. Furthermore, the Lieber Code was also used in the Spanish-American war of 1898, and figured in part in the 1914 US manual “Rules of Land Warfare”.

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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 suspends local criminal and civil law as well as the local administration and government in so far as military necessity so requires. 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 [...].” Martial law was defined as being “military authority exercised in accordance with the laws and usages of war”. 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 the initiative of Russia, an international conference striving to codify, for the first time, the laws and usages of war was held in Brussels in 1874. Even though the Brussels Conference of 1874 never led to the conclusion of an international convention, the project influenced subsequent codes, in particular the 1899/1907 Hague Regulations. The definition of occupation, for instance, is identical in both the Brussels Project and the 1899/1907 Hague Regulations. It is for this reason that the discussion leading to the adoption of the Brussels text is of interest for the present paper.

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. However, two key questions: whether or not physical occupation is required and what size of occupation forces is necessary for making an occupation effective, remained unanswered.

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.”

In contrast to the Lieber Code, the Brussels Project seems to have 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 fact of occupation results in a suspension of the legitimate power’s authority.¹⁷

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.¹⁸ The Oxford Manual was then sent to various European governments which were encouraged to adopt similar manuals.¹⁹

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”.²⁰

Accordingly, belligerent occupation required that the local authorities were driven out by the invading forces and could therefore no longer exercise their authority. In addition, the invading State had to be the only one in a position to 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 its occupation and the powers it exercises.²¹ Like previous texts, the Oxford Manual indicated the “essentially provisional […] character” of belligerent occupation.²²

During the period following the Oxford Manual, one of the preponderant issues discussed was the continuing controversy as to whether or not physical presence of troops was necessary for the existence and delimitation of occupation.²³

NOTES


6. Ibid.
7. See Supreme Court of the United States, The Amy Warwick (The Prize Cases), 67 US 635 (1862).
9. See Article 3 Lieber Code.
10. See Article 1 Lieber Code.
11. See Article 4 Lieber Code.
13. Compare Article 1 of the Brussels Project and Article 42 of the 1907 Hague Regulations.
14. For a detailed description see Graber, *The Development...*, at p. 43 onwards.
16. Article 1 of the Brussels Project.
17. See Article 2 Brussels Project; Graber, *The Development...*, at p. 47.
II. The Notion and Beginning of Belligerent Occupation under the 1899/1907 Hague Conventions

1. Historical Background

1 The First Hague Peace Conference convened in 1899 sought, among other things, the revision of the Brussels Project of 1874. As stated by Graber, both the Convention (II) with Respect to the Laws and Customs of War on Land and its annexed Regulations Respecting the Laws and Customs of War on Land (hereafter: 1899 Hague Regulations) adopted at this conference 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”.24 Significantly, ambiguous or unsettled aspects of belligerent occupation could not be settled in the twenty-five year period between the Brussels Project and the First Hague Peace Conference. The concept of belligerent occupation adopted in The Hague in 1899 differs only slightly from the one elaborated in the Brussels Project.25 Although the delegates discussed several proposals to revise the definition, they eventually preferred the text of the Brussels Project.26 While the ratifying States were obliged to “issue instructions to their armed land forces, which shall be in conformity with the [1899 Hague Regulations]”,27 many failed or did so inadequately.28

2 In 1907, the Second Hague Peace Conference brought together virtually the entire civilised world.29 Its purpose was to revise the 1899 Hague Regulations by clarifying or amending points of detail.30 The provisions on belligerent occupation, however, remained largely unchanged. In particular, the definition of belligerent occupation was not a matter of dispute 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.31
The development of both the definition and general notion of belligerent occupation thus underwent no noticeable change as a result of the Hague Peace Conferences and remained as vague as it had been 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 great powers of the 19th century and the Franco-Prussian War of 1870, in particular. At that time, war was conducted between governments and their armies and, as a consequence, civilians were usually kept out of war. 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 competence of the occupying power and towards greater protection of the inhabitants of the occupied territory. 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. The 1907 Hague Regulations therefore primarily regulated the conduct between the armed forces and endeavoured to serve State interests.

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 Regulations puts forward an apparently simple test regarding 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.”

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 thereby 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 is therefore contingent upon the principle of effectiveness.

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 Regulations stipulates that belligerent occupation may be limited to a relatively small part of the enemy’s territory. In addition, the article does not require 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”.\(^3\) 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.”\(^4\)

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.\(^5\)

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, control over the area concerned through their physical presence.\(^6\) 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 Conference of 1874.\(^7\) The prevailing opinion, however, prefers the interpretation that enemy troops must be present on the invaded territory in order to establish a state of belligerent occupation.\(^8\) 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.\(^9\) The number and type of troops necessary must be assessed on a case-by-case basis and depends on various considerations.\(^10\)

This conception seems to be consistent with the discussions held at the 1874 Brussels Project,\(^11\) 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.\(^12\) Similarly, one of the guidelines put forward by the Trial Chamber of the ICTY in the Naletlić case to determine whether authority has been established requires 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]”.\(^13\)

Lack of clarity also remains with regard to what 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?\(^14\) 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”. Furthermore, the occupying power would not need to be in control of all government functions but must be in control of, at a minimum, those functions necessary for the enforcement of governmental authority such as the police and the military. According to another author, 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”.

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. 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”. 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 was therefore an occupying power in that part of Congolese territory. By contrast, other areas where Ugandan troops were stationed, such as the Kisangani Airport deemed under their “administrative control”, were not considered subject to belligerent occupation in the meaning of Article 42 of the 1907 Hague Regulations.

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. At the time when the 1907 Hague Regulations were adopted, it was assumed that the occupant, having gained control, would then establish its authority by introducing “a system of direct administration”. Roberts also concludes that “an open and identifiable command structure is thus a central feature of the Hague definition of military occupation”. By contrast, the ICJ held in the Armed Activities Case that the establishment of a “structured military administration of the territory occupied” would not be relevant in order to decide whether or not Uganda was an occupying power. Instead, the Court contented itself with examining whether “authority was in fact established and exercised”. Indeed, the practice of establishing a direct administration seems to have become the exception rather than the rule and a failure to do so will not free an occupying power of the obligation to comply with the rules on occupation. On the other hand, the establishment of an occupation administration certainly would facilitate the compliance with the duties of an occupying power.

3.2 Distinction between invasion and belligerent occupation

The traditional and predominant conception of a state of belligerent occupation is founded on a strict distinction between invasion and occupation. The term “invasion” depicts the phase in which a hostile army penetrates the territory of an enemy State. 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. For belligerent occupation to be established, an
additional condition must be realised. 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."

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."  

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

A state of belligerent occupation is thus interpreted as “a transitional period following invasion and preceding the agreement on the cessation of the hostilities”. 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 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 thus acknowledges that belligerent occupation “[...] may frequently coincide with invasion”. Furthermore, once a state of belligerent occupation has been established, occupation and hostilities as a result of local resistance may co-exist. 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 an invasion ends and a state of belligerent occupation begins.
NOTES

24. Ibid., at p. 32.
25. 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.
27. Article 1 Convention (II) with Respect to the Laws and Customs of War on Land of 1899.
28. See Graber, The Development..., at p. 33.
29. Ibid.
30. Ibid.
31. Ibid., at p. 61.
32. 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.
34. See Kolb/Vité, Le droit..., at p. 27.
37. Article 42 of the 1907 Hague Regulations.
38. See Kolb/Vité, Le droit..., at p. 63.
41. See Article 42 of the 1907 Hague Regulations.
43. For a detailed description of the arguments see Graber, The Development..., at p. 44 onwards.
44. See Gasser, Protection..., at p. 274.
45. 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.
47. See Graber, The Development..., at pp. 44 - 45.
50. See Article 42 1907 Hague Regulations.
51. Dikker Hupkes, What Constitutes..., at p. 23.
52. Ibid., at p. 24.
56. Ibid., at paras. 175 - 176.
57. Ibid., at para. 177.
58. The title reads: "Military Authority over the territory of the hostile state".
62. 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]".
63. Benvenisti, *The International..., at p. 5.
64. See Dikker Hupkes, *What Constitutes..., at p. 20.
65. See Kolb/Vité, *Le droit..., at p. 137.
66. Ibid., at p. 138.
67. UK Manual, at para. 11.3.2.
68. For the different elements of belligerent occupation see above at p. 10 onwards.
72. Ibid.
73. Ibid.
74. Ibid., at para. 214.
76. See below at p. 24.
III. Belligerent occupation under the Fourth Geneva Convention of 1949

1. Historical Background

1 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 the quest for 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. A draft of the “Civilian Convention” was nonetheless 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. In particular, civilians in occupied territory were left without adequate protection and faced horrendous practices during the Second World War; crowds of civilians being deported to faraway camps where they went through incredible suffering and where many among them met with a ghastly death. The nightmare of the Second World War 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 Conventions and the long awaited Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (hereafter: Fourth Geneva Convention).

2 The 1949 Geneva Conventions have revolutionised contemporary international humanitarian law, particularly as regards 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.
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 provision. According to Article 2 paragraph 1, the four Geneva Conventions apply in all cases of declared war or armed conflict between two or more High Contracting Parties. 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 groundbreaking development of the 1949 Geneva Conventions is that they also apply to cases where partial or total occupation meet with no armed resistance. 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.

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 “populations against certain consequences of war” and other fundamental guarantees, 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. Important prior instruments, such as the 1907 Hague Regulations, had been more concerned with governing the “military authority over the territory of the hostile State” and thus reflected the classical inter-State relationship of international law. As a result, 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. 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”. This can be seen as convergence with human rights law and the Fourth Geneva Convention indeed protects individuals who are civilians against arbitrary action by the enemy.

b) Definition of Protected Persons

Pursuant to 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”.  

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

Furthermore, the persons satisfying this nationality-test must find themselves “in the hands of a Party to the conflict or Occupying Power”. 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. This is, without any doubt, the case when a person physically, or directly, is under the control 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”. Therefore, not only persons physically under the control 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. Nor is it necessary that the foreign power has actually exercised authority over the protected person; all that is required is that the person comes within the sphere of control exercised by the occupying power. Otherwise, some authors argue, only detained or interned civilians would benefit from the protection of the Fourth Geneva Convention and, as a result, the latter instrument would be partly deprived of its protective content. This indirect form of being within the power of the enemy has also been adopted in recent case law. 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”. 

Finally, the expression “at any given moment and in any manner whatsoever” 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”. 

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 provision is certainly not designed to protect civilians from the effects of hostilities. For the latter, one has to consult the rules concerning the conduct of hostilities set out in the Hague Conventions of 1907 and Additional Protocol I of 1977. 

One can thus conclude that as soon an adversary has control over a 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 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. It can be argued that this would be in line with an interpretation based on the ordinary meaning of a term in its context, and with Article 154 of the Fourth Geneva Convention, which states that the convention supplements in part the 1907 Hague Regulations. Furthermore, the 1949 Geneva Conventions themselves seem to distinguish between invasion and occupation. 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.

However, 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, such a distinction may also result in a decrease in the protection afforded to the civilian population. As long as the invading army has not established and affirmed, 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 is still protected by the rules governing the conduct of hostilities and Articles 13 to 26 of the Fourth Geneva Convention offering general protection against certain consequences of war. 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. 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". 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, especially considering that the applicable rules do not address, for instance, the internment or deportations and transfers of protected persons. The drafters of the Fourth Geneva Convention must therefore 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 fulfilled.\textsuperscript{114} The US Army Field Manual envisages this \textit{de facto} application of the law of belligerent occupation for situations where troops are passing through enemy territory or even on the battlefield.\textsuperscript{115} 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 which rules apply would depend purely upon the will of the invading force.\textsuperscript{116}

\textbf{b) The functional beginning of belligerent occupation theory}

As seen above, civilians would benefit from less protection during the invasion period than the protection they would be afforded once occupation is established. With regard to some provisions a gap in protection would be created.\textsuperscript{117} 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 theory of the functional beginning of belligerent occupation.\textsuperscript{118} 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.\textsuperscript{119} 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.”\textsuperscript{120}

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, specifies when the Fourth Geneva Convention begins to apply. From that moment onwards the Fourth Geneva Convention applies to all protected persons.\textsuperscript{121} The expression “from the outset”\textsuperscript{122} should underline the fact that the Fourth Geneva Convention applies from the first act of violence onwards,\textsuperscript{123} which includes situations in which invading troops do not encounter armed resistance.\textsuperscript{124} 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”.\textsuperscript{125} The functional approach thus proposes a new understanding of one of the constitutive elements of belligerent occupation,\textsuperscript{126} 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.¹²⁷

In line with the overall humanitarian character of the 1949 Geneva Conventions, the Fourth Geneva Convention generally focuses on the individual,¹²⁸ granting 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”.¹²⁹ Effective control as understood in the Fourth Geneva Convention would therefore not relate to the territory and its authority, but rather to its inhabitants.¹³⁰ In other words, the relationship between an invading power and “protected persons” is, for the functional beginning of belligerent occupation theory, 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 by 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 established.¹³¹ 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 state of belligerent occupation.¹³² This is, at the least, true in so far as individuals are concerned and for the Fourth Geneva Convention.¹³³

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 accordance with the nature and level of contact between the local population and the enemy troops; some provisions will thus apply immediately, others only at a later stage.¹³⁴ The functional approach of occupation thereby results in a flexible and fluid regime which perfectly adapts to the complex situations occurring during the usually turbulent and unstable period beginning with the invasion of foreign territory.¹³⁵ 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.

In the author’s view, it is important to stress already at this point that the functional approach to occupation does not conflict a priori with the overall aim of the invading troops, that is to say with the overcoming of the enemy.¹³⁶ 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”.¹³⁷ Consequently, the conduct of hostilities with a view to establishing and maintaining 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.¹³⁸ 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 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 theory 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.

22 Furthermore, it should be noted that the law of belligerent occupation does not only 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 powers to deal with the individuals under its authority. 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. While these rules are of paramount importance during a state of belligerent occupation, they are even more important when hostilities are ongoing or the security situation has not yet been stabilised.

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

23 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 of whether the functional beginning of belligerent occupation theory also has repercussions on the application of Section III of the 1907 Hague Regulations. The following possibilities are conceivable:

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 enlarged the scope of application of the 1907 Hague Regulations.

24 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. Yet, the plenipotentiaries felt that it would be preferable to adopt a text that neither indicates any limitations between the two instruments nor establishes a hierarchy. They chose a text according to which the Fourth Geneva Convention does not abrogate the 1907 Hague Regulations and instead is supplementary to the latter’s Sections
II and III relative to hostilities and occupation. 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". 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. 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 upon in the Fourth Geneva Convention. In other words, the Fourth Geneva Convention derogates from provisions of the 1907 Hague Regulations only to the extent that those provisions have been stated differently or more precisely in the later 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 Hague Regulations". With regard to the prohibition of pillage, 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. Similarly, the Fourth Geneva Convention reinforced the prohibition of coercion by outlawing all forms of coercion no matter for what purpose. 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 where 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. 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", 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 theory, and hence accepted through subsequent practice the broader scope of application of the provisions relating to belligerent occupation of the Fourth Geneva Convention, then this should consequently also enlarge the application of the 1907 Hague Regulations.

NOTES

78. 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.

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

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

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

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

85. Article 3 of the Fourth Geneva Convention; Article 75 of the 1977 Additional Protocol I.

86. Title of Section III of the 1907 Hague Regulations.

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

88. See Title of the Fourth Geneva Convention.

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

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

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

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

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


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

96. Ibid.

97. Ibid.

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


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

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

103. Ibid., Title of the Convention, at p. 10.

104. See above at p. 10 onwards.


106. See Article 154 of the Fourth Geneva Convention.

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


109. See above at p. 13 onwards.


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


115. Ibid.


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

118. See Articles 2(1) and 6(1) of the Fourth Geneva Convention.
119. See Pictet, Commentary..., Article 6, at p. 60.
120. Ibid.
121. See Ibid., at p. 59.
122. Article 6(1) of the Fourth Geneva Convention.
123. See Pictet, Commentary..., Article 6, at p. 59.
124. See Article 2(2) of the Fourth Geneva Convention.
125. Pictet, Commentary..., Article 6, at p. 59.
126. Kolb/Vité, Le droit..., at p. 143.
127. See Dikker Hupkes, What Constitutes..., at p. 31.
128. See Kolb/Vité, Le droit..., at p. 144.
129. Article 4(1) of the Fourth Geneva Convention.
130. See Dikker Hupkes, What Constitutes..., at p. 32.
131. See Kolb/Vité, Le droit..., at p. 144.
132. 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.
133. See Pictet, Commentary..., Article 6, at p. 60.
134. Ibid.
135. See Kolb/Vité, Le droit..., at p. 146.
136. For the analysis of the feasibility of the functional beginning of belligerent occupation see below Part B, at p. 35 onwards.
138. Ibid.
139. Roberts, What..., at p. 304.
140. See, for instance, Articles 64(1) and 49(2) of the Fourth Geneva Convention respectively.
141. See Roberts, What..., at p. 304.
142. 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.
144. See Article 154 of the Fourth Geneva Convention.
146. See Dikker Hupkes, What Constitutes..., at p. 30.
147. See Kolb/Vité, Le droit..., at p. 70.
149. See Article 33(2) of the Fourth Geneva Convention; Articles 28 and 47 of the 1907 Hague Regulations.
151. See Article 44 of the 1907 Hague Regulations; Article 31 of the Fourth Geneva Convention.
152. See Pictet, Commentary..., Article 31, at pp. 219 - 220.
153. Kolb/Vité, Le droit..., at p. 70.
154. Ibid.
155. Note that many military manuals do not adopt the functional beginning of belligerent occupation; see above p. 20.
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. The Democratic Republic of the Congo asserted that, following attacks in border regions of eastern Congo between 7 and 8 August 1998, Ugandan troops occupied several provinces and violated provisions of the 1907 Hague Regulations and the Fourth Geneva Convention relating to occupied territory. 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. 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]”. The ICJ thereby 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 such authority is actually 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]”.

While the ICJ in the Armed Activities case was convinced that Uganda established and exercised authority in Ituri district as an occupying Power, 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”. 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.
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 other things, the Trial Chamber was confronted with cases of forced transfers and deportations, forced labour and wanton destruction. These incidents allegedly took place following the attacks of the 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. 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 described above.

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”. 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” and “that the application of the law of occupation as it affects ‘individuals’ as civilians protected under Geneva Convention IV does not require that the occupying power have actual authority”. 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”.

The Trial Chamber thus followed the functional beginning of occupation theory 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 for a state of belligerent occupation as defined under Article 42 of the 1907 Hague Regulations for dealings “with property and other matters”.


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.
The two parties disagreed on, *inter alia*, 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”. 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].”

Later, in dealing with claims related to the Western Front, the Commission found that the Ethiopian military presence was generally 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].”

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 *Naletilic* 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 contact with enemy civilians calls for protection.

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 the control necessary for occupation to exist. 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”. Accordingly, belligerent occupation would exist as soon as “a party to a conflict is exercising some level of authority over enemy territory”. Given that the predominant doctrine and prevailing practice do not accept that a state of belligerent occupation can be established while 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 the “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 traditional definition of belligerent occupation, a gap in protection; an intermediate phase during which the civilian population could not benefit of the protection that that the law of occupation offers. Furthermore, if only a few days suffice to establish a state of occupation, it seems even more difficult to understand why the protection of the civilian population should not benefit from at least certain provisions of the law of belligerent occupation in the intervening period.\textsuperscript{179}

\textbf{NOTES}

\textsuperscript{156.} ICJ, \textit{Armed Activities case}, supra note 54, at paras. 166 - 180.
\textsuperscript{157.} Ibid., at para. 167.
\textsuperscript{158.} Ibid., at para. 172.
\textsuperscript{159.} Ibid., at para. 173.
\textsuperscript{160.} See Article 42(2) of the 1907 Hague Regulations.
\textsuperscript{161.} ICJ, \textit{Armed Activities case}, supra note 54, at para. 176.
\textsuperscript{162.} Ibid., at para. 177.
\textsuperscript{163.} Ibid.
\textsuperscript{164.} ICTY, \textit{Naletilić case}, supra note 48, at paras. 215 and 216.
\textsuperscript{165.} Ibid., at para. 214.
\textsuperscript{166.} Ibid, at para. 219.
\textsuperscript{167.} See. Article 4 of the Fourth Geneva Convention.
\textsuperscript{168.} ICTY, \textit{Naletilić case}, supra note 48, at para. 221.
\textsuperscript{169.} ICTY, \textit{Naletilić case}, supra note 48, at para. 222.
\textsuperscript{170.} Ibid.
\textsuperscript{171.} See Article 5(1) of the December Agreement.
\textsuperscript{172.} Eritrea-Ethiopia Claims Commission, \textit{Central Front - Eritrea's Claims 2, 4, 6, 7, 8 & 22} (Partial Award of 28 April 2004), at para. 57.
\textsuperscript{173.} Ibid.
\textsuperscript{174.} Eritrea-Ethiopia Claims Commission, \textit{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.
\textsuperscript{175.} See Kolb/Vité, \textit{Le droit...}, at p. 148.
\textsuperscript{176.} Thürer, Daniel; MacLaren, Malcolm, "\textit{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.
\textsuperscript{177.} Ibid.
\textsuperscript{178.} Ibid.
\textsuperscript{179.} See Kolb/Vité, \textit{Le droit...}, at p. 148.
V. Conclusion of Part A

1. While specific issues regarding the definition of occupation have been subject to controversy almost since the Lieber Code, it has nonetheless become 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 a focus on 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 main 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 between invasion and occupation.\textsuperscript{179} Cessation of resistance, more or less complete, was considered an indication that the legitimate power no longer exercises authority and was thus a requirement for the existence of occupation. Otherwise mere invasion would exist.

2. 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 others 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].”\textsuperscript{180}

3. 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 Conventions. The latter have revolutionised contemporary international humanitarian law, particularly with reference to the treatment of civilians, and have 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 theory 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 him or herself 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.

4 Depending on the relationship between the Fourth Geneva Convention and the 1907 Hague Regulations, applying the functional beginning of belligerent occupation theory 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, potentially covers 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 to controversy.

5 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 designate 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.

6 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. The functional beginning of belligerent occupation theory, 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 theory seems to result in a more flexible regime which maximises the protection of protected persons.

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179. See Graber, The Development..., at p. 68.
180. Ibid., at p. 69.
181. See Roberts, What..., at p. 304.
Part B: Feasibility of the Application of the Functional Beginning of Belligerent Occupation Theory
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. 

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. 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 must consequently be applicable.

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 from being deprived of their rights and safeguards laid down in the Fourth Geneva Convention. According to this provision, changes introduced into the institutions or government of the occupied territory, new 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” 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 sense and should be applied at all times.
Admittedly, Article 47 of a Fourth Geneva Convention is generally of greatest importance only once a part of a State’s territory has been brought under the authority of the hostile army. Yet, a non-application of one of the fundamental principles of the Fourth Geneva Convention, namely that agreements with local authorities cannot be to the detriment of protected persons, would produce a gap of protection. By way of a de jure annexion, 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 approach. 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 this provision merely 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”. It defines the persons who qualify as “protected persons” under the Fourth Geneva Convention and hence benefit from all its rights and safeguards. As explained above, 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 theory. As a logical consequence and in accordance with the wording of the text, individuals that meet 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 into the hands of a party to a conflict.

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183. See Article 2 of the International Law Commission’s Articles on State Responsibility.
184. See Dinstein, The International..., at p. 57; Pictet, Commentary..., at p. 47; ICTY, Tadić case, supra note 98, at para. 579.
185. See Article 47 of the Fourth Geneva Convention; Pictet, Commentary..., Article 47, at p. 274.
186. Article 47 of the Fourth Geneva Convention.
187. 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.
188. Pictet, Commentary..., Article 4, at p. 45.
189. For a detailed analysis of Article 4 of the Fourth Geneva Convention see above at p. 18 onwards.
190. See above at p. 22 onwards.
II. Core Guarantees Applicable to both the Territories of the Parties to the Conflict and Occupied Territories

1 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,\textsuperscript{191} 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 Articles 27 to 34 of the Fourth Geneva Convention were intended to be provisions common to these two situations only.\textsuperscript{192} Also, the plenipotentiaries must have assumed that every protected person finds him or herself 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 in protection would exist for some people. 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”\textsuperscript{193} indicates that the articles of Section I of Part III of the Fourth Geneva Convention apply not only in a party’s own territory to the conflict (with regard to aliens) and occupied territories, but also on the territory of another party to the conflict that has been invaded.\textsuperscript{194}

2 Depending on which of the two above-mentioned interpretations one adopts, the potential gap in protection caused by not applying the functional beginning of belligerent occupation theory 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 in protection would exist with regard to these core guarantees. The functional beginning of belligerent occupation theory is, however, of paramount importance to prevent gaps in protection if one follows the interpretation suggested in the travaux préparatoires.

3 Despite overlaps with the next section of this paper, an entire section is devoted to these core guarantees.
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, a sort of a mini human rights convention by setting out the fundamental rights of protected persons. 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”.

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 of humane treatment;
- The protection of women by denouncing attacks on their honour in general and forms of sexual violence in particular;
- The right of equality and non-discrimination.

These core guarantees proclaim the basic principles upon which the whole 1949 Geneva Conventions are founded. By 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, 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 be either an alien in the territory of a belligerent State or in occupied territory, the latter being understood in terms of the wider meaning given by the functional beginning of belligerent occupation theory.

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”. The parties to the conflict are left with 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. This right somewhat balances out the duties imposed 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 provision.
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”. 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”. 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 against military operations. The former extends the scope of application to all civilians and also covers “movements” of the civilian population or civilian individuals as well. 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.

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 a party to the conflict’s own territory 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. 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”.

In stating “[...] the custom [...] that an invasion army may force the inhabitants of an occupied territory to serve as ‘guides’ is now forbidden”, 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 is actually in the hands of an invading army. From that moment onwards the provision becomes applicable in accordance with the functional beginning of belligerent occupation theory. 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 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 comes with 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 acts 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. 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”. It is thus not surprising that the prohibited measures falling within the scope of Article 32 of the Fourth Geneva Convention are generally considered grave breaches of the Fourth Geneva Convention. 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 law as well. Furthermore, they also constitute war crimes under the Rome Statute of the International Criminal Court and may amount to crimes against humanity if they are “committed as part of a widespread or systematic attack directed against any civilian population”.

What has been argued with regard to Article 28 of the Fourth Geneva Convention also holds true for the prohibition of measures causing physical suffering or extermination. Consequently, there is no evident reason to justify not applying 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”, mostly Western States feared an interference with the 1907 Hague Regulations and the majority voted for a text limited to protected persons in the hands of a High Contracting Party. The intention of the drafters was to show clearly that the article would not apply to the conduct of military operations. As discussed above the functional beginning of occupation theory 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.

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 penalising persons for acts for which they are not responsible. The first paragraph enshrines the principle of individual criminal responsibility and prohibits collective penalties and “all measures of intimidation or of terrorism”. The words quoted were 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. 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, is also set down as a fundamental guarantee in paragraph (4)(b) of Article 75 of Additional Protocol I, reflecting customary international humanitarian law, and is a maxim for all recent international tribunals. Furthermore, the principle also seems to be upheld in “most, if not all, national legal systems”. 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, is recognised as a fundamental guarantee in paragraph 2(d) of Article 75 of Additional Protocol I and considered to reflect customary international humanitarian law.

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 prior to the establishment of a state of occupation, understood in its traditional sense, 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: in Article 28 under Section II relative to the conduct of hostilities; and in Article 47 applicable in occupied territories. The Fourth Geneva Convention took up this old principle of international law and underlined its absolute character. Furthermore, the prohibition of pillage is also recognised as being part of customary international humanitarian law.

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 both private and public property. 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 theory, 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."²²

Although belligerent reprisals may be legitimate under certain circumstances as an enforcement measure,²³²³ the categories of persons and objects that can be the subject of reprisals have continuously been reduced during the past century and there seems to be a trend to outlaw them altogether.²³³²

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”²³⁹ 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.²³⁸ While the customary status of the prohibition of reprisals against civilian persons and objects during the conduct of hostilities remains controversial, customary international humanitarian law imposes strict conditions on belligerent reprisals in general,²⁴¹ and completely prohibits reprisals against protected persons and objects in the hands of an adverse party.²⁴²

The protection of protected persons would suffer a severe blow if one were to accept that the prohibition of reprisals against protected persons and their property only applies to the own territory of a High Contracting Party and to belligerent occupation in the traditional sense. This would create a gap in protection for the period 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 consists 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”.²⁴³

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 was substantially developed in treaty law and in customary international law as well.²⁴⁴ 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 conflicts²⁴⁵, 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 Convention and is recognised 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.

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, there is a strong argument in favour of an application of Article 34 of the Fourth Geneva Convention according to the theory of the functional beginning of belligerent occupation.

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191. See above at p. 21.
194. See Kolb, Jus..., 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.
195. 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".
197. See Article 27(1) of the Fourth Geneva Convention.
198. See Article 27(2) of the Fourth Geneva Convention.
199. See Article 27(3) of the Fourth Geneva Convention.
200. See Pictet, Commentary..., Article 27, at p. 200.
202. See Article 27(4) of the Fourth Geneva Convention.
203. See Pictet, Commentary..., Article 27, at p. 207.
204. Article 28 of the Fourth Geneva Convention.
205. Pictet, Commentary..., Article 28, at p. 209.
206. 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).
207. See Article 51(7) of the 1977 Additional Protocol I.
209. Pictet, Commentary..., Article 31, at p. 220.
210. Ibid.
211. Ibid.
212. See ICTY, Naletilić case, supra note 48, at para. 221.
213. See Pictet, Commentary..., Article 32, at p. 221.
215. See Article 147 of the Fourth Geneva Convention.
217. See Articles 8(2)(a)(i) to (iii), 8(2)(b)(x) and 8(2)(b)(xxi) of the Rome Statute.
218. See Article 7(1) of the Rome Statute.
220. Ibid., at. p. 719; Pictet, Commentary..., Article 32, at p. 222.
222. See above at pp. 24 to 25.
223. See Pictet, Commentary..., Article 33, at p. 225; Article 50 of the 1907 Hague Regulations.
224. Article 33(1) of the Fourth Geneva Convention.
225. See Pictet, Commentary..., Article 33, at pp. 225 to 226.
228. 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.
232. See Articles 28 and 47 of the 1907 Hague Regulations.
233. See Pictet, Commentary..., Article 33, at p. 226.
235. Pictet, Commentary..., Article 33, at p. 226.
236. Shaw, International Law..., at p. 1129.
237. For the conditions see: Henckaerts/Doswald-Beck, Customary..., Rule 145, at p. 515 onwards.
239. Pictet, Commentary..., Article 33, at p. 228.
240. See Articles 51(e) and 52(1) 1977 Additional Protocol I respectively.
242. See Ibid., Rules 146 and 147 respectively, p. 519 onwards.
244. See Arai-Takahashi, The Law..., at p. 293 onwards; Dinstein, The International..., at p. 151 onwards.
245. ICJ, Armed Activities case, supra note 54, at para. 218.
246. See Article 147 of the Fourth Geneva Convention.
III. Non-application of the functional beginning theory risks a gap in protection

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

1. The first paragraph of Article 49 of the Fourth Geneva Convention is of the utmost importance and the principle it expresses is repeated, or implied, in other provisions of the Convention. Moreover, the prohibition of forced transfers or deportations has become part of customary international law. 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.

2. 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 military reasons” within the occupied territory and, under certain circumstances, even outside of the bounds of the occupied territory. Such evacuations, however, are subject to stringent conditions, one of which states that the evacuated persons need to be transferred back to their homes. 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”.

3. Article 49 of the Fourth Geneva Convention also outlaws the practice of deporting or transferring parts of the occupant’s civilian population into the territory it occupies. According to the ICJ’s Advisory Opinion on the Legal Consequences of the Construction of a Wall in the occupied Palestinian territory, the prohibition in 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”.256

4 On the example of forced transfers or deportation of protected persons, the gap in protection that can result in a strict distinction between invasion and occupation becomes striking. If Article 49 of the Fourth Geneva Convention is not applied according to the functional beginning of belligerent occupation theory, no other provision of international humanitarian law would regulate the issue of transfers or deportations of protected persons during an 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.

5 In accordance with the functional beginning of belligerent occupation theory the prohibition on forced transfers and deportations would apply from the moment that a protected person falls into the hands of invading troops.257 However, such an 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”.258

6 While the functional approach to 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.259 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 be a serious gap in protection, application of the functional beginning of belligerent occupation theory 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

7 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 inhabitants in military operations against their own country.260 The egregious forced labour system created by the Nazi regime during World War II proved 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.261 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.

8 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”.262 Such work must not involve protected persons in military operations263 and protected persons must not be compelled to employ force to ensure the security of the place of work.264

9 The third paragraph of Article 51 of the Fourth Geneva Convention lays down the working conditions. Pursuant to these conditions, the labour must be carried out within
the occupied territory and, as far as possible, in the usual place of employment. Furthermore, workers shall be paid fair wages and the work must be “proportionate to their physical and intellectual capacities”.\textsuperscript{265} Reiterating the obligation to maintain existing legislation in the occupied territory,\textsuperscript{266} the plenipotentiaries underlined that the “legislation in force in the occupied territory concerning working conditions, and safeguards” remains applicable.\textsuperscript{267} Finally, compulsory work shall not result in labourers being mobilised in an organisation of a military or semi-military character.\textsuperscript{268}

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. Not applying the functional beginning of belligerent occupation theory 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 a foreign power must therefore be regulated by paragraphs two to four of Article 51 of the Fourth Geneva Convention.\textsuperscript{269}

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 has severe repercussions for the economies of the belligerent parties. The conduct of hostilities will inevitably affect the economic activities of a given territory and may itself lead to unemployment. The local economy of an invaded country in particular 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 inducing the inhabitants of a territory to work for the occupying power will usually coincide with 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 certain behaviour. An invading power does not therefore 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 an invading power could already be in a position to impose restrictions that severely affect the invaded territory and hence create unemployment or restrict working opportunities.\textsuperscript{270} 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 the case of an invasion, the functional beginning of occupation theory would only require an invading power to abstain from a policy that induces workers of the invaded territory to work for the 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.\textsuperscript{271}
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 “rendered absolutely necessary by military operations”. This provision reinforces and extends the rules regarding property in occupied territory already laid down in the 1907 Hague Regulations as it also covers property owned collectively or belonging to the State. At the same time, the Commentary stresses that the geographical scope of Article 23(g) of the 1907 Hague Regulations relating to 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”. As an example the Commentary mentions the bombardment of factories in an enemy country which has not yet been occupied and where Article 53 of the Fourth Geneva Convention and the grave breaches regime would accordingly not apply. 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.

To judge whether a gap in protection would exist if Article 53 of the Fourth Geneva Convention were to apply 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” and “rendered absolutely necessary by military operations” are identical. Dinstein believes that the difference between the two expressions “seems to be nominal”. As a matter of fact, the Commentary refers, with regard to when destruction of property is justifiable, to “imperative military requirements” as well. 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 modern law and usages of war”, have a wider scope than “military operations”. By often being used synonymously with the term “hostilities”, the latter expression need not necessarily be connected with all the necessities of war, 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. 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 beginning of belligerent occupation theory 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 in 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. Yet, not all conduct by belligerents actually constitutes part of hostilities. While treaty law does not provide for a definition of hostilities, it is proposed that the concept of hostilities refers to all acts 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]. Furthermore, there must be a direct causal link between the act and the harm in question. During the conduct of hostilities only military objectives may be attacked, and even attacks on military objectives which may be expected to cause disproportionate damage to civilian objects are outlawed. 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].”

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 any attacks of the legal sovereign against its own territory under the control of an adverse party, 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.

• 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 theory and hence that 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 maintaining law and order, or to ensure their safety, and proceed, for instance, with house searches.

This approach distinguishing between different situations and applying different law to each of them would respect the specificities encountered during hostilities, where the destruction of property under control of the enemy is almost an inexorable result. At the same time, the application of Article 53 of the Fourth Geneva Convention to objects under
the control of an invading power offers protection from destruction to such property and is further 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 theory 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’”, 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.

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 that it is allowed only if it is for the needs of the occupying army and proportionate. Article 57 of the Fourth Geneva Convention has not changed this basic rule but has added some safeguards. The requisition of civilian hospitals must be temporary 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. 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. 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”.

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 according to its traditional meaning, the functional beginning of belligerent occupation theory would regulate and, to a certain degree, authorise an invading army to requisition civilian hospitals and resources for the treatment of its own sick and wounded. At the same time the invading army would be legally obliged to take into account the needs of the population within its sphere of control.

6. National Red Cross organisations 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 organisations 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. Under similar conditions other relief societies must also be permitted to continue their humanitarian activities. Furthermore, the provision forbids an occupying power from requiring changes to the personnel or structure of these societies that would prejudice their humanitarian activities.
During an armed conflict the National Red Cross and other relief societies offer services of an inestimable value to the population affected by the armed conflict. The non-application of the functional beginning of belligerent occupation theory with regard to this provision could lead to a gap in protection. For such time as the invasion persists and a state of occupation in the traditional sense has not been established, there is no legal basis for the continued existence and work of National Red Cross organisations 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. One should also note that, in accordance with Article 18 of the First Geneva Convention, military authorities shall permit the spontaneous collection and care of sick and wounded persons belonging to the armed forces by other inhabitants and by relief societies.\footnote{257}

Moreover, the functional beginning of belligerent occupation theory offers a win-win situation: National Red Cross organisations 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 to comply with its duties \textit{vis-à-vis} the local population,\footnote{258} and yet the invading army would retain a legal basis to suspend the work of these organisations through “temporary and exceptional measures imposed for urgent reasons of security”.\footnote{259}

\section*{Notes}
\begin{itemize}
\item \footnote{248} See Articles 51(3), 52(2) and 76(1) of the Fourth Geneva Convention.
\item \footnote{250} ICTY, TC, \textit{Prosecutor v. Radislav Krstić}, (Judgement), IT-98-33-T (2 August 2001), at para. 521.
\item \footnote{251} Article 49(2) of the Fourth Geneva Convention.
\item \footnote{252} See Article 49(2) of the Fourth Geneva Convention.
\item \footnote{253} See Article 49(2)-(4) of the Fourth Geneva Convention.
\item \footnote{254} Article 49(5) of the Fourth Geneva Convention; see also Pictet, \textit{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.
\item \footnote{255} See Article 49(6) of the Fourth Geneva Convention.
\item \footnote{256} ICJ, \textit{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.
\item \footnote{257} See ICTY, \textit{Naletilić} case, supra note 48, at paras. 222 and 517.
\item \footnote{258} Article 49(5) of the Fourth Geneva Convention.
\item \footnote{259} See Article 49(6) of the Fourth Geneva Convention.
\item \footnote{260} See Article 52(1) of the 1907 Hague Regulations.
\item \footnote{261} See Pictet, \textit{Commentary...}, Article 51, at p. 292.
\end{itemize}
262. Article 51(2) of the Fourth Geneva Convention.

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

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

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

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

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

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

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


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


273. See Pictet, Commentary..., Article 53, at p. 301.

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

275. Pictet, Commentary..., Article 147, at p. 601.

276. Title of Section II of the 1907 Hague Regulations.

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

278. Dinstein, The International..., at p. 195.

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


281. Dinstein, The International..., at p. 196.


283. Article 14 of the 1863 Lieber Code.


285. See Melzer, Targeted..., at pp. 271 to 272.

286. Ibid., at pp. 273 to 274.

287. See Article 147 of the Fourth Geneva Convention.


289. See Ibid., at p. 41.

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

291. Ibid.

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

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

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

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

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

297. ICTY, Naletilić case, supra note 48, at para. 221.

298. 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 in question because fighting and mopping up of ABiH (Army of Bosnia and Herzegovina) soldiers continued (See para. 587).

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

300. See Pictet, Commentary..., Article 57, at p. 316.

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


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

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

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

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.

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.).

Article 63(1) of the Fourth Geneva Convention.
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

1 Article 43 of the 1907 Hague Regulations expresses the basic principle that an occupying power has to respect, unless absolutely prevented from doing so, the laws in force in the occupied country. Its “Geneva law counterpart”, Article 64 of the Fourth Geneva Convention, may be considered as elucidating the expression “unless absolutely prevented”. Notwithstanding that the first paragraph of Article 64 of the Fourth Geneva Convention seems to refer only to “penal laws”, 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 that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution.”

2 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. One could also argue that the provision 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.

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

- 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:

- 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
- “[m]aintain 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 theory they must respect the laws in force in the invaded territory unless, of course, they constitute a threat to 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 approach, 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 doctrine 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 beginning 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.

An application of Article 64 of the Fourth Geneva Convention in accordance with the functional beginning of belligerent occupation theory requires as a consequence that an invading army also comply with several limitations and judicial guarantees set forth in the articles that follow this provision. 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.

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

2. Judicial system

Having analysed the feasibility of the functional beginning of belligerent occupation theory for the 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 theory also has impacts 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 from altering the status of public officials and judges in the occupied territory. Neither may an occupying power sanction, coerce or discriminate against them if they do not fulfil their functions for reasons of conscience. The purpose of this provision is to ensure that public officials and judges are in a position to continue their pre-occupation duties as independently as possible. Since the superintendence passes to the occupying State, 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. 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. Furthermore, the occupying power has the right to remove public officials of any kind from their posts and for any reason. 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 of altering 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 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 theory would give invading troops a legal basis to remove public officials who could use their authority in a detrimental manner.

Although the non-application of the functional beginning of belligerent occupation approach 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 to maintain jurisdiction over the local penal (and civil) laws in force. 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” 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”. In order to fulfill this obligation an occupying power may call upon inhabitants to assume positions within the judicial system or may even itself set up its own courts applying local law.

The occupying power’s establishment of its own courts to deal with the violation of penal provisions it has enacted is expressly envisaged by Article 66 of the Fourth Geneva Convention. If it so wished, the occupying power may set up its own, properly constituted, non-political military courts. In any case, trial courts must sit in the occupied territory, and, whenever possible, courts of appeal as well.

What has been said with regard to the legislative powers of an invading army in accordance with the functional beginning of belligerent occupation theory 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 insofar as they are permitted by the Fourth Geneva Convention, the occupying 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 theory 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 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, the penalty must be proportionate to the offence. Offences intending simply 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. Furthermore, any time a protected person accused of an offence spent in pre-trial detention must be deducted from the duration of imprisonment.

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 theory, 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.”

For the functional beginning of belligerent occupation theory 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.\textsuperscript{333} 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.\textsuperscript{334}

19 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. Not applying these fundamental rules in accordance with the functional beginning of belligerent occupation theory, 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

20 Article 78 of the Fourth Geneva Convention authorises an occupying power to take safety measures and to subject protected persons to, at the most, assigned residence or internment for “imperative reasons of security”.\textsuperscript{335} 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 requirements for the procedure, the provision refers to the one set out in Article 43 of the Fourth Geneva Convention relative to the interment of aliens in the territory of a party to the conflict.\textsuperscript{336}

21 With the exception of 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 on 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 a serious gap. As a consequence, an invading power would not have an express legal basis for subjecting 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 theory would thus be of service both for the invading troops and also for protected persons who would be protected by minimum safeguards and afforded detailed standards of treatment.\textsuperscript{337}

NOTES

310. See Pictet, Commentary..., Article 64, at p. 335.
311. 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".
312. Pictet, *Commentary...,* Article 64, at p. 335.
315. See Article 64(1) of the Fourth Geneva Convention.
316. See Article 64(2) of the Fourth Geneva Convention.
317. See the observation made with regard to Article 4 of the Fourth Geneva Convention, above at p. 18.
318. 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-enacted civil law as well.
319. See Article 65 of the Fourth Geneva Convention.
320. See Article 54(1) of the Fourth Geneva Convention
321. See Pictet, *Commentary...,* Article 54, at p. 304.
322. See Ibid., at p. 305.
323. See Article 54(2) of the Fourth Geneva Convention.
324. See Article 54(2) of the Fourth Geneva Convention; Pictet, *Commentary...,* Article 54, at p. 308.
325. See Article 64(1) second sentence of the Fourth Geneva Convention.
327. Article 64(1) second sentence of the Fourth Geneva Convention.
328. See Pictet, *Commentary...,* Article 64, at p. 336.
329. See Article 66 of the Fourth Geneva Convention.
330. See Article 68(1) of the Fourth Geneva Convention.
331. See Article 69 of the Fourth Geneva Convention.
332. Article 70(1) of the Fourth Geneva Convention.
333. See Article 76(1) of the Fourth Geneva Convention.
334. See Article 76 of the Fourth Geneva Convention.
335. See Article 78(1) of the Fourth Geneva Convention.
336. See Article 76 of the Fourth Geneva Convention.
337. See Articles 79 to 135 of the Fourth Geneva Convention.
V. Positive and negative obligations due to the mere fact of occupation

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

1 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 also be the most challenging one.

2 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.”

3 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.”

4 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.338 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.339

5 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”. It is thus not absolute and their qualifications allow for certain flexibility.

6 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 for restoring and ensuring “public order and life”, which therefore requires it to take affirmative measures in order to comply with its duties. 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. 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.

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

8 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.

9 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 understood in the traditional sense. 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” applicable at all times with regard to protected persons. To address an economy in shambles or a social breakdown causing distress to the civilian population would evidently presuppose a consolidated and continuous occupation of territory.

10 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.

11 Furthermore, invading troops would have to immediately respect, “unless absolutely prevented” from doing so, the domestic law in force. 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 of this provision 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. 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. 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 who 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.

The text of Article 48 of the Fourth Geneva Convention stipulates that the decision whether a protected person may leave must be made through a procedure instituted by the occupying power. For the applicable procedure the article refers to Article 35 of the Fourth Geneva Convention requiring “regularly established procedures”. The Commentary explains that this expression would require procedural safeguards preventing arbitrariness, including previously-specified conditions under which permission to depart is granted and also the appointment of a responsible authority. In order to comply with the functional beginning of belligerent occupation theory, a military commander, for example, could decide as a first instance whether or not the application to leave made by 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. 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. Applying these rules relating to the application for the right to leave the occupied territory in accordance with the functional beginning of belligerent occupation theory would therefore 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 the co-operation of 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 within the territory it occupies and their activities, but is also bound to support them so that they can fulfil
their work. 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 whether the foreign power can actually provide that support will depend upon the circumstances and the capabilities of the invading troops. Furthermore, supporting these institutions is an obligation of means, meaning that it only requires that the invading troops do 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. 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. This work shall be supported by the Information Bureau set up in accordance with Article 136 of the Fourth Geneva Convention. This Information Bureau must be established at the outbreak of a conflict (and in all cases of occupation). 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 theory thus 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, with the former’s primary obligation is not to impede with the work of the latter. The occupying power will only have to co-operate and open a special section of the Information Bureau in occupied territory if the local authorities cannot establish the identity of a child. Therefore, the invading troops only need to be in a position to interview children and other people in order to gather the necessary information that 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. Furthermore, it outlaws the enlistment of children into “formations and organisation subordinate to [the occupying power]”. This clause deals with the enlistment into political movements and the like, not the recruitment into the armed forces which is covered by the first paragraph of Article 51 of the Fourth Geneva Convention.

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. At first, this paragraph seems to contain a duty to provide that 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.”

18 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 the 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. As was the case with the first paragraph discussed above, the third paragraph does not constitute a heavy burden for invading troops who need only take at least some steps to ensure the maintenance and education of orphans and children separated from their parents where the local authorities have failed in carrying out their duties. Hence, even invading troops should be absolved from taking care of such children.

19 Finally, in expressing the basic rule that, unless absolutely prevented from doing so, 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.”

20 Although changing the status of children or enlisting them into formations or organisations subordinate to the occupying power will most likely 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

21 Under 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. 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 is thus more restrictive. The Commentary is explicit that an occupying power is forbidden from resorting to forced enlistment “whatever the theatre of operations and whoever the opposing forces might be”. The scope of the prohibition 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 well. Furthermore, it can be considered as an application of the general prohibition of coercion.

22 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 from
compelling nationals of the adversary to take part in the operations of war against their own country.\textsuperscript{371} 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 theory 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.

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. This potentially includes the duty to import needed articles in case of inadequate resources within the occupied territory.\textsuperscript{372} 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”,\textsuperscript{373} 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”.\textsuperscript{374}

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 theory. All an invading army is asked to do 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. Furthermore, the occupying power must ensure that fair compensation is paid for requisitioned goods. 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.

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 to those for “the needs of the army of occupation” or for “the use by the occupation forces and administration of personnel”. 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. The provision of the Fourth Geneva Convention is thus more restrictive than Article 23(g) of the 1907 Hague Regulations. Since 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 outside the theatre of hostilities. This interpretation would prevent possible gaps in protection and would ensure that the needs of the population must be considered before 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 cooperation of national and local authorities, medical and hospital establishments and services, public health and hygiene. Particular reference is made to “prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics”. As the Commentary stresses, the duty to organise hospitals and health services and the taking of measures to control epidemics are “above all [...] for the competent services of the occupied territory itself”. As long as the national authorities are able to fulfil these tasks, the occupying power is merely required not to hamper their work. The author sees no reasons why the functional beginning of belligerent occupation theory 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 according to the means available to it. As was the case with regard to the first paragraph of Article 55 of the Fourth Geneva Convention discussed above, 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 comply with 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. Furthermore, the obligation to permit “medical personnel of all categories [...] to carry out their duties” 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
represent a fair correlative to the right to requisition civilian hospitals.\textsuperscript{386} For all these reasons, the application of this paragraph in accordance with the functional beginning of belligerent occupation theory seems warranted.

31 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 to newly set up hospitals and the distribution of identity cards to its staff. Should an invading army be present on foreign territory and the newly set up hospitals and their staff unable to get the required documents from the competent body of the occupied State, it seems only natural that the power who controls the area concerned should assume this task.

32 The last paragraph of Article 56 of the Fourth Geneva Convention calls for the respect of moral and ethical susceptibilities of the population of the occupied territory where 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. Therefore, nothing stands in the way of applying 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

33 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".\textsuperscript{387} 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 pursuant to 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.\textsuperscript{388}

34 By contrast, the acceptance of religious books and articles and particularly the facilitation of their distribution\textsuperscript{389} 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 its logistical means.

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

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

The principle of free passage of consignments of a 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, whereas the safeguards of Article 59 of the Fourth Geneva Convention aim to prevent the occupying power from using consignments for its own benefit. Moreover, while Articles 59 to 61 of the Fourth Geneva Convention are more limited in scope, they regulate in a more detailed manner the responsibilities of the occupying power as well as the distribution of the consignments.

After all, the provisions on collective relief essentially impose only minimal further obligations on the invading power. Facilitation of relief schemes “by all the means available at its [the occupying power’s] disposal”, can be achieved by using manifold means such as transport, stores, facilities for distributing and supervising agencies. An application of the functional beginning of belligerent occupation theory in this context would even give the invading power the possibility to divert consignments in the interests of the population of the occupied territory, in exceptional circumstances. To the extent that an invading army already controls a certain area or has parts of the foreign population within its power, applying Articles 59 to 61 of the Fourth Geneva Convention in accordance with the theory of 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.


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 theory would hence be favourable to the invading army, which would be strengthened in terms of the means they would have to verify individual relief consignments.
NOTES

338. Dinstein, *The International..., at p. 89.
340. See Article 43 of the 1907 Hague Regulations.
341. See Dinstein, *The International..., at p. 91.
344. UK Manual, at para. 11.3.
345. Article 27(4) of the Fourth Geneva Convention.
346. See Article 43 of the 1907 Hague Regulations.
347. See Article 48 of the Fourth Geneva Convention.
348. See Article 35 of the Fourth Geneva Convention.
349. See Article 48 of the Fourth Geneva Convention; Pictet, *Commentary..., Article 48, at p. 277.
351. See Pictet, *Commentary..., Article 35, at p. 236.
352. See Article 35(2) of the Fourth Geneva Convention.
353. See Pictet, *Commentary..., Article 50, at p. 286.
354. Article 50(2) of the Fourth Geneva Convention.
355. Ibid.
356. See Article 50(4) of the Fourth Geneva Convention.
357. See Article 136(1) of the Fourth Geneva Convention.
358. See Pictet, *Commentary..., Article 50, at p. 287.
359. Ibid., at p. 289.
361. Article 50(2) second sentence of the Fourth Geneva Convention.
362. See Pictet, *Commentary..., Article 50, at p. 288.
363. See Article 50(3) of the Fourth Geneva Convention.
364. See Article 24(1) of the Fourth Geneva Convention.
365. See Pictet, *Commentary..., Article 50, at p. 288.
366. Article 50(5) of the Fourth Geneva Convention.
367. Article 51(1) of the Fourth Geneva Convention.
368. Pictet, *Commentary..., Article 51, at p. 293.
370. See Article 31 of the Fourth Geneva Convention.
371. See Article 23(h) of the 1907 Hague Regulations.
372. See Article 55(1) of the Fourth Geneva Convention.
373. Article 55(1) of the Fourth Geneva Convention.
375. See Article 55(2) first sentence of the Fourth Geneva Convention.
376. See Article 55(2) second sentence of the Fourth Geneva Convention.
378. Article 52(1) of the 1907 Hague Regulations.
379. Article 55(2) of the Fourth Geneva Convention.
380. 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".
381. See Article 56(1) first sentence of the Fourth Geneva Convention.
382. Pictet, Commentary..., Article 56, at p. 313.
383. Ibid.
384. See Article 51(2) of the Fourth Geneva Convention.
385. See Article 56(1) second sentence of the Fourth Geneva Convention.
386. See Article 57 of the Fourth Geneva Convention.
387. Article 58(1) of the Fourth Geneva Convention.
388. See Articles 27(4) and 78 of the Fourth Geneva Convention.
389. See Article 58(2) of the Fourth Geneva Convention.
390. See Article 59(1) of the Fourth Geneva Convention.
391. Pictet, Commentary..., Article 59, at p. 320.
392. See Article 23 of the Fourth Geneva Convention.
393. See Article 59(4) of the Fourth Geneva Convention.
394. See Pictet, Commentary..., Article 23, at p. 181.
395. See Articles 60 and 61 of the Fourth Geneva Convention respectively.
396. See Article 59(1) of the Fourth Geneva Convention.
397. Pictet, Commentary..., Article 59, at p. 320.
398. See Article 60 of the Fourth Geneva Convention.
VI. Conclusion Part B

1 Two arguments are commonly brought forward to call into question the application of 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 theory would not be necessary because a strict distinction between invasion and a state of belligerent occupation does not create a gap in protection. The existing rules alongside those on belligerent occupation, it is argued, are perfectly sufficient for dealing 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, it is suggested, would leave no room to deal with the majority of these rules.

2 The analysis of Part B of the present paper, however, has shown that these assertions and concerns can easily be refuted. As regards the second contention against an application of the functional beginning of belligerent occupation theory, one can note that the provisions of the Fourth Geneva Convention, for which the functional beginning of belligerent occupation theory is mainly designed, find the right balance between necessity and humanity. 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 of 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 relevant provisions are often 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!

3 It has also been shown that many provisions of the Fourth Geneva Convention relating to occupied territories govern issues of paramount concern for the local population that 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 reveals that not applying the functional beginning approach results
in serious gaps in protection, which in itself warrants the promotion of this humanitarian interpretation of the law of belligerent occupation.
General Conclusion

1 Since the mid-19th century military powers and various 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 presents 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 so effective that an invasion turns into a state of belligerent occupation? 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 that would allow us to determine with precision at what point territory is considered occupied and when the rules on belligerent occupation start to apply. Moreover, States deploying armed forces in another country often avoid, for various reasons, 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 which, consequently, might entail serious consequences for the protection of the local population.

2 The functional beginning of belligerent occupation theory, 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, who becomes 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.

3 Admittedly, the functional beginning of belligerent occupation approach 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 theory 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. Proceeding on the basis of the functional beginning of occupation theory could create greater legal certainty for both the invading forces and the local population.

Perhaps one should not understand the application of the 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 would otherwise not adequately address.\footnote{See Dörmann/Colassis, \textit{International..., at p. 301.}}

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\footnote{See Dörmann/Colassis, \textit{International..., at p. 301.}}
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