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

1.1 The Lieber Code of 1863

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”.

The Functional Beginning of Belligerent Occupation
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.\(^ {23}\)

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**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.
12. See Graber, The Development..., at p. 20.
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.
15. Graber, The Development..., at p. 45.
16. Article 1 of the Brussels Project.
17. See Article 2 Brussels Project; Graber, The Development..., at p. 47.
23. See Graber, The Development..., at p. 54-58.