

DEBATE

Is the law of occupation applicable to the invasion phase?

Marten Zwanenburg, Michael Bothe and Marco Sassòli

The 'debate' section of the Review aims at contributing to the reflection on current ethical, legal, or practical controversies around humanitarian issues.

The definition of occupation under international humanitarian law (IHL) is rather vague, and IHL instruments provide no clear standard for determining the beginning of occupation. Derived from the wording of Article 42 of the 1907 Hague Regulations, occupation may be defined as the effective control of a foreign territory by hostile armed forces. It is not always easy to determine when an invasion has become an occupation. This raises the question whether or not the law of occupation could already be applied during the invasion phase. In this regard, two main positions are usually put forward in legal literature. Generally it is held that the provisions of occupation law only apply once the elements underpinning the definition set out in Article 42 of the 1907 Hague Regulations are met. However, the so-called 'Pictet theory', as formulated by Jean S. Pictet in the ICRC's Commentary on the Geneva Conventions, proposes that no intermediate phase between invasion and occupation exists and that certain provisions of occupation law already apply during an invasion.

The collapse of essential public facilities such as hospitals and water-supply installations, partly due to the large-scale looting and violence that came along with the progress of the coalition forces, in Iraq in 2003 demonstrates that this discussion is not simply a theoretical one. Invading armed forces need clarity as to what rules they need to apply.

*Three experts in the field of occupation law – Marten Zwanenburg, Michael Bothe, and Marco Sassòli – have agreed to participate in this debate and to defend three approaches. **Marten Zwanenburg** maintains that for determining when an invasion turns into an occupation the only test is the one set out in Article 42 of the*

1907 Hague Regulations, and therefore rejects the ‘Pictet theory’. **Michael Bothe**, while also rejecting the ‘Pictet theory’, argues that a possible intermediate situation between invasion and occupation, if there is any at all, would be very short and that, once an invader has gained control over a part of an invaded territory, the law of occupation applies. Finally, **Marco Sassòli** defends the ‘Pictet theory’ and argues that, in order to avoid legal vacuums, there is no distinction between an invasion phase and an occupation phase for applying the rules of the Fourth Geneva Convention.

The debaters have simplified their complex legal reasoning for the sake of clarity and brevity. Readers of the Review should bear in mind that the debaters’ actual legal positions may be more nuanced than they may appear in this debate.

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Challenging the Pictet theory

Marten Zwanenburg*

Marten Zwanenburg is a legal advisor at the Ministry of Defense of the Netherlands.

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The law of occupation has enjoyed increasing attention in recent years. Most of this attention has focused on the interpretation of substantive rules of this branch of international humanitarian law (IHL), its interrelationship with human rights law, and the impact of decisions by the United Nations Security Council on its application.

Relatively little attention has been paid to the question of when the law of occupation starts to apply, and in particular when an invasion turns into an occupation. The International Committee of the Red Cross (ICRC), in its report to the 31st International Conference of the Red Cross and Red Crescent on the

* martenzwanenburg@yahoo.com. This contribution was written in a personal capacity. The views presented are not necessarily those of the Ministry of Defense or any other part of the Government of the Netherlands.

‘Challenges of Contemporary Armed Conflicts’, states that important outstanding legal questions in the field of occupation law remain:

Not only is the definition of occupation vague under IHL, but other factual elements – such as the continuation of hostilities and/or the continued exercise of some degree of authority by local authorities, or by the foreign forces during and after the phase out period – may render the legal classification of a particular situation quite complex. . . . Linked to the issue of the applicability of occupation law is the question of the determination of the legal framework applicable to invasion by and the withdrawal of foreign forces. It is submitted that a broad interpretation of the application of the Fourth Geneva Convention during both the invasion and withdrawal phases – with a view to maximizing the legal protection conferred on the civilian population – should be favoured.¹

The ICRC is referring to longstanding debate concerning the threshold of application of the law of occupation. Traditionally, occupation was clearly distinguished from invasion. It was generally accepted that only after a minimum level of stability had been reached in an area that had been invaded did the law of occupation start to apply. This was reflected in the wording of Article 42 of the 1907 Hague Regulations.²

When the four Geneva Conventions were adopted, the provisions on occupation in the Hague Regulations were complemented by Section III of Part III of the Fourth Geneva Convention. This convention included an important broadening of the scope of application of the law of occupation, by providing in Article 2(2) for its application in case of an occupation without resistance – that is, without a prior invasion. For situations where there was such a prior invasion, the convention is silent on when such an invasion turns into an occupation. This raises the question whether the same test should be applied for this transition as for determining when the provisions on occupation in the Hague Regulations become applicable, or whether a separate, and different, test applies in the case of the Fourth Geneva Convention.

The latter is the point of view adopted by Jean Pictet in his commentary on the Geneva Conventions,³ which is why it is also referred to as the ‘Pictet theory’.⁴ The test employed by Pictet for determining whether there is an occupation for the

- 1 Report to the 31st International Conference of the Red Cross and Red Crescent, ‘International humanitarian law and the challenges of contemporary armed conflicts’, ICRC, Geneva, October 2011, available at: http://www.rccrcconference.org/docs_upl/en/31IC_IHL_challenges_report_EN.pdf (last visited 21 February 2012).
- 2 Article 42 of the 1907 Hague Regulations reads: ‘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’.
- 3 See Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958 (Fourth Geneva Convention, Article 6§1), available online at: <http://www.icrc.org/ihl.nsf/COM/380-600007?OpenDocument> (last visited 21 February 2012).
- 4 It is to be noted that Jean Pictet’s theory according to which the definition of occupation would be different in the context of the Fourth Geneva Convention from that stemming from Article 42 of the 1907 Hague Regulations does not reflect the ICRC’s present views on the subject matter. For the ICRC, in the

purposes of the Fourth Geneva Convention is based on a particular reading of Article 4 of that convention. This reading is that the provisions on occupation in the Fourth Geneva Convention apply as soon as enemy forces exercise control over a protected person. Thus, the test applied is based on control over persons, rather than control over territory as required under the Hague Regulations. It has been adopted by a number of authors. It also appears to have been embraced by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Naletilić and Martinović* case.⁵ Many of the supporters of this test buttress their arguments with the submission that if it were not accepted this would result in gaps in the protection afforded by IHL.⁶ As such, it would accord with a teleological interpretation of the Fourth Geneva Convention aimed at maximizing the protection afforded by IHL.

There are serious arguments for questioning the ‘Pictet theory’, however. These arguments will be briefly addressed in this contribution. The first objection concerns the wording of Article 4 of the Fourth Geneva Convention. The relevant part of this article provides that:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of an armed conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

It is important to note that the article refers to persons who find themselves in the hands of, *inter alia*, an Occupying Power. The article thus appears to require a pre-existing occupation, in the context of which persons find themselves in the hands of the Occupying Power. In other words, the occupation does not come about through the fact that persons find themselves in the hands of a power. It is interesting to note that this is implicitly supported in Pictet’s commentary, suggesting that this commentary is not internally consistent:

The words ‘in case of a conflict or occupation’ must be taken as referring to a conflict or occupation as defined in Article 2. The expression ‘in the hands of’ is used in an extremely general sense. It is not merely a question of being in enemy

absence of any detailed definition of occupation under the Fourth Geneva Convention and by the operation of its Article 154 highlighting the supplementary character of the instrument in relation to the 1907 Hague Regulations, the affirmation according to which the Fourth Geneva Convention would provide a different definition of occupation is not any more relevant in light of *lex lata*. In that regard, the ICRC interprets Pictet’s theory as only lowering the threshold of application of certain norms of the Fourth Geneva Convention so that they could also produce their legal effects during the phase of invasion (i.e. in a situation that does not amount to effective control for the purposes of IHL) with the view to enhancing the legal protection conferred by IHL to protected persons trapped in invaded areas. Therefore, the ICRC still views Article 42 of the 1907 Hague Regulations as the only legal benchmark against which the determination of the existence – or not – of a state of occupation shall be made. For further details, see the article by Tristan Ferraro, ‘Determining the beginning and end of an occupation under international humanitarian law’, in this edition.

5 ICTY, *Prosecutor v. Naletilić and Martinović*, Judgment (Trial Chamber), Case No. IT-98-34-T, 31 March 2001, paras. 219–221.

6 If the test were not accepted, individuals in territories invaded but not yet occupied would only benefit from limited protections set forth in Part I and Part II of GC IV.

hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or 'hands' of the Occupying Power. It is possible that this power will never actually be exercised over the protected person: very likely an inhabitant of an occupied territory will never have anything to do with the Occupying Power or its organizations. In other words, the expression 'in the hands of' need not necessarily be understood in the physical sense; it simply means that the person is in territory which is under the control of the Power in question.⁷

Accepting the Pictet theory would lead to a situation in which the determination whether a person is a 'protected person' is conflated with the test for determining whether there is an occupation. This is difficult to reconcile with the existence of a section in the Fourth Geneva Convention that is specifically devoted to situations of occupation. It would also raise the question whether a distinction must be made between persons and goods as regards the situations in which they are protected. Part III, Section III of the Fourth Geneva Convention contains provisions protecting persons as well as provisions protecting goods. Under the Pictet theory, the threshold for application of the former would be lower than for the latter. The former would be protected by virtue of Article 4 of the Fourth Geneva Convention as soon as they found themselves in the hands of a Party to the conflict, whereas the latter would presumably only be protected in the case of an occupation in the sense of the Hague Regulations.

There is nothing in the *travaux préparatoires* of the Geneva Conventions to suggest that the drafters intended to depart from the previously accepted notion of occupation. If it had been their intention to include such a radical departure in the Fourth Geneva Convention, one would at the very least expect that such an intention would have been mentioned during the debates.

It is true that, if the Pictet theory is rejected, persons finding themselves in the hands of invading forces enjoy less protection than persons in the hands of an Occupying Power. Such a difference in levels of protection between different groups of persons is, however, no exception in the Geneva Conventions. It is a fact that the drafters of the Geneva Conventions made certain distinctions that have consequences for the level of protection afforded to particular groups of persons. The most obvious example is the distinction between international and non-international armed conflicts. Article 4 of the Fourth Convention provides another example of such a distinction. It provides that nationals of a neutral state, who find themselves in the territory of a belligerent state, and nationals of a co-belligerent state, shall not be regarded as 'protected persons' while the state of which they are nationals has normal diplomatic representation in the state in whose hands they are. Like it or not, such distinctions are part and parcel of IHL as it presently stands. That the object and purpose of the Geneva Conventions are of a humanitarian nature does not change this. This object and purpose have an

7 See J. S. Pictet, above note 3 (GV IV, Art. 4), available online at: <http://www.icrc.org/ihl.nsf/COM/380-600007?OpenDocument> (last visited 21 February 2012).

important role to play in the interpretation of a particular provision of the Conventions, but they cannot introduce a new rule in those Conventions where it did not previously exist.

One could argue that states may, in the application of a treaty provision, come to recognize that a particular provision must be read differently from what the original drafters intended. In accordance with Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' shall be taken into account in interpreting a treaty provision.

A well-known example of subsequent state practice changing the previously accepted interpretation of a rule in the context of IHL is Article 118 of the Third Geneva Convention, concerning the release and repatriation of prisoners of war. There is ample state practice demonstrating that states interpret this provision in a different manner from that adopted in 1949.⁸ This is not the case for the definition of occupation, however. On the contrary, most of the available state practice, with the notable exception of the judgment of the ICTY Trial Chamber in the *Prosecutor v. Naletilić and Martinović* case mentioned above, points in the opposite direction. For example, in the case of *Rev. Mons. Sebastiao Francisco Xavier dos Remedios Monteiro v. The State of Goa*, the Indian Supreme Court applied the definition of occupation under Article 42 of the 1907 Hague Regulations to define the beginning of an occupation in the sense of the Geneva Conventions.⁹ The International Court of Justice (ICJ), in the case concerning armed activities on the territory of the Congo (*DRC v. Uganda*), held that the definition of occupation in Article 42 of the Hague Regulations reflects customary law.¹⁰ It then went on to apply this definition in analysing the claims made by the DRC, including the claims that Uganda had violated provisions of the Geneva Conventions. This suggests that the Court considered that the definition of occupation set out in Article 42 also applies to the Geneva Conventions.

One may wonder whether accepting the Pictet theory accords with the principle of effectiveness. In other words, it could be argued that it would lead to a situation in which an Occupying Power is in a position of material impossibility to fulfil obligations imposed on it. This would imply that the drafters of the Fourth Geneva Convention did not espouse the Pictet theory, as it cannot be supposed that they would accept obligations for their respective states that they knew those states would not be able to fulfil. In general, most of the provisions of Part III, Section III, of the Fourth Convention appear to presuppose the existence of effective control over a certain territory in order to be fully respected. This is particularly true for the

8 See, *inter alia*, the practice referred to in John Quigley, 'Iran and Iraq and the obligations to release and repatriate prisoners of war after the close of hostilities', in *American University International Law Review*, Vol. 5, No. 1, 1989, p. 83; and Marten Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff, Leiden, 2005, p. 256.

9 Supreme Court of India, *Rev. Mons. Sebastiao Francisco Xavier dos Remedios Monteiro v. The State of Goa*, 26 March 1969, *All India Reporter* 1970 SC 329.

10 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports* 2005, p. 168, para. 172.

‘positive’ obligations included in this Section, namely those obligations that require the Occupying Power to do something rather than refrain from doing something. One example is the obligation in Article 50 to facilitate the proper working of all institutions devoted to the care and education of children. Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education – if possible by persons of their own nationality, language, and religion – of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend. It is clear that a single patrol that has penetrated into the territory of the enemy and holds a village there for a brief time will hardly be in a position to ensure education for children it encounters. Such tasks typically involve specialized (‘civil–military co-operation’, ‘civil affairs’) personnel who are not deployed with such a patrol. Another example is Article 56, which obliges the occupant to ensure and maintain, with the co-operation of national and local authorities, the medical and hospital establishments and services, public health, and hygiene in the occupied territory. The Article refers in particular to the prophylactic measures necessary to combat the spread of contagious diseases and epidemics. According to the Pictet commentary, measures to be taken by an Occupying Power to meet its duties under Article 56 include, for example, supervision of public health, education of the general public, the distribution of medicines, the organization of medical examinations and disinfection, the establishment of stocks of medical supplies, the dispatch of medical teams to areas where epidemics are raging, the isolation and accommodation in hospital of people suffering from communicable diseases, and the opening of new hospitals and medical centres. These measures presuppose capabilities and specialized personnel that will not normally be available in many situations in which the Pictet theory would apply. It is true that Article 56 nuances the obligation placed upon the occupant by adding the words ‘to the fullest extent of the means available to it’. This does not detract from the fact that this and other provisions in Part III, Section III, were clearly not written with application during an invasion in mind.

Some might argue that, in view of the above, not all but only certain rights and obligations of the law of occupation would apply in a situation where protected persons find themselves in the hands of a Party to the conflict. This is problematic for two reasons. First, there is nothing in the text of the Fourth Geneva Convention to suggest such a differentiation between different obligations in Part III, Section III. Second, it is entirely unclear precisely which rights and obligations would apply in a situation where the Pictet theory applies, and which would not. This would create a situation in which states parties (as well as protected persons) would be left guessing which obligations they had in a particular situation. This is very undesirable from the perspective of legal certainty.

In conclusion, there are a number of arguments that strongly suggest that there is at present no separate test, apart from that set out in the Hague Regulations, for determining when an invasion turns into an occupation. This is not to say that one cannot argue for the application of the Pictet theory as a matter of *lex ferenda*. Indeed, application of this theory leads to increased protection for protected persons

and would address a 'protection gap' in the law. However, a certain measure of caution is called for.

As the abovementioned ICRC report states, practice has demonstrated that many states put forward claims of inapplicability of occupation law even as they maintain effective control over foreign territory or a part thereof, owing to a reluctance to be perceived as an Occupying Power. If this is already the case when Article 42 of the Hague Regulations is the standard for determining whether there is an occupation, this tendency would be likely to increase sharply if the Pictet theory were to be accepted. In that case, it is questionable whether the application of the theory would indeed provide all the benefits of increased protection claimed by its supporters.



Effective control during invasion: a practical view on the application threshold of the law of occupation

Michael Bothe

Michael Bothe is Professor Emeritus of the Johann Wolfgang Goethe University, Frankfurt-am-Main (M.Bothe@jur.uni-frankfurt.de).

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The question asked by the editors – ‘Is the law of occupation applicable during the invasion phase?’ – relates two situations to each other, ‘occupation’ and ‘invasion’. While the term ‘occupation’ is defined in IHL, controversial as the fine tuning of the definition may be, the term ‘invasion’ is not. For the purposes of this comment, the term will be taken in its ordinary, common meaning. In a military context, it means the movement of military units into an area belonging to another state. In this sense, it is, for instance, used in the UN General Assembly definition of aggression, which includes: ‘(t)he invasion or attack by the armed forces of a State of the territory of another State’.¹¹

The existence of an occupation triggers the application of a specific legal regime that one finds in the Hague Regulations, which constitute customary law, in the Fourth Geneva Convention, and in certain details in the First Additional Protocol to the Geneva Conventions. This regime cannot apply unless there is an occupation. During an invasion phase, it can only be applied if and to the extent that a situation of occupation has arisen at the same time. In legal instruments that deal with both invasion and occupation, however, occupation is generally seen as a situation that arises after an invasion, or that is the result of an invasion. Thus, the paragraph of the definition of aggression quoted above also includes ‘military

11 United Nations General Assembly, Resolution 3314 (XXIX), 14 December 1974, Annex, Art. 3(a).

occupation . . . resulting from such invasion'.¹² This is also true for the so-called Oxford Manual adopted by the Institut de Droit International in 1880: occupation occurs 'as a consequence of invasion by hostile forces'.¹³ However, it is submitted that it is not impossible for a situation of invasion to coexist or overlap with a situation of occupation. In particular, if one considers the situation of an invaded state as a whole, control over invaded territory may be established by the invader while the military movement forward – the invasion – is still going on in other parts.

This does not mean simply playing with words. It is an immensely practical question. This can be elucidated by the situation that occurred during the 2003 US/UK invasion of Iraq: while the invading troops advanced, looting by private persons was frequent. If the law of occupation applied, the invasion/occupation forces would have had a duty to prevent it. If not, it is very difficult to find a basis for such preventive duty.

The law of occupation provides for a balanced system of rights and duties of the Occupying Power. It is aptly summarized by the ICJ as follows:¹⁴

[The Occupying Power is] under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the [occupied country]. This obligation comprise[s] the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

This regime satisfies a number of protective interests. Do all the interests at stake require protection during an invasion phase? Can their protection be reasonably expected during an invasion phase? In the doctrinal debate about the question of overlap between the two terms, the theory put forward by Pictet provides an easy answer: any successful invasion immediately creates a situation of occupation:

There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets.¹⁵

This approach, with due respect to the author and to his concern for the protection of victims, is, to say the least, an oversimplification. It is rightly

12 *Ibid.*

13 The Laws of War on Land (hereafter Oxford Manual), Oxford, 9 September 1880, Art. 41.

14 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 178.

15 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, Art. 6, p. 60.

rejected by Marten Zwanenburg. If one takes the term 'occupation' in its natural meaning, there must be some kind of control involved. Only some degree of control can trigger the specific regime of rights and duties, including protective duties imposed on the Occupying Power, that is the essence of the law of occupation. The mere presence of forces on foreign territory is unable to trigger the application of that regime. A hit-and-run raid across the border does not establish a situation of control and, thus, an occupation. While an invading army advances, fighting its way into foreign territory, a situation of control is not established immediately. If a tank advances to join a battle that is raging a kilometre ahead and passes a burning house, the driver is not supposed to stop and help the firefighters. He or she must not shoot on the firefighters as they are civilians, and he or she must let them do their job as they are a protected civil defence unit. But in that stage of the conflict, the invading force does not yet have the duty of an Occupying Power to see to the welfare of the population of the occupied territory, which might indeed include help in firefighting. The fighting invading force has essentially negative duties in relation to the population: not to attack the civilian population, individual civilians, or civilian objects. In a contact zone, while fighting is still going on, the invading army has other concerns and responsibilities than fulfilling the public order functions of an Occupying Power.

But when does this situation change to the effect that these responsibilities are indeed imposed on the invading force? This is an essential question that Zwanenburg does not address and did not have to address within the framework of his line of argument. Yet it is one thing to deconstruct the Pictet theory; it is another to give an appropriate answer to that crucially important question. How long does the population of the invaded territory have to wait until the invader takes care of public order that is desperately needed by that population? Until the commander of the invading army makes himself or herself comfortable in the office of the former provincial government and has the secretaries arrive to take up the phone and to type a declaration that he or she has taken over the powers of an occupant? If this question were answered in the affirmative, it would mean, in the final analysis, to make the establishment of a regime of occupation dependent upon the good will of the commander of an invading army, or of his or her government. This would neglect the needs of the affected population, which must be protected by some governmental power. It would make the notion of 'occupation' a subjective one, dependent on the will of the occupant. But occupation is an objective notion. The law of occupation applies once there is, objectively speaking, a situation of occupation.

Objectively, occupation means *de facto* control. To that extent, Zwanenburg is right. But if forces present on a foreign territory are unwilling to exercise such control, this does not change the objective situation. A situation of occupation does not only arise if an occupation force has indeed taken over governmental powers; it has already arisen if that force is in a position to do so. This is a construction of the scope of application of the law of occupation that is contained in older formulations of this law and in quite recent ones.

It was already expressed clearly in the Oxford Manual:

Art. 41. Territory is regarded as occupied when, as a 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. The limits within which this state of affairs exists determine the extent and duration of the occupation.¹⁶

The same concept is articulated in the new UK Manual of the Law of Armed Conflict, according to which two conditions must be satisfied: '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'.¹⁷ The ICTY adopts essentially the same two pronged test: 'The occupying power *must be in a position* to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly'.¹⁸

When is an invading army in a position to exercise control? That depends on diverse circumstances. Yet experience, especially in Iraq, shows that it may happen earlier than expected. If no resistance is offered to an invasion and the former government structure just melts away, the invader, whether he likes it or not, is very soon in that position. This is the situation, already alluded to, where the resistance of an invaded state quickly breaks down, so that the invader is indeed in a position to exercise the said *de facto* authority while the movement forward (invasion) is still continuing in other parts of that territory. A responsible (and somewhat optimistic) commander of an invasion force should therefore draft rules of engagement in a way that alerts the soldiers to the responsibility to provide at least some basic protection to the population at a relatively early stage of a successful invasion.

What does this mean for Pictet's postulate that there is no intermediate situation between invasion and occupation? According to the view proposed here, that intermediate situation, if there is any, would indeed be very short. Once an invader has gained control over a part of an invaded territory, the law of occupation applies, even if the movement forward that precedes such control is continuing in other parts of the territory. The essential point that brings the solution proposed in this comment close to that of Pictet is the interpretation that it is not the actual establishment of a mechanism of control that triggers the application of the law of occupation, but that this application is already triggered where the invader is in a position to exercise authority, even if it is not yet willing to do so.

It is the example given by Pictet in the two sentences quoted above¹⁹ that is objectionable. A patrol penetrating into enemy territory without any intention of

16 Oxford Manual, above note 13 (emphasis added).

17 UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, 2004, Sec. 11.3 (emphasis added).

18 ICTY, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgement (Trial Chamber), 31 March 2003, para. 217 (emphasis added).

19 See text accompanying note 15.

staying there does not establish a situation of effective control and therefore does not trigger the application of the law of occupation. But it is exactly at this point that Marco Sassòli joins the Pictet theory. He argues that the Pictet theory is indeed necessary to ensure an appropriate protection of persons falling into the hands of an invading force before a situation of occupation exists in the sense defended by this comment. It is submitted that this protection can be ensured through rules other than those of the law of occupation, in particular Additional Protocol I, customary humanitarian law, and human rights. Part of the problem, as Sassòli rightly points out, is due to the somewhat awkward definition of 'protected persons' in the Fourth Geneva Convention. Article 75 of Additional Protocol I was intentionally drafted to remedy this flaw. It is submitted that the solution proposed in this comment does not compromise the necessary protection of persons falling into the hands of an invading force, but it avoids another serious difficulty that the Pictet theory faces. The duties of the Occupying Power to re-establish and ensure public order and safety and to see to it that the population is provided with food, lodging, health care, and education are positive duties of protection. As Sassòli admits, the Occupying Power cannot reasonably be expected to fulfil such duties while fighting is still going on. In other words: certain duties of the Occupying Power, at least according to Sassòli's interpretation of the Pictet theory, do not apply during the invasion phase. This protects the Pictet theory against the criticism of being practically impossible, but it leads to a need to restrict the protective duties of the Occupying Power as applying not to every situation of occupation but only to one of longer duration.



A plea in defence of Pictet and the inhabitants of territories under invasion: the case for the applicability of the Fourth Geneva Convention during the invasion phase

Marco Sassòli

Marco Sassòli is Director of the Department of International Law and International Organization and Professor of International Law at the University of Geneva, and Associate Professor at the Université Laval and the University of Québec in Montreal, Canada; he is also a member of the Editorial Board of the *International Review of the Red Cross*.*

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Both Marten Zwanenburg and Michael Bothe, for whom I have the highest possible respect, distinguish between an invasion phase and an occupation phase in the context of a state engaged in an international armed conflict against another state on the territory of the latter. They argue that the rules of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (hereafter Convention IV) pertaining to occupied territories apply only during the latter phase. I disagree. Where they differ – and their interpretations differ only in nuances, on which I rather side with Michael Bothe – is on when IHL of military occupation starts to apply. Both describe the debate about whether an invasion phase and an occupation phase should be distinguished fairly. This makes my task easier to

* I would like to thank my former student Mr. Michael Siegrist for the ideas he has provided me with from his Masters thesis and my research assistant and doctoral student, Ms Nishat Nishat, for revising this text.

defend the opposite interpretation, one put forward by someone for whom I equally have the highest possible respect, Jean S. Pictet. As an advocate of one position, I have the luxury of being one-dimensional and able to ignore complexity. I will argue, first, that a systematic interpretation of Convention IV, taking its object and purpose into account and avoiding absurd results, leads to the conclusion that enemy control over a person in an invaded territory is sufficient to make this person protected by the rules of Convention IV on occupied territories. Second, even if occupation is defined purely territorially, a civilian falling into the power of the enemy during an invasion perforce finds himself or herself on a piece of land controlled by that enemy. Third, this interpretation does not require of invading forces what they cannot deliver. The very wording of the provisions of Convention IV (and arguably that of the 1907 Hague Regulations concerning the Laws and Customs of War on Land (hereafter the Hague Regulations)) is flexible enough not to require what is impossible in the invasion phase. Alternatively, the concept of control could be interpreted in a functional way, with a different threshold for different rules.

Avoiding a gap resulting from the structure of the Fourth Geneva Convention

Most of the rules of Convention IV – that is, its Articles 27–141, forming Part III of the treaty – benefit only ‘protected civilians’, as defined in its Article 4. This provision reads:

Persons protected by the Convention 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.

As mentioned by Marten Zwanenburg, it would be circular to explain why inhabitants of invaded territories are protected civilians by arguing that they are in the hands of an Occupying Power. However, what Zwanenburg forgets, is the first alternative of Article 4, namely the ‘case of a conflict’. When inhabitants of an invaded territory fall – for example, by arrest and detention – under the control of invading forces, they are without any doubt in the hands of a Party to the conflict of which they are not nationals.

As inhabitants of invaded territories who fall into the hands of the invader are protected persons, they must benefit from some rules of Part III of Convention IV dealing with the ‘status and treatment of protected persons’. The rules of Part III are separated into rules applicable to aliens who find themselves on the ‘own’ (i.e. non-occupied) territory of a state and those applicable to occupied territories. The two categories are mutually exclusive, and I would argue that together they cover all possible situations in which a civilian is in enemy hands. Section II protects foreigners on a Party’s own territory. Section III applies to occupied territory. Section IV contains detailed rules protecting civilians interned for imperative security reasons in both a party’s own and occupied territories. As for Section I, its

title referring to 'provisions common to the territories of the Parties to the conflict and to occupied territories' could be read as encompassing not only own and occupied territories, but also any other territory of a Party to the conflict. However, under a systemic interpretation, the term 'common' must perforce refer to what appears in the following sections, II and III. Furthermore, the *travaux préparatoires* show that Part III was intended to cover (only) two categories of persons: aliens in the territory of a Party to the conflict and the population of occupied territories.²⁰ Not a single rule of Part III protects a civilian who is neither in a Party's own nor in an occupied territory.

Therefore, if invaded territory were not considered as occupied in the sense of the categories of Convention IV, 'protected civilians' (and the main purpose and object of Convention IV is to protect 'protected civilians') falling into the hands of the enemy on invaded territory would not be protected by any rule of Part III. It would not be a violation of Convention IV to torture such an inhabitant of an invaded territory,²¹ to rape her,²² to take her as a hostage,²³ or to subject her to collective punishment.²⁴ All aforementioned conduct against protected persons is only prohibited by Convention IV if those persons are aliens in a Party's own territory or if they find themselves in an occupied territory. Some may object that such conduct is prohibited by international human rights law (if it applies extraterritorially, which some scholars and states would deny, in particular if there is no occupation, as Marten Zwanenburg and Michael Bothe would argue), Article 75 of Additional Protocol I, and Article 3 Common to the Geneva Conventions as a common minimum applicable in all armed conflicts. Others may add that inhabitants of invaded territories remain covered by Chapter I of Section II of the Hague Regulations on 'Means of injuring the enemy, sieges, and bombardments', by Part II of Convention IV on 'General protection of populations against certain consequences of war', and by the dictates of public conscience of the famous Martens clause. However, while the last does not provide any detail and may therefore deploy its protective effect only when belligerents act in good faith, Chapter I of Section II of the Hague Regulations deals mainly with conduct of hostilities issues, and only its very general Article 22, stating that '[t]he right of belligerents to adopt means of injuring the enemy is not unlimited', could be considered to cover the abovementioned issues. As for Part II of Convention IV, it deals with entirely different issues and applies to all civilians, not only to protected

20 Committee III, 'Report to the Plenary Assembly', in *Final Record of the Diplomatic Conference of Geneva of 1949*, Berne, 1950–1951, Vol. IIA, p. 821: 'Part III constitutes the main portion of our Convention. Two situations presenting fundamental differences had to be dealt with: 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'. The ICRC's 'preliminary remarks' to the text of the Geneva Conventions are even more explicit: '[Convention IV] distinguishes between foreign nationals on the territory of a party to the conflict, and the population of occupied territories. It is divided into five Sections. Section I contains provisions common to the above two categories of persons ...'. See also *The Geneva Conventions of 12 August 1949*, ICRC, Geneva, 2010, Preliminary Remarks, p. 32.

21 Article 32 of GC IV only applies in own and occupied territories.

22 Article 27(2) of GC IV only applies in own and occupied territories.

23 Article 34 of GC IV only applies in own and occupied territories.

24 Article 33(1) of GC IV only applies in own and occupied territories.

civilians, while the specificity of inhabitants of a territory under invasion is that they are enemy nationals encountering a belligerent on their own territory, independently of their will. This is precisely the situation for which IHL of military occupation was made.

Control over a person is sufficient

In any case, it is uncontroversial that Convention IV provides better and more specific protection for civilians who find themselves in the hands of the enemy than all other mentioned instruments. In my view, it is not imaginable that its drafters would have left such a gap between own and occupied territory, leaving some persons whom they defined as protected without *any* protection provided by the treaty rules they adopted, even though there is no possible reason why those persons need or deserve less protection than other civilians who are in the power of the enemy. In addition, to take the example aptly mentioned by Pictet,²⁵ it seems absurd that the deportation of civilians would not be prohibited in the invasion phase by any rule of Convention IV²⁶ but would be absolutely prohibited once the invasion has turned into an occupation. There seems to be no possible justification for this arbitrary difference. Control over a person in a territory that is not the invader's own must therefore be sufficient to trigger the application to that person of Convention IV's provisions applicable to occupied territories.

A functional understanding of the amount of the territory that must be occupied

Many, including Zwanenburg and Bothe, object that, according to the ordinary meaning of terms (and Article 42 of the Hague Regulations), occupation must involve control over territory. Indeed, a person may be arrested or detained, but not 'occupied'. The reply to this objection could be that a person cannot possibly be in the power of invading forces if the spot of land ('territory') on which he or she happens to be is not under the control of someone belonging to the invading forces. To torture, beat, arrest, detain, or deport a person, I must necessarily control the spot on earth where that person is. Nothing, either in Convention IV or the Hague Regulations clarifies the minimum extension that a territory must have to be occupied. Article 42(2) of the Hague Regulations simply implies that control over parts of the territory of a state is sufficient for the rules on occupied territories of the Hague Regulations to apply. No one would deny that a single border village could be occupied. Why could it not be possible to reduce the requisite amount of territory to the piece of land of an invaded territory where the invading soldier is standing? It is

25 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, p. 60.

26 Article 49(1) of GC IV only applies in occupied territories.

necessarily under his control, and the territorial state is necessarily no longer able to exercise authority over that spot, otherwise our soldier would be a prisoner of war²⁷ or dead.

A flexible interpretation of the obligations of Occupying Powers

The main objection against the abovementioned interpretation is that many rules of Convention IV, in particular those that provide for positive obligations of an Occupying Power, cannot possibly be respected by invading forces, and that unrealistic interpretations of IHL rules must be avoided (and here I agree with Zwanenburg), not only according to the rules of treaty interpretation but also because unrealistic rules do not protect anyone and weaken the willingness of belligerents to respect even the realistic rules of IHL. However, those making this argument treat the rules of Convention IV on occupied territories as if they were all laying down strict obligations of result. As shown in detail by my former student Michael Siegrist in his Masters thesis, this is not the case.²⁸ I will discuss here, based on the results of his research, just the examples mentioned by Zwanenburg. Under Article 50 of Convention IV, an Occupying Power has the obligation to facilitate, with the co-operation of the national and local authorities, the proper working of institutions working for the education of children. This obligation means first and foremost a prohibition of interference with the activities of those institutions.²⁹ I do not see why invading forces should be unable not to requisition the only school in a village they invade. By contrast, I agree with Zwanenburg that supporting those institutions might require a certain degree of control and authority. Yet the kinds of support required may be manifold, and whether the invading forces can actually provide those different kinds of support will depend upon the circumstances and the capabilities of the invading troops. Furthermore, according to the clear wording of Article 50 ('facilitate'), supporting these institutions is an obligation of means, which means 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.

As for the argument that Article 50(3) of Convention IV ('make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend') presents an undue burden, it must be recalled that it only applies if local institutions are inadequate (which invading forces are not able to

27 If he were on territory controlled by the enemy, he would necessarily be in 'the power of the enemy' according to Article 4 of Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949.

28 For a full discussion, see Michael Siegrist, *The Functional Beginning of Belligerent Occupation*, The Graduate Institute, Geneva, eCahiers, No. 7, April 2011, pp. 35–77, available at: <http://iheid.revues.org/75?lang=en> (last visited 28 March 2012).

29 J. S. Pictet, above note 25, p. 286.

assess). The duty to provide is only a last resort (if there is no adequate institution and relatives or friends could not take care of orphans or children separated from their parents) and only requires that arrangements be made (in other words, that plans or preparations are made).

Similarly, with regard to Article 56 of Convention IV, Pictet stresses that the duty to organize hospitals and health services, and the taking of measures to control epidemics, 'is above all one for the competent services of the occupied territory itself'.³⁰ As long as the national or local authorities are able to fulfil these tasks, the Occupying Power is merely required not to hamper their work. Only when hospitals and medical services are not properly functioning will the Occupying Power be required to provide services, and, under the wording of Article 56, only '[t]o the fullest extent of the means available to it'. Invading forces have only limited means to adopt 'prophylactic and preventive measures', in particular, as Convention IV correctly requires, 'in cooperation with national and local authorities'. As for the fundamental obligation to care for the wounded, it is, in any event, binding on the invading force (subject to 'military considerations'), as a consequence of Article 16 of Convention IV, which applies even outside occupied territories.

The provisions of Convention IV find the right balance between necessity and humanity. Necessity, limited means, and other priorities have 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. Often, the positive obligations are obligations of means, which take into account the circumstances and the means available to the invading forces. Humanity, on the other hand, ensures that fundamental rights and safeguards cannot be abrogated. Those provisions are absolute, but they are of a negative nature and hence do not require invading forces to provide anything.

In addition, those who argue that IHL of military occupation is not applicable at all during the invasion phase forget that the rules of Section III of Part III of Convention IV may also be seen as conferring certain rights on invading forces, such as a legal basis for security measures, internment, or the requisition of labour. It could be argued that, otherwise, invading forces would simply have no legal basis to arrest and detain civilians who threaten their security.

Alternatively, the concept of occupation could be different for different rules

I can understand that some readers may be sceptical towards such a flexible interpretation of the rules of IHL of military occupation, because flexibility always opens the door to abuse, including by Occupying Powers after the invasion phase. Those sceptics could come to the same result by adopting a functional concept of (the beginning of) occupation. The idea that only some rules of IHL apply during the invasion phase is not new. Pictet himself distinguishes the Hague Regulations

30 *Ibid.*, p. 313.

from Convention IV, arguing that for the latter ‘the word “occupation” . . . has a wider meaning than it has in Article 42 of the Hague Regulations’,³¹ which implies that his theory does not apply to the Hague Regulations. However, the prohibition in Article 44 of the Hague Regulations, ‘to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defence’, may more easily (and must certainly) be respected by an invader than Article 50 of Convention IV, providing for a subsidiary obligation of an Occupying Power to ensure that children benefit from education. Siegrist shows that even Article 43 of the Hague Regulations, requiring an Occupying Power to ‘take all measures in his power to maintain public order’, comprises some obligations that may and must be respected by invading forces.³²

Others, including the ICTY,³³ want to distinguish between the rules protecting persons and those protecting property, only the former applying during the invasion phase. This finds support in a formulation by Pictet, who writes: ‘So 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 Hague Regulations]’.³⁴ In my view, this wording does not necessarily imply that Pictet draws this distinction between individuals and their property. One could just as well consider that property is protected because of the individuals who own it. In any case, property is equally protected during the invasion phase against pillage and destruction in Section II, Chapter I of the Hague Regulations.³⁵ As for destruction, in my view the prohibition in Article 23(g) of the Hague Regulations, under which it is forbidden ‘[t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war’, has been refined for two specific situations by modern IHL. For the invader, concerning objects that are under enemy control, the decisive test is laid down in Article 52(2) of Additional Protocol I: whether the object contributes to enemy military action and whether its destruction constitutes a military advantage for the attacker. As soon as an invader has control over an object, by definition it can no longer contribute to military action of the enemy. Its destruction can therefore only be justified by reference to IHL of military occupation, namely Article 53 of Convention IV, when its destruction ‘is rendered absolutely necessary by military operations’, which is a more restrictive standard. Similarly, it makes little sense that the prohibition of requisition of hospitals in Article 57 of Convention IV would not apply during the invasion phase, while the obligations concerning education in Article 50 would apply because they mention persons as beneficiaries.

Although I take very seriously Zwanenburg’s objection that IHL rules must be clear and foreseeable for those who have to apply them in the field, I would suggest an analysis of what rules apply during the invasion phase not according to

31 *Ibid.*, p. 60.

32 M. Siegrist, above note 28, pp. 66–67.

33 Compare ICTY, *The Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, paras. 221 and 587.

34 J. S. Pictet, above note 25, p. 60.

35 See Articles 23(g) and 28 of the Hague Regulations.

pre-established broad categories, but for every rule taking into account the degree of control that the invader exercises in that particular case. This would also avoid the difficulty identified by Bothe of determining when the invasion phase turns into the occupation phase. Such an understanding would parallel, for the beginning of occupation, the functional concept of end of occupation that is inherently adopted by all those in scholarly writings,³⁶ UN documents,³⁷ and among states who consider Gaza still to be occupied by Israel, but (fortunately) do not require Israel to re-enter the Gaza Strip to maintain law and order,³⁸ to ensure that detainees in Gaza are treated humanely,³⁹ or to ensure that they are not used (by Palestinians) to render certain points immune from military operations.⁴⁰ Pictet's remark that 'Articles 52, 55, 56 and even some of the provisions of Articles 59 to 62... presuppose presence of the occupation authorities for a fairly long period' points in the same direction.⁴¹ Under such a functional understanding of occupation, an invaded territory could at a certain point in time already be occupied for the purpose of the applicability of Article 49 (prohibiting deportations), but not yet occupied for the purpose of the applicability of Article 50 (on education). On such a sliding scale of obligations according to the degree of control, obligations to abstain would be applicable as soon as the conduct they prohibit becomes materially possible (the person benefiting from the prohibition is in the hands of the invading forces), while obligations to provide and to guarantee would apply only at a later stage. Siegrist distinguishes between those rules where a significant gap of protection would exist if they were not applicable during the invasion phase (Articles 49, 51(2)–(4), 52, 53, 57, and 63 of Convention IV); obligations to provide or respect that are triggered by activities of the Occupying Power and that therefore, in any event, only apply during the invasion phase if the Occupying Power is able and willing to carry out such activities (Articles 64–75, 54, 64(1) and 66, and 78 of Convention IV), for example, to try or intern protected civilians; and the obligations to provide or respect due to the mere fact of occupation (Article 43 of the Hague Regulations and Articles 48, 50, 51(1), 55, 56, 58, 59–61, and 62 of Convention IV).⁴² Such a sliding scale would also be much more suited

36 See, for instance, Solon Solomon, 'Occupied or not: the question of Gaza's legal status after the Israeli disengagement', in *Cardozo Journal of International and Comparative Law*, Vol. 19, 2011, pp. 59–90; Shane Darcy and John Reynolds, 'An enduring occupation: the status of the Gaza Strip from the perspective of international humanitarian law', in *Journal of Conflict & Security Law*, Vol. 15, No. 2, 2010, pp. 211–243; and Mustafa Mari, 'The Israeli disengagement from the Gaza Strip: an end of the occupation?', in *Yearbook of International Humanitarian Law*, Vol. 8, 2005, pp. 356–368.

37 See UN Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009, paras. 273–279; UN Human Rights Council, Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, UN Doc. A/HRC/15/21, 22 September 2010, paras. 63–66.

38 As it should under Article 43 of the Hague Regulations.

39 As it should under Articles 27 and 76 of GC IV.

40 As it should under Article 28 of GC IV. If Gaza is occupied territory, inhabitants of Gaza are necessarily protected persons, because every person (not national of the Occupying Power) who finds himself in that territory is constructively in the hands of the Occupying Power. See J. S. Pictet, above note 25, p. 47.

41 *Ibid.*, p. 60.

42 See M. Siegrist, above note 28, pp. 47–77.

to the fluid realities of modern warfare, weapons, and the absence of frontlines than the traditional 'all or nothing' approach. Both a flexible interpretation of the obligations and a functional understanding of occupation would resolve all the examples given by Marten Zwanenburg and Michael Bothe as arguments against the 'Pictet theory'.

In conclusion, while my theoretical starting point is diametrically opposed to that of both Marten Zwanenburg and Michael Bothe, I must admit that my position would only lead to different results from those that follow from Bothe's position in a few cases. As for Zwanenburg's position, I am unable to evaluate how much its practical consequences differ from those of my position since it is not clear precisely when he would consider the nature of a territory to change from invaded to occupied. Nor does he indicate whether there is a minimum amount of territory required for an occupation and, if so, how much it would be. Anyway, on the theoretical level, my theory has the advantage of avoiding legal vacuums between categories, such as ones (between civilians and combatants or international and non-international armed conflicts) that have had significant practical consequences in recent years.